



SINGAPORE ACADEMY OF LAW

29 May 2004

LAW REFORM COMMITTEE

Comments on the COMPETITION BILL 2004

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**1. Section 2 - Interpretation**

**Definitions of terms such as 'markets', 'dominant position' etc.**

The Committee notes that terms such as 'markets' in s 6(c), and 'dominant position' in s 47 have been left undefined in the Competition Bill ("the Bill").

This approach appears to be similar to the one taken by the UK Competition Act 1998 wherein such terms are similarly left undefined. The UK approach of leaving the term undefined can however be attributed to the fact that Competition Law in the UK has evolved over a period of time and during this period a significant pool of case-law has been built-up to provide guidance in the interpretation of specific statutory terms such as 'markets'. Also, with the increasing impact of the EC Competition policies on national laws, leaving such terms undefined provides greater flexibility to the UK courts when making rulings on such issues.

However, Competition law being a new phenomenon in Singapore, the Committee is of the view that it may be better if such terms are given a definition whether in the statute or in the form of guidelines for purposes of guidance. While the Committee agrees that it may be hard to define a 'dominant position' due to economic complexities, the Committee recommends that a definition of the term 'market' be provided in the Bill. The Committee also suggests that such a definition could be modelled along the lines of *Section 4E of the Australian Trade Practices Act 1974*, which defines a 'market' as follows:

*Market - For the purposes of this Act, unless the contrary intention appears "market" means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services*

that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

### **Definition of 'undertaking'**

The Committee is of the view that the present definition of the term 'undertaking' does not include foreign state enterprises *i.e.* foreign governments that carry out commercial activities. As there could be foreign state enterprises that are parties to contracts in Singapore or are carrying out businesses that have an impact on agreements made in Singapore, the Committee suggests that the authorities review the need to include foreign state enterprises under the ambit of this Bill.

### **2. Section 34 - Agreements, etc., preventing, restricting or distorting competition**

#### **Any Agreement ...prohibited by subs (1) is void**

The Committee is concerned that the usage of the term 'void' in s 34(3) may cause confusion and raise the following issues -

- (a) are such agreements that are prohibited by ss 1 *void ab initio* *i.e.* void from the beginning ? Is s 34(3) therefore intended to have a retrospective effect on agreements entered into before the commencement of the Act?
- (b) are such agreements void from the date of commencement of the Act or void after 12 months of the date of commencement ?
- (c) are such agreements void completely or are they *void pro tanto* *i.e.* only to the extent that they are prohibited ?

The Committee suggests that to avoid any confusion, the provision may be drafted in the following manner -

*(3) Any agreement or decision which is prohibited by subsection (1) is void to the extent of such contravention and from the date of commencement of this Act unless there is an exemption in force.*

### **3. Section 36 - Individual Exemptions**

#### **Inequitable to void certain agreements**

The Committee is of the view that many large scale agreements that were negotiated prior to the commencement of the Act could, subsequent to the commencement of the Act, be rendered void under s 34 (3). This may result in many agreements having to be renegotiated and in increased litigation over parties' rights and contractual obligations both prior to and post commencement of this Act. In the case of large scale projects, it is also possible that one or more agreements could become void and in-turn have a negative impact over the entire contract or project.

In view of the wording used in s 34(3), which treats agreements prohibited by subsection 1 as void (with a possible retrospective effect), the Committee is of the view that an individual exemption may be granted to large scale agreements that were negotiated prior to the commencement of the Act. In these cases it may be inequitable to void these agreements. Such an exemption may be provided under a new s 36(1)(c) as follows -

*(c) a request for such an exemption is made by a party to the agreement and there are reasonable grounds for the Commission to believe that nullifying the agreement would, in relation to one or more parties to the agreement, be inequitable.*

### **Applications for Individual Exemptions**

Under s 36, it does not appear to be possible for a party to bring an application to the Competition Commission for an individual exemption before the commencement of the Act. This is because the Commission will start functioning only when the Act comes into effect. The Committee is of the view that this approach may not be desirable as parties may want to apply to the Commission for individual exemptions early on and not wait until the Act comes into effect.

