PROPOSED COMPETITION BILL

COMMENTS OF
STAMFORD LAW CORPORATION
14 May 2004

9 Raffles Place #32-00
Republic Plaza
Singapore 048619

Tel: 6389 3050
Fax: 6389 3099

paul.fitzgerald@stamfordlaw.com.sg

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SUMMARY OF SUBMISSIONS

1. Introduction

1.1. Stamford Law Corporation ("StamfordLaw") welcomes the enactment of a generic competition law in Singapore and supports the commitment contained in Chapter 12 of the United States – Singapore Free Trade Agreement to enact general competition legislation by January 2005 proscribing anti-competitive business conduct.

1.2. StamfordLaw is concerned that the draft Competition Bill (the "Bill") which has been made available for public consultation is simplistically drafted, selective in its application and not sufficiently rigorous in proscribing anti-competitive business conduct. We also query whether the Bill satisfies the commitment contained in the United States – Singapore Free Trade Agreement.

2. General Summary

2.1. In general terms, StamfordLaw considers the Bill to be flawed in that it creates a competition law regime that is:

a) conceptually confused and therefore arbitrary;

b) diluted by excessive exceptions;

c) too readily reliant on ministerial discretionary power; and

d) deficient in material details.

2.2 The Consultation Paper issued with the Bill states that studies have been carried out in various jurisdictions and the Bill takes into account Singapore's context as a small open economy. We assume that this can be the only explanation for the large number of exceptions that are contained in the Bill and which, in our opinion, seriously undermine the integrity of the regime contemplated by the Bill. We note that with the exception of Ireland, none of the countries listed in the Consultation Paper as having been studied can be considered as a small economy. We further note that small economies such as Ireland and New Zealand manage to have effective competition law regimes which do not require the extensive list of exceptions contained in the Bill.

2.3 Accordingly, StamfordLaw submits that significant amendments are necessary to the Bill. The main amendments proposed by StamfordLaw are:

2.3.1 No exemption from Part III for the Government or statutory bodies to the extent that they engage in trade;

2.3.2 Removal of provisions allowing block exemptions from the Clause 34 prohibition;

2.3.3 Removal of the exemption for vertical agreements;

2.3.4 Adoption of a benefit test in granting individual exemptions;

2.3.5 Adoption of the Australian model of abuse of a dominant market position;

2.3.6 Mandatory application for merger approval if lessening of competition in a market may result;

2.3.7 All appeals from Commission to go to the Appeals Board;

2.3.8 At least 1 member of Board hearing an appeal to be a District Judge;

2.3.9 Appeals to the High Court from the Board to be a rehearing;

2.3.10 No ministerial power to amend the Third and Fourth Schedules;

2.3.11 Regulations to be made by the Minister and not the Commission;

2.3.12 Third Schedule to be enacted in the main body of the legislation; and

2.3.13 Public consultation to take place before Minister makes public interest decision.

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STATEMENT OF INTEREST

3. Stamford Law Corporation

3.1. StamfordLaw was set up in 2000 by Lee Suet Fern and provides comprehensive legal services in all areas of corporate law.

3.2. StamfordLaw was rated the top mergers and acquisition law firm in Singapore by Thomson Financial Consultants and also M&A Asia for 2003 having advised on US$2.6 billion worth of transactions for that period.

3.3. The primary focus of StamfordLaw is mergers and acquisitions and StamfordLaw is intimately involved in many mandatory, voluntary as well as partial offers under the Code of Take-overs and Mergers as well as schemes of arrangements undertaken pursuant to Section 210 of the Companies Act. StamfordLaw has also advised on competitive bid processes (on both vendor as well as purchaser sides) which precede many major acquisitions or disposals and advised on the sale and purchases of shares, businesses, assets and undertakings in many industries, both locally and regionally.

3.4. As a testament to StamfordLaw's position as a leading M&A practice in Singapore, it has been involved in most of the recent significant transactions in this area, including the Comfort-DelGro merger (which created one of the world's largest land passenger transport company) and Neptune Orient Lines' sale of American Eagle Tankers to Malaysia International Shipping corporation (the largest M&A between Singapore and Malaysia to-date).

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SPECIFIC COMMENTS ON THE BILL

Our detailed comments on the individual clauses of the Bill are set out below:

4. Clauses 1 to 8

We have no comment on these clauses.

5. Clause 9(3)

We do not understand the need for this Clause. We cannot conceive of any justification for the Commission to delegate any of its powers to "any person" as contemplated by this Clause.

