PROPOSED COMPETITION BILL

SECOND PUBLIC CONSULTATION

COMMENTS OF
STAMFORD LAW CORPORATION
20 August 2004

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SUMMARY OF SUBMISSIONS

1. Introduction

1.1. Stamford Law Corporation ("StamfordLaw") welcomes the opportunity to comment further of the revised draft Competition Act (the "2nd Bill").

1.2. For the purposes of the Second Consultation, we intend to comment only on those provisions of the 2nd Bill that raise significant issues of policy or legal principle. Our submissions on the 2nd Bill ought to be read in conjunction with our submissions of 14 May 2004 ("May Submissions"), as a number of issues raised in those submissions remain relevant to the 2nd Bill.

2. General Summary

2.1. In general terms, StamfordLaw remains of the view expressed in our May Submissions that the Bill is flawed in that it establishes a competition law regime that is:

a) conceptually confused and therefore arbitrary; and

b) diluted by excessive exceptions;

2.2 Accordingly, StamfordLaw submits that amendments are necessary to the Bill in the following areas:

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

2.2.2 Insertion of a provision prohibiting retail price maintenance;

2.2.3 Insertion of a right to a hearing before the removal of rights in Clauses 42(4), 43(4), 52(4), 53(4) and 60(4);

2.2.4 Amendment of Clause 54(7)(b) to ensure a level playing field in merger control; and

2.2.5 Deletion of Clause 92 relating to the power of ministerial amendment of the Act.

* * * *

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 33(4) and 33(5)

Clause 33(4) exempts the Government and statutory bodies from the effect of Part III of the 2nd Bill. In our May Submissions, we recommended that the clause should be amended to provide for Part III of the Bill to apply to the Government and statutory bodies to the extent that the Government or any statutory body engages in trade.

The 2nd Bill addresses the issue raised in our May Submissions in new Clause 33(5) by providing for Part III to apply to any such statutory body that the Minister may prescribe.

We are extremely disappointed that the drafters of the 2nd Bill have seen fit to address a clear policy decision by falling back on Ministerial discretion, notwithstanding the number of submissions in the first consultation that expressed reservations on the extent of Ministerial discretion in the Bill. The policy issue is clear-cut: either the provisions of Part III apply to all undertakings that engage in trade or they do not. In our submission, there should be a level playing field for all undertakings, statutory or otherwise, that engage in trade. To allow some undertakings engaging in trade to be exempt from Part III is inconsistent with the aims of the 2nd Bill and dilutes the integrity of the competition law regime.

Recommendation

Clause 33(5) be deleted and Clause 33(4) 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.

5. Clause 35

Clause 35 has the effect, *inter alia*, of excluding from the Section 34 prohibition, vertical agreements that constitute retail price maintenance.

In our May Submissions, we noted that retail price maintenance is an acknowledged category of anti-competitive conduct and we questioned the policy objective behind such an exclusion. In the Consultation Paper accompanying the 2nd Bill, it is stated that there is a general consensus amongst economists that the majority of vertical agreements have net pro-competitive effect. We have serious doubts as to whether such a consensus exists in the case of retail price maintenance as every significant competition law regime of which we are aware prohibits retail price maintenance. In our

submission, this universal prohibition is based on the inherently anti-competitive nature of retail price maintenance.

We note that Schedule 3 provides for Ministerial discretion to prohibit retail price maintenance. However, in our submission, the policy decision to prohibit retail price maintenance is so clear and so well-established that an express prohibition ought to be included in the 2nd Bill.

Recommendation

A new Clause be inserted as follows:

> " (1) No person shall engage in the practice of resale price maintenance.
>
> (2) For the purposes of this section a person engages in the practice of resale price maintenance if that person (in this section referred to as the supplier) does any of the acts referred to in subsection (3) of this section.
>
> (3) The acts referred to for the purposes of subsection (2) of this section are:-
>
> (a) The supplier making it known to another person that the supplier will not supply goods to the other person unless the other person agrees not to sell those goods at a price less than a price specified by the supplier:
>
> (b) The supplier inducing, or attempting to induce, another person not to sell, at a price less than a price specified by the supplier, goods supplied to the other person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier:
>
> (c) The supplier entering or offering to enter into an agreement, for the supply of goods to another person, where one of the terms is or would be that the other person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier:
>
> (d) The supplier withholding the supply of goods to another person for the reason that the other person :-
>
> (i) Has not agreed to the condition mentioned in paragraph (a) of this subsection; or
>
> (ii) Has sold, or is likely to sell, goods supplied to him by the supplier, or goods supplied to him by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price

specified by the supplier as the price below which the goods are not to be sold:

(e) The supplier withholding the supply of goods to another person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the other person :-

(i) Has not agreed not to sell those goods at a price less than a price specified by the supplier; or

(ii) Has sold or is likely to sell goods supplied or to be supplied to that third person, by the other person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold.

6. Clause 41

We repeat our May Submissions that the criteria set out in Clause 41(a) and (b) are vague, subjective, and open-ended. There is no obvious policy reason why anti-competitive conduct ought to be allowed on such general criteria, particularly where there is no requirement in the 2nd Bill that such exempted agreements provide a benefit to the consumer.

Accordingly, we repeat our submission that 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

Clause 41 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."

7. Clauses 45(4), 46(4), 52(4), 53(4) and 60(4)

These Clauses have the effect of removing a legal entitlement from a person. As we noted in our May Submissions, 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. In our submission, this is a breach of natural justice that entitles a person so affected to seek judicial review of any such decision made without the person affected

being given the opportunity to make representations to the Commission before a final decision is made.