The Committee suggests two possible solutions in this regard. One solution may be to kick-start the administrative machinery some time prior to the commencement of the Act. The other solution may be to provide a blanket exemption for such agreements for a specific period of time - say, 12 months.

#### **4. Section 37 - Cancellation, etc., of individual exemptions**

##### **'Reasonable grounds for believing' and 'reasonable suspicion'**

Sections 37(1) and (2) provide that in cases where material change of circumstances have taken place since the grant of an individual exemption or in cases where the decision to grant an exemption was based upon incomplete, false or misleading information, the Commission may cancel an exemption under s 37(1)(a), vary or remove any condition or obligation under s 37(1)(b); or impose one or more additional conditions or obligations under s 37(1)(c).

While s 37(1) provides a higher threshold by requiring that the Commission can take such steps only if it has 'reasonable grounds for believing', s 37(2) provides a lower threshold by requiring that the Commission may take such steps even on the basis of 'reasonable suspicion'.

The Committee is of the view that since cancellation could have drastic effects on the agreement, it may be better if the threshold level in both s 37(1) and (2) is made uniform. The Committee therefore recommends that the threshold level provided in s 37(1) be changed from 'reasonable suspicion' to 'reasonable grounds for believing'.

##### **Aggrieved party right to be heard**

Section 37 does not require the Commission to give notice to the party nor does it provide aggrieved parties with a right to be heard. The Committee notes that a decision to cancel an exemption by the Commission without giving prior notice or without hearing representations from the parties can have a severe effect on the

agreement between the parties. It therefore suggests that there should be an avenue by which an aggrieved party can make representations before the Commission.

The Committee suggests that the Commission should give notice of its intention to take any of the steps mentioned under ss 37(1)(a),(b),(c), and invite representations from aggrieved parties before taking its decision.

The Committee also suggests that a similar provision providing for a right to be heard should be inserted under s 38 which provides for block exemptions.

## **5. Section 38 - Block Exemptions**

### **Condition and obligation**

The Committee notes that the Bill provides that the Commission/Minister when granting individual or block exemption may make an order specifying certain conditions or obligations that need to be complied with. Breach of a condition or the failure to comply with an obligation can render the exemption to be cancelled in respect of an agreement. While the breach of a condition results in automatic cancellation under s 38(7)(a), the failure to comply with an obligation may render the block exemption to be cancelled upon the discretion of the Commission.

The Commission must bear the clear distinction between obligations and conditions in mind when issuing guidelines and must strive to clarify which parts of an order are conditions and which parts are obligations. Failure to do so could result in unnecessary confusion and possible litigation.

### **Replace the word 'an' in s 38(7)(a) with the word 'the'**

In s 38(7)(a), the block exemption can and should be cancelled only with respect to a specific agreement and not 'any' agreement. The Committee therefore suggests replacing the present s 38(7)(a) in the following manner -

*(a) the breach of a condition imposed by the order shall have the effect of cancelling the block exemption in respect of the agreement as from such date as the Commission may specify;*

## **6. Section 44 - Notification for decision**

### **Third parties right to apply for a notification for decision**

The Bill only provides for a party to an agreement to apply for the agreement to be examined under s 44 for a notification for decision. The Committee is of the view that there could be cases where third parties who are not parties to the agreement, but who are affected by the agreement or who have an interest in the agreement may wish to apply to the Commission for an examination of the agreement.

As such, the Committee suggests that the Bill should include a provision to allow parties who are not parties to an agreement with the right to apply for a notification for decision under s 44(1).

## **7. Section 45 - Effect of guidance**

### **'Reasonable grounds for believing' and 'reasonable suspicion'**

Similar to the recommendation made earlier under s 37, the Committee is of the view that since the effect of cancellation could have drastic effects on the agreement, it may be better if the threshold level in both ss 45(2)(a) and 45(2)(b) is made uniform. The Committee therefore recommends that the threshold level provided in s 45(2)(b) be changed from 'reasonable suspicