ASIAN CLEAN FUELS ASSOCIATION

SUBMISSION ON
PROPOSED DRAFT COMPETITION BILL

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1. Summary of Major Points

Asian Clean Fuels Association is pleased to be given the opportunity to comment on the draft proposed Competition Bill ("**draft Bill**") released by the Ministry of Trade and Industry ("**MTI**") on 12 April 2004. This submission contains our comments in relation to the following:

- the effect of "voidness" under section 34(3);
- "appreciable adverse effect" under section 34(1);
- the definition of "dominant position" under section 47(3);
- "appreciable adverse effect" under section 47;
- the definition of "merger" under section 54(2)(a);
- the enforcement of decisions under section 69; and
- the right of private action under section 75.

To this extent, we recognise that MTI has, in drafting the draft Bill, studied the competition legislation of various jurisdictions around the world, including Australia, Canada, Ireland, the United Kingdom and the United States and taken into account Singapore's context as a small open economy.

2. Statement of Interest

We are a 'trade association' whose members are involved in the global clean fuels and fuel component business. We are also linked to a myriad of international bodies whose interests are targeted at improving air quality through the use of cleaner burning fuels.

Our Mission Statement: "To promote and advance the interests of stake-holders in the use of clean fuels that benefit the environment through leveraging their economic, technical and environmental attributes in Asia. Appropriate methodologies will be designed, developed and implemented to achieve the desired results."

3. Comments

3.1 Effect of "Voidness" under Section 34(3)

3.1.1 Section 34(3) of the draft Bill states that "[a]ny agreement or decision which is prohibited by [section 34(1)] of the draft Bill is void".

3.1.2 We submit that the sanction of voidness is ostensibly an absolute one with potentially serious consequences for undertakings which are party to infringing agreements. This has given rise to concerns in the European Community ("**EC**") and the United Kingdom ("**UK**").

(i) Extent of Voidness

(a) The first concern is whether a cause of action for civil remedies is extinguished once an agreement is void. Section 75 of the draft Bill preserves for any person who suffers loss and damage as a result of an infringement of the section 34 prohibition, the section 47 prohibition or the section 54 prohibition a right of action for relief in civil proceedings in a court against any undertaking which is or which has at the material time been a party to such infringement.

(b) This is inconsistent with the notion of an agreement which infringes section 34 of the draft Bill being void *ab initio*, which means that the infringing agreement would have been "null and void" from the beginning.

(c) If it is contemplated that a section 75 right of private action premised on a section 34 infringement represents an exception to the concept of voidness *ab initio* under the section 34 prohibition, this should be clearly articulated in the draft Bill so as to preclude technical arguments to the contrary by a defendant to a section 75 action.

(ii) Duration of Voidness

(a) Another concern is whether an agreement that is prohibited under section 34(1) of the draft Bill when it is entered into, and therefore void, subsequently ceases to be prohibited because the agreement no longer has the effect of preventing, restricting or distorting competition in the relevant market. In the decision of *Passmore v Morland plc*,[1] the English Court of Appeal upheld the Chancery Division's judgment recognising the concept of "transient voidness" i.e. that an agreement could move from voidness to validity (and back again) according to the effect that it might have on the relevant market. In that case, Chadwick LJ said of the Chapter I prohibition (the UK prohibition on which the section 34 prohibition is based):

> "The prohibition is temporaneous (or transient) rather than absolute, in the sense that it endures for a finite period of time – the period of time for which it is needed – rather than for all time".

(b) It is submitted that the concept of transient voidness as a qualification to the sanction of voidness should be incorporated into the draft Bill.

3.2 "Appreciable Adverse Effect" under Section 34(1)

3.2.1 Paragraph 6 of the Consultation Paper reads:

> "[F]ocus will be placed on anti-competitive agreements or conduct that will have an appreciable adverse effect on markets in Singapore."

3.2.2 This requirement of appreciability is recognised by the Office of Fair Trading (the UK competition regulator) as a qualification to the Chapter I prohibition i.e. an agreement only infringes Chapter I if it has as its object or effect an appreciable prevention, restriction or distortion of competition in the UK.[2]

3.2.3 However, the appreciability qualification has not been legislated in the draft Bill. It is significant that the requirement of appreciability has similarly not been legislated in the United Kingdom Competition Act 1998 ("**UKCA 1998**") and is instead found in the abovementioned guideline. We submit that there were particular reasons for not codifying this qualification in the UK context. The issue was debated in the House of Lords where it was argued by some of the Law Lords that a specific amendment

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1 [1998] 4 All ER 468.
2 OFT Guideline 401.

should be made to the Chapter I prohibition to reflect that a finding of appreciability is needed. It was subsequently decided that no change to Chapter I was necessary as the relevant EC jurisprudence (which recognised the concept of appreciability) would apply by virtue of EC law.[3]

3.2.4 Accordingly, we submit that the requirement of appreciability should be expressly incorporated into the draft Bill. The threshold of materiality afforded by the appreciability requirement would allow, as the Consultation Paper suggests, attention to be focused on agreements other than those with a *de minimis* effect on markets in Singapore.