Recommendation

To delete.

6. Clause 10

No comment.

7. Clauses 11 to 30

These Clauses relate to the financial operations of the Commission and are mere machinery provisions. As such, they can be removed to a Schedule.

Recommendation

Move to the First Schedule or a separate Schedule.

8. Clauses 31 and 32

No comment.

9. Part III Competition – General Comments

9.1. Competition law is by its nature complex, involving difficult issues of fact and law interwoven with economic theories and issues. Accordingly, in our submission, an effective competition law requires clarity of objectives and of the means whereby those objectives are to be attained. In many ways, the Bill as drafted is overly simplistic in its treatment of what constitutes anti-

competitive conduct and this does little to promote the integrity of the new competition law regime in Singapore or certainty of the law.

9.2. The Consultation Paper that accompanies the Bill states that competition spurs firms to be more efficient, innovative, and responsive to consumer needs. However, the concept of competition that emerges from the Bill is confused. It is not clear that a consistent concept is being applied in the Bill and the result is that it becomes arbitrary whether conduct which is accepted in numerous jurisdictions as being anti-competitive falls within the ambit of the Bill or not.

9.3. One clear example arises in Part III in relation to Section 34 which prohibits price fixing. Clause 8 of the Third Schedule creates an exception whereby vertical agreements are exempted from the Section 34 prohibition. This decision effectively eliminates an established category of anti-competitive conduct, namely, resale price maintenance, from the competition law regime in Singapore. However, it is not clear what policy objective underlies this decision. It is not clear why a horizontal agreement between two suppliers not to sell goods below a certain price is prohibited conduct when a vertical agreement between the supplier of the exact same goods and a retailer whereby the retailer agrees not to sell the goods below a certain price is exempted conduct. In our submission, this is entirely arbitrary as both are anti-competitive. In other words, anti-competitive conduct at the horizontal level which fixes the prices for consumers is in substance no different from anti-competitive conduct at the vertical level which has the same result. In our submission, the competition law regime in Singapore ought to catch both sets of anti-competitive conduct.

10. Clause 33(1)

This clause is poorly drafted as it appears to attempt to apply Part III to the entire world with no connection between the conduct and a market in Singapore.

Recommendation

The Clause be amended by inserting the words "in relation to a market in Singapore" following the word "Part" at the end of the Clause.

11. Clause 33(4)

This Clause seeks to exempt the Government and statutory bodies from the effect of Part III. In our submission, the Government and statutory bodies ought not to be exempt from Part III of the Bill to the extent that the Government and statutory bodies engage in trade. Where there is engagement in trade, the same principles ought to apply to the Government as to any other undertaking in Singapore.

Recommendation

The clause should be amended by inserting the words "Except in so far as the Government, any statutory body or any person referred to in (c) below shall engage in trade, nothing in this Part shall apply" at the commencement of the Clause.

12. Clauses 34 to 36

No Comment.

13. Clause 37

Clause 37 has the effect of removing an entitlement from a person. We note that there is no obligation placed on the Commission to consult with the person involved, even in circumstances where the Commission has acted on the basis of a complaint by a third party (Clause 37(7)). In our submission, this is a breach of natural justice and a person so affected ought to have the right to make representations to the Commission before any decision is made.

Recommendation

A new clause 37(8) be added to the effect that:

"(8) The Commission shall not take any of the steps mentioned in subsection (1) until the holder of the individual licence concerned has had at least 14 days from the date of the notice issued in subsection (1) to make representations to the Commission as to why the Commission ought not take the steps referred to in the notice issued under subsection (1)."

14. Clauses 38 to 40

We do not see any justification for block exemptions being granted. We are not convinced that there is any competition law policy objective that is served or benefit to consumers and/or competition in general that will be delivered by these provisions. A block exemption serves as a licence to carry out anti-competitive conduct by reference to the category of agreement rather than the circumstances of an individual case. We do not consider that any policy objective is attained by such an approach.

Recommendation

The Clauses be deleted.

15. Clause 41

The criteria set out in Clause 41(a) and (b) are vague, subjective and open-ended. The effect of this Clause, in our submission, is to rob Clause 34 of any substantial meaning.

In our submission, the aims and objectives of the legislation would be better served by adopting a benefit test similar to Section 61(6) of the Commerce Act 1986 of New Zealand whereby an exemption may be given if the agreement concerned will result or be likely to result in a benefit to the public which would outweigh the lessening in competition that results from the agreement in question.

Recommendation

To be deleted and replaced by the following:

> "41. Section 36 shall apply to any agreement where the entering into, giving effect to, or carrying out of the agreement, as the case may be, will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result, therefrom."

16. Clauses 42 to 46

The references to block exemptions ought to be deleted.

Recommendation

To delete Clauses 43(3)(a) and 45(1)(b).

We also repeat the comments that we made on Clause 37 regarding natural justice where the Commission removes any entitlement.

Recommendation

New Clauses 45(6) and 46(6) be added to the effect that:

> "(6) The Commission shall not take any of the steps mentioned in subsection 4 until the holder of the immunity concerned has had at least 14 days from the date of the notice issued under subsection (4)(c) to make representations to the Commission as to why the Commission ought not take the steps referred to in the notice issued under subsection (4)(c)."

17. Clause 47

This Clause is likely to be the most important clause in the Bill and in most jurisdictions, abuse of a dominant position has been the central issue in a large number of the major anti-trust proceedings. We are not clear on why Clause 47 is modeled on the United Kingdom/Irish Competition Acts and what advantages are perceived to accrue through the UK/Irish model as opposed to adopting the Australian model.

From a practitioners' perspective, we are inclined to favour the Australian model. This is for two main reasons. The first is that the Australian model has been in operation since 1974 and there is a vast amount of available jurisprudence on the meaning of the terms and their application. The second reason is that the Australian model has been successfully applied in a small economy, namely New Zealand, and therefore has demonstrated its suitability to a small economy.

Recommendation

To delete the existing Clause 47 and replace it with the following:

"47. –(1) Subject to Section 48, no person who has a dominant position in a market shall use that position for the purpose of:-

(a) Restricting the entry of any person into that or any other market in Singapore; or

(b) Preventing or deterring any person from engaging in competitive conduct in that or any other market in Singapore; or

(c) Eliminating any person from that or any other market in Singapore.

(2) For the purposes of this Section, a dominant position in a market is one in which a person as a supplier or an acquirer of goods and services either alone or with any related body corporate is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market by reason of:

(a) that person's share of the market; or

(b) the extent to which that person is constrained by the conduct of competitors or potential competitors in that market; or

(c) the extent to which that person is constrained by the conduct of suppliers or acquirers of goods and services in that market.

(3) In this Section, "dominant position" means a dominant position within Singapore or elsewhere.

18. Clauses 48 to 51

No comment.

19. Clauses 52 and 53

We repeat our comments in Clause 37 regarding natural justice where the Commission removes any entitlement.

Recommendation

New Clauses 52(6) and 53(6) be added to the effect that:

"(6) The Commission shall not take any of the steps mentioned in subsection 4 until the holder of the immunity concerned has had at least 14 days from the date of the notice issued under subsection (4)(c) to make representations to the Commission as to why the Commission ought not take the steps referred to in the notice issued under subsection (4)(c)."

20. Clause 54

General Comments

StamfordLaw strongly supports the introduction in Singapore of merger control provisions to prevent mergers that lessen competition within any market in Singapore without any appreciable benefits to consumers in Singapore. However, it is not clear to us what is intended by the phrase "substantial lessening" as "substantial" appears to be arbitrary, subjective and no guide is given in the Bill as to the parameters of the term. Our preference is to delete "substantial" as being too high and too vague a threshold.

We are also concerned at the provision in Clause 54(7)(b) as it appears to sanction the creation of a monopoly without regard to the effects of that monopoly on competition, in circumstances which may be more common in Singapore than in other jurisdictions. For example, the need for competition in Singapore's aviation sector, and particularly at Changi International Airport, has been identified by the Government of Singapore as being necessary. However, purely as an example, Clause 54(7)(b) would allow the merger of the two current ground-handling companies at Changi International Airport (SATS and CIAS) into one, based on the control of the ultimate shareholder.

Similar examples from other sectors can also be provided. Accordingly, we do not support the retention of Clause 54(7)(b) in the Bill as we believe it unduly favours certain players in the Singapore market over others and has no regard to whether such a monopoly would affect competition in the Singapore market.

In addition, we submit that all mergers which have the effect of lessening competition in a market in Singapore ought to be subject to the prior approval of the Commission. This approach is consistent with other jurisdictions and we see no policy objective that is attained by removing the need for prior approval.

