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SCCA Singapore Corporate Counsel Association

Feedback on

Competition Bill (re The Competition Act 2004)

15 May 2004

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Statement of Interest

The vision of the Singapore Corporate Counsel Association ("SCCA") is to foster a dynamic community of professional corporate counsel which will give its members the chance to network with other in-house counsel and to share information and resources. In addition, the SCCA hopes to be able to coordinate continuing educational opportunities, raise the profile of the in-house community in Singapore and provide a platform to establish views in respect of issues that concern the community and our respective employers, thereby providing a collective voice where representation is needed on behalf of the community.

Two of the activities which the SCCA intends to undertake in the short to medium term are:

- To provide a platform for representation of the interests of the in-house community and their employers, relevant to legislative developments and other issues.

- To enhance Singapore's position as a regional hub for businesses.

This Feedback, therefore, falls within the ambit of the above two activities.

Finally, the SCCA hopes that MTI will accept this Feedback in the spirit it is given, which is:

- To assist in the creation of appropriate Competition legislation in the context of the small, open economy that is Singapore.

- To try to avoid or at least minimise the problems experienced by other countries in their enforcement of their respective Competition legislation, in particular where such legislation may have been relied on in the drafting of the Bill.

- To aim for Competition legislation is readily understood by all and sundry.

Summary of Major Points

1. **"Annex B"**
COMPETITION BILL CONSULTATION PAPER

Annex B sets out the exclusions from the draft Competition Bill (paragraphs 5, 6 and 7 of the Third Schedule and the Fourth Schedule). However, what has been set out in Annex B is not in the Bill itself. It would therefore be preferable if these specific exclusions could be set out in the Bill, or at least in regulations or the Competition Commission's guidelines.

2. **Definition of "appreciable adverse effect"**
COMPETITION BILL CONSULTATION PAPER, PARAGRAPH 6

The phrase "appreciable adverse effect" sets out an important principle. It determines what agreements and conduct would be caught under the Act (Section 34) when it comes into force. In light of this, MTI should consider defining this term in the Bill.

3. **"Void" Deeming**
COMPETITION BILL, SECTION 34(3)

If an agreement contravening Section 34 is deemed void *ab initio*, the "innocent" party to such an agreement may be left with only an action based on failure of consideration against the "guilty" party, since a void agreement is unenforceable. MTI should consider legislating that the rights of such "innocent" party shall survive only for the purpose of assessing damages in its favour pursuant to its private action (as provided by the Bill) against the "guilty" party.

4. **Definition of "dominant position"**
COMPETITION BILL, SECTION 47

This term is not defined in the Bill (apart from a statement that it is taken to mean dominant position within Singapore or elsewhere i.e. Section 47(3)). It would be helpful to businesses if MTI could set out how "dominant position" is determined, presumably in the Competition Commission's guidelines.

5. **Definition of "market in Singapore"**
COMPETITION BILL, SECTION 47

Again, this is an important phrase that is not defined in the Bill. If MTI is still not persuaded to have it defined in the Bill, it should do so in the regulations or the Competition Commission's guidelines, in decreasing order of preference.

6. Consequences of Breach

COMPETITION BILL, SECTION 69

Since the effect of contravening Section 34 is an agreement or decision that is deemed void, the Competition Commission will be unable to make use of its power under Section 69 to require the parties to such agreement or decision to modify or terminate it.

7. Third & Fourth Schedules

COMPETITION BILL

The Third and Fourth Schedules should be reworded such that it is clear that the entire Competition Bill does not apply to areas which are already regulated elsewhere, as under the present wording, reference is only made to Sections 34, 47 and 54 of the Bill.

Comments

Our fuller reasoning and explanations supporting the foregoing Summary are as follows:

1. **"Annex B"**
COMPETITION BILL CONSULTATION PAPER

Annex B sets out the exclusions from the draft Competition Bill (paragraphs 5, 6 and 7 of the Third Schedule and the Fourth Schedule). However, what has been set out in Annex B is not in the Bill itself. It would therefore be preferable if these specific exclusions could be set out in the Bill, or at least in regulations or the Competition Commission's guidelines.

We appreciate that incorporating in full these exclusions into the Bill itself would make it even longer and thereby more complicated. We therefore suggest putting them instead into the regulations or the Competition Commission's guidelines, in order that the Competition legislation framework is comprehensively dealt with in one set of documentation rather than having to be collated from different pieces of legislation, regulations, guidelines and other such documentation.

(See also point 7 hereinbelow.)

2. **Definition of "appreciable adverse effect"**
COMPETITION BILL CONSULTATION PAPER, PARAGRAPH 6

The phrase "appreciable adverse effect" sets out an important principle. It determines what agreements and conduct would be caught under the Act (Section 34) when it comes into force. In light of this, MTI should consider defining this phrase in the Bill.