3.3 Definition of "Dominant Position" under Section 47(3)

3.3.1 There is no definition of "dominance" in the draft Bill. Instead, section 47(3) of the draft Bill defines "dominant position" in a rather circular manner as "a dominant position within Singapore or elsewhere".

3.3.2 The aforesaid definition appears to be drawn from the UKCA 1998 except that the UK legislation does not contain the words "or elsewhere". We submit that the words "or elsewhere" may lead section 47(3) of the draft Bill to have a wider effect than intended.

3.3.3 The ostensible intention of section 47(1) of the draft Bill appears to be to prohibit undertakings that have a dominant position in a geographic market outside of Singapore but do not have a dominant position within Singapore from abusing that dominant position with respect to a Singapore market. However, we submit that the words "or elsewhere" may have the unintended effect of precluding a Singapore company with a dominant position in a small market outside Singapore from competing aggressively in the Singapore market.

3.4 "Appreciable Adverse Effect" under Section 47

For the same reasons as set out in paragraph 3.2 above, we submit that the section 47 prohibition should be qualified by an appreciability requirement. To this extent, it is noteworthy that the Office of Fair Trading recognises[4] that the European Court has defined a "dominant market position" as:

> "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers".[5]

3.5 Definition of "merger" under Section 54(2)(a)

3.5.1 Section 54(2)(a) of the draft Bill provides that "a merger occurs if 2 or more undertakings, previously independent of each other, merge", which appears to be influenced by the language and provisions of the Irish Competition Act 2002.

3.5.2 Yet, under Singapore law, "merge" is not a legal term of art independently of acquisitions of shares or assets, nor does the concept of "universal succession" which exists under certain laws, such as Dutch law, subsist under Singapore law. Consequently, section 54(2)(a) of the draft Bill does not assist in ascertaining when a

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3 HL Report Stage, 9 February 1998, cols 884-888.
4 OFT Guideline 402.
5 Case 27/76 *United Brands v EC Commission* [1978] ECR 207, [1978] 1 CMLR 298.

merger occurs. We would like to suggest that the term "merge" be further defined in section 54(2)(a) so as to preclude any ambiguity.

3.6 Enforcement of decision by Commission under Section 69

3.6.1 Section 69(2)(a) of the draft Bill provides that where the Commission has made a decision that the section 34 prohibition has been infringed, a direction from the Commission may contain provisions "requiring parties to the agreement to modify or terminate the agreement".

3.6.2 However, this is irreconcilable with section 34(3) of the draft Bill which expressly provides that any agreement that infringes section 34 is void (i.e. void *ab initio*), as an agreement that is void *ab initio*, by definition, cannot be subsequently modified or terminated.

3.6.3 The solution may be to amend section 69(2)(a) of the draft Bill to allow the Commission the power to require the "parties to the agreement to modify or terminate the agreement on such terms as the Commission shall direct, notwithstanding section 34(3)". A consequential amendment will also be necessary to section 34(3) of the draft Bill to include the words "save as otherwise directed by the Commission under section 69(2)(a)" after the word "void" and before the full stop at the end of section 34(3).

3.6.4 This will ensure that the *prima facie* position is the voidness of an agreement found in infringement of section 34 of the draft Bill, yet allow flexibility in enforcement of decisions of the Commission under section 69.

3.6.5 This would aid in tailoring a solution for a specific problem rather than attempting to deal with dissimilar problems in an omnibus fashion, which may not be desirable, given the economic setting of the Commission's work and role.

3.7 Rights of Private Action under Section 75

3.7.1 A person who has suffered loss or damage as a result of an infringement of the sections 34, 47 or 54 prohibitions may only bring an action against an undertaking that is party to such infringement after the establishment of a decision referred to in section 75(2)(a) of the draft Bill or during the period referred to in section 75(4).

3.7.2 While it appears to be the intention behind the scheme of section 75 of the draft Bill that, until a decision of the Commission (or any decision on appeal therefrom), no action can be brought for civil remedies as a result of an infringement of the prohibitions in sections 34, 47 or 54 of the draft Bill, it may be better to state that no action for breach of statutory duties is concurrently possible.

3.7.3 This would avoid arguments that such a tort is available under the Act.

3.7.4 In addition, there does not seem to be any clear provision under section 75 of the draft Bill allowing Commission decisions (or any decisions on appeal therefrom) to be adduced in evidence.

3.7.5 We suggest provisions similar to the certification process for the adducing of convictions/acquittals, under section 43A of the Evidence Act.

4. Conclusion

We trust these matters will be taken into account by MTI and hope that our comments are of assistance. We look forward to your response on the above.