21. Clause 54(1)

Recommendation

Delete the word "substantial" in the phrase "substantial lessening of competition."

Clause 54(7)

Recommendation

Delete Clause 54(7)(b).

22. Clause 55

No comment.

23. Clause 56

To amend to provide for the requirement that any merger which has the effect of lessening competition within any market in Singapore shall require the consent of the Commission.

Recommendation

To amend Clause 56 as follows:

> "56. –(1) Subject to Section 55, any persons who propose to merge any undertakings in Singapore in a manner referred to in Section 54(2) shall, if the result or expected result of the merger may be to lessen competition within any market in Singapore, apply to the Commission for authorization.
>
> (2) Within 45 working days of an application under subsection (1), the Commission shall:

(a) if it is satisfied that the proposed merger will not result in a lessening of competition in any market in Singapore, give notice in writing to the person making the application under subsection (1) authorizing the merger; or

(b) if it is satisfied that the proposed merger will result in a lessening of competition in a market in Singapore, give notice in writing to the person making the application under subsection (1) declining authorization for the merger to proceed.

(3) Where any notice is given under subsection (2)(b) declining authorization, the Commission shall state in writing its reasons for declining authorization.

(4) The Commission may, if it deems fit, require the person making the application under subsection (1) to appear before it and to provide such evidence that the Commission shall require in order for the Commission to be able to reach a decision.

(5) The Minister may by regulations provide for the procedure to be followed –

(a) by any person making an application under subsection (1) of this Section;

(b) by any person making an application under Section 57; and

(c) by the Commission, in considering such applications."

24. Clause 57

Recommendation

To be amended as follows

"57. - A party to a proposed merger may, before applying for authorization under Section 56, apply to the Commission for guidance on whether the merger is likely to infringe the prohibition in Section 54."

25. Clauses 58 and 59

Under the regime proposed above, there is no longer any need for Clauses 58 and 59.

Recommendation

Clauses 58 and 59 to be deleted.

26. Clause 60

To be consistent with the regime proposed above, this Clause will need to be amended.

Recommendation

Clause 60(1) ought to be amended as follows:

> "60.-(1) This Section applies to a merger if the Commission has considered an application under Section 54(1) and determined that the merger has not infringed the Section 54 prohibition."

Clause 60 also needs to be amended to take into account our comments in respect of Clause 37

Recommendation

To insert a new Clause 60(6) as follows:

> "(6) The Commission shall not take any of the steps mentioned in subsection 4 until the holder of the immunity concerned has had at least 14 days from the date of the notice issued under subsection (4)(c) to make representations to the Commission as to why the Commission ought not take the steps referred to in the notice issued under subsection (4)(c)."

27. Clauses 61 to 63

No comment.

28. Clause 64

The powers in Clause 64(5) are potentially draconian and the exercise of all such powers ought to be qualified by a "reasonable grounds" test.

Recommendation

To amend Clause 64(5) as follows:

> "(5) An investigating officer or inspector entering any premises under this section may, if there are reasonable grounds, -..."

Clause 65(5)(c) needs to be consequentially amended to remove the "reasonable grounds for believing" qualification.

29. Clauses 66 to 70

No comment.

30. Appeals – General Comments

StamfordLaw submits that Clause 71(2) places an excessive amount of discretionary power in the hands of the Minister. We cannot see any justification for ministerial discretion playing such a large part in a competition law regime and we see no policy reasons which can justify shifting the decision-making power on certain matters of competition law from the Board to the Minister. The Board will be a specialist body which in time will develop expertise in its area and it ought, in our submission, to have all decision-making on operative matters within its jurisdiction.

31. Clause 71

As stated above, we consider Clauses 71(2) and 71(3) to be objectionable on policy grounds and both ought to be deleted. All appeals from decisions of the Commission ought to go to the Board.

Recommendation

Delete Clauses 71(2) and 71(3).

32. Clause 72

StamfordLaw notes that it is the intention of the Bill to have all issues of fact determined by the Board with the jurisdiction of the Courts limited to points of law and financial penalties. We do not support this intention. Major litigation in other jurisdictions clearly establishes that the factual matrix in competition law cases can be complex and findings of fact on the evidence presented and the credibility of witnesses will likely be beyond the capability of lay persons unless judicial guidance is available.

The Bill also does not state what qualifications members of the Board are to have, nor is there any indication that any of the members of a committee of the Board undertaking substantive hearings under Clause 71 shall be judicial officers. We consider this to be a major omission.