We fail to see how the integrity of the Commission or the Competition Law regime will be enhanced by statutorily providing for such a deficient procedure which invites judicial review proceedings.

Recommendation

New Clauses 45(6), 46(6), 52(6), 53(6) and 60(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)."

8. Clause 54(7)(b)

In our May Submissions, we highlighted our concern that Clause 54(7)(b) sanctions the creation of a monopoly without regard to the effects of that monopoly on competition. Singapore's economy is significantly different from the other small economies in that Government-Linked Companies have a significant market share in a number of sectors which will fall under the general competition law regime. To allow such companies to merge without any scrutiny by the Commission is unjustifiable on policy grounds and unfair to other companies that compete in the market with such Government-Linked Companies and which will have their merger activity subject to scrutiny by the Commission. Accordingly, our submission is that this Clause seriously detracts from the concept of a level playing field in Singapore for merger control.

Recommendation

Clause 54(7)(b) should be amended by inserting at the end of the Clause the words ", unless such undertakings are controlled by any undertaking in which the Government of Singapore has a direct or indirect controlling interest."

9. Clause 92

In our May Submissions, we objected to this Clause as it 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. We also noted that the Clause directly conflicts with Section 58 of the Constitution and therefore may be unconstitutional.

It is with some concern that we note the comments in the Consultation Paper accompanying the 2nd Bill that justify Clause 92 on the basis of a need for flexibility. We were not aware that the need for administrative flexibility could justify the overriding of fundamental principles of constitutional and public law.

It is not the purpose of these Submissions to provide an extensive outline of what are known as "Henry VIII" Clauses, being clauses which involve the inclusion in an Act of the power to amend either that Act or other Acts by regulation. It is sufficient to note that the main objections to Henry VIII Clauses are that they have insufficient regard for the doctrine of separation of powers, which in Singapore is contained in the Constitution, and ultimately, for the institution of Parliament itself. By granting to the Executive the power to amend an Act of Parliament, the status of Parliament is incrementally diminished.

The most authoritative study of Henry VIII Clauses is arguably that by the Donoughmore Committee in 1932 in the United Kingdom. According to the Donoughmore Committee, in words we submit are equally applicable in Singapore:

> *"In the British Constitution there is no such thing as the absolute separation of legislative, executive, and judicial powers; in practice itis inevitable that they should overlap. ... One of the main problems ofa modern democratic state is how to preserve the distinction, whilstavoiding too rigid an insistence on it, in the wide borderland where it is convenient to entrust minor legislative and judicial functions to executive authorities."*
>
> *It is customary to-day for Parliament to delegate minor legislative powers to subordinate authorities and bodies. ... Some people hold the view that this practice of delegating legislative powers is unwise... We do not agree with those critics... We see in it definite advantages,* ***provided that the statutory powers are exercised and the statutory functions performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required****, if the country is to continue to enjoy the advantages of the practice without suffering from its inherent dangers.[1]"* (emphasis added)

The Donoughmore Committee went on to state that such a clause should be avoided unless demonstrably essential and that such a clause:

> *"can only be essential for the limited purpose of bringing an Act into operation and it should accordingly be in most precise language restricted to those purely mechanical arrangements vitally requisite for that purpose; and the clause should always contain a maximum time."*

[1] Report by the Committee on Ministers' Powers (the Donoughmore Committee), His Majesty's Stationary Office, London, 1932, p.36.

The issue is not whether Parliament has the power to authorise the Executive to amend an Act of Parliament. The issue is under what circumstances such a delegation is appropriate so that the legislative power granted to Parliament alone by the Constitution is not progressively transferred to the Executive without the Constitution being amended.

The limited circumstances which have been accepted by a number of Commonwealth Parliaments as justifying the use of Henry VIII Clauses include:

- To facilitate the Consolidation and Rationalisation of Acts in a Reprinting Process;

- To commence an Act of Parliament;

- To facilitate Transitional Arrangements; or

- To effect large and complex legislative reform.

In circumstances where such clauses are used, it is accepted legislative drafting practice to ensure that the clauses are drafted in the most specific and limited terms possible and are subject to a sunset clause. It is also commonly emphasised by Parliamentary Committees charged with scrutinising delegated legislation that Henry VIII Clauses are not a substitute for proper legislative drafting.

The proposed Clause 92 provides to the Minister the power to amend Schedules which are, in our submission, substantive and not mere detail. Indeed, one of the submissions contained in our May Submissions was that the contents of the Third Schedule are substantive and ought to be included in the main body of the Bill. It is clear that the power contemplated by Clause 92 goes beyond matters of detail and machinery and, as the power granted by Clause 92 is wide-ranging and unfettered with no safeguards such as a sunset clause being in place, we submit that Clause 92 is an improper use of a Henry VIII Clause.

Recommendation

Clause 92 be deleted.

* * * *

CONCLUSION

10. As stated in the Introduction, StamfordLaw has restricted its comments in these Submissions to matters of policy and legal principle. We urge the Ministry to consider the issues raised in these Submissions and the extent to which a failure to address these issues will dilute the integrity of the 2nd Bill and the new Competition Law regime.

11. We are most grateful for having had the opportunity to comment on the 2nd Bill and we would be happy to meet with you at your convenience to discuss our submissions.

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Stamford Law Corporation
20 August 2004

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