Defining this phrase would give much clarity and comfort to businesses seeking to avoid its agreement or decision being automatically deemed void for contravention of Section 34. A strict reading of "which have as their object or effect the prevention, restriction or distortion of competition within Singapore" would result in an otherwise valid agreement being deemed void where the *effect* of such agreement, though not the intended aim of the contract parties, was the prevention, restriction or distortion of competition in Singapore. To qualify the word "effect" with the phrase "appreciable adverse" would therefore allow agreements that do affect competition but only to an *non*-appreciable degree to continue to exist without being struck down as void, provided of course that the parties to such agreement had not set out in the first place to achieve an anti-competitive result by virtue of their agreement or decision.

3. **"Void" Deeming**
COMPETITION BILL, SECTION 34(3)

If an agreement contravening Section 34 is deemed void *ab initio*, the "innocent" party to such an agreement may be left with only an action based on failure of consideration against the "guilty" party, since a void agreement is unenforceable. MTI should consider legislating that the rights of such "innocent" party shall survive only for the purpose of assessing damages in its favour pursuant to its private action (pursuant to the Bill) gainst the "guilty" party.

We understand that jurisdictions such as the United Kingdom have been struggling with the effect a void agreement has on "innocent" parties to the agreement, amongst other things. Since the aim of the Competition Bill is to penalise anti-competitive behaviour, we suggest that the Bill specifically provides that an "innocent" party's rights against the party who had sought to engage in the anti-competitive behaviour is not prejudiced by the fact that the agreement automatically becomes unenforceable. In other words, to try to give to the "innocent" party a right to his damages being assessed proportionately to the harm caused to him.

4. Definition of "dominant position"
COMPETITION BILL, SECTION 47

This term is not defined in the Bill (apart from a statement that it is taken to mean dominant position within Singapore or elsewhere i.e. Section 47(3)). It would be helpful to businesses if MTI could set out how "dominant position" is determined, presumably in the Competition Commission's guidelines.

Although it is true that the Competition Commission will find decisions by foreign Competition tribunals very persuasive on this point, the average Singapore businessman would need substantial guidance on this important term in the initial stage. This is especially so if MTI ultimately declines to define the phrase "market in Singapore" as also recommended hereinbelow.

5. Definition of "market in Singapore"
COMPETITION BILL, SECTION 47

Again, this is an important phrase that is not defined in the Bill. If MTI is still not persuaded to have it defined in the Bill, it should do so in the regulations or the Competition Commission's guidelines, in decreasing order of preference.

We understand that this phrase is meant to be read as "*economic* market in Singapore". However, Singapore is very different from many other legislations which have competition legislation. For example, the EU is a huge common (borderless) market albeit made up of many sovereign nations. As for the UK, Japan, Australia and Korea, these countries have sizeable domestic markets each. If the phrase "market in Singapore" is inadequately clarified, a lot of reliance (too much?) will have to be placed on experts in economics in interpreting each case before the Competition Commission in the early stages, resulting in little certainty for the average Singapore businessman in the short to medium term.

6. Consequences of Breach

COMPETITION BILL, SECTION 69

Since the effect of contravening Section 34 is an agreement or decision that is deemed void, the Competition Commission will be unable to make use of its power under Section 69 to require the parties to such agreement or decision to modify or terminate it.

We query the usefulness of Section 69(2)(a) since a void agreement cannot be modified or terminated. If it can be modified or terminated, it would mean that the agreement was either still in existence or only voidable. However, Section 34(3) is very clear that such an agreement is void. Referring to point 3 hereinabove, we again urge MTI to review the perhaps unintentional effect of a void agreement on "innocent" parties.

7. Third & Fourth Schedules

COMPETITION BILL

The Third and Fourth Schedules should be reworded such that it is clear that the entire Competition Bill does not apply to areas which are already regulated elsewhere (under the present wording, reference is only made to Sections 34, 47 and 54 of the Bill).

The aim here is the same as that stated in point 1 hereinabove, that is, to achieve a comprehensive framework of competition law in a single set of documentation, so that one would know from the Bill what other areas were already regulated by other pieces of legislation and thus be naturally referred to those other legislation.

Conclusion

The SCCA firmly believes that the aim of Competition legislation is always good and noble. However, we also fully appreciate that it is a challenge to create a legislative framework that is appropriate for Singapore's unique circumstances. We do have confidence that MTI will take on board the best practices of Competition legislation of other jurisdictions and we remain committed to assisting MTI with our collective experience as in-house counsel from both Singapore as well as multinational companies.

If our recommendations in this Feedback appear a bit thin on the ground, we would like to make the excuse of insufficient time to consult and hence obtain better or more comprehensive feedback from our members. Probably due to circumstances beyond MTI's control, the Bill was available for review only around 12 April 2004 while the deadline for feedback is noon of 15 May 2004. We hope that the revised Bill after this first round of consultation can be released to the public for the final round of consultation as early as possible, in view of the next deadline of July/August 2004 specified in the Competition Bill Consultation Paper.

If you have any queries on our submissions herein, please contact Neoh Sue Lynn whose details are provided on the cover page.