Recommendation

Clause 72(7) to be amended as follows:

> (7) All the powers, functions and duties of the Board may be exercised, discharged and performed by any committee of the Board consisting of not less than 3 members of the Board, one of whom may be the

Chairman of the Board, provided that when any such committee is hearing any appeal under Section 71, at least 1 of the members of the committee shall be a District Judge.

33. Clause 73

No comment other than to note that Clauses 73(3) and 73(6) support our recommendation in respect of Clause 72.

34. Clause 74

As stated above, we do not support limiting the jurisdiction of the Courts to points of law and financial penalties. In our submission, the Bill ought to provide for a rehearing by the Court of any appeal from a decision of the Board and this is consistent with other jurisdictions. Experience in other jurisdictions has shown that competition law cases are complex and the Courts hearing such cases in Singapore ought not be limited to findings of fact made by the Board, particularly in any case where the majority of the Board consists of lay persons.

Recommendation

Clause 74 (1) to be amended as follows:

> "(1) Any person who is aggrieved by any decision of the Board made under Section 73 may appeal to the High Court and any such appeal shall be by way of a rehearing."

35. Clause 75

Recommendation

References to decisions of the Minister ought to be removed from Clauses 75(3)(b) and 75(4)(a).

36. Clauses 76 to 91

No comment.

37. Clause 92

Clause 92 provides the Minister with the power to amend the Third and Fourth Schedules to the Bill by order published in the *Gazette*. This Section is contrary to the long-standing principle of public law that an empowering clause that enables legislation to be amended by regulation is undesirable on the basis that it provides the Executive with the power to override Parliament.

In addition, as Section 58 of the Constitution provides Parliament with the power to pass laws, we consider this Clause may be unconstitutional.

Recommendation

To delete.

38. Clause 93

We also object to the Commission being granted such wide-ranging powers to make regulations, particularly the power to levy fees as this is more properly a power to be exercised by the Minister.

Recommendation

Clauses 93 be amended as follows:

> "93.-(1) The Minister may make regulations for any purpose...
>
> "(2) Without prejudice to the generality of subsection (1), the Minister may make regulations...."

39. The First Schedule

No comment other than as raised in respect of moving Clauses 13 to 30 of the Bill to the Schedule.

40. The Second Schedule

No comment.

41. The Third Schedule

StamfordLaw considers that the provisions of the Third Schedule, other than Paragraphs 1 and 8 which ought to be deleted, are better suited to being placed in the main body of the Bill rather than as a Schedule. The provisions in the Third Schedule are substantive and not machinery provisions. It is inappropriate for them to be in a Schedule, particularly in circumstances where it is intended to let the Minister have the power to amend the Schedule.

We submit that Paragraph 1, dealing with an exception for undertakings entrusted with the operation of services of general economic interest or being revenue-producing monopolies, is so vague as to be unenforceable. The Paragraph does not indicate who is entrusting such undertakings, what the scope of "general economic interest" is or what a "revenue-generating monopoly" may be. In our submission, an exception based on such vague

drafting cannot be enacted as the uncertainty created thereby is detrimental to the integrity of the new competition law regime.

We further submit that Paragraph 8, dealing with vertical agreements, is arbitrary and unsupportable on policy grounds. Our full comments on this Paragraph are set out under Clause 34. We cannot see any justification for excluding anti-competitive practices such as resale price maintenance from the competition law regime in Singapore and this Paragraph ought to be deleted.

Recommendation

Paragraphs 1 and 8 to be deleted. The remaining paragraphs to be enacted in the main body of the Bill.

42. The Fourth Schedule

We have no objection to a public interest exemption from the merger controls in Clause 54. However, we would prefer to see a procedure enacted for such applications allowing scope for public consultation before the Minister makes a decision.

* * * *

CONCLUSION

43. As stated in the Introduction, StamfordLaw welcomes the enactment of a competition law regime in Singapore. However, we have reservations as to the regime set out in the Bill as it appears to us to be insufficiently robust to be effective. We are particularly concerned at the number of exemptions that dilute the integrity of the Bill and we urge the Ministry to give some thought to strengthening the Bill along the lines contained in this submission.

44. We are most grateful for having had the opportunity to comment on the Bill and we would be happy to meet with you at your convenience to discuss our submissions.

Paul Fitzgerald
Lee Suet Fern
Yap Wai Ming

Stamford Law Corporation
14 May 2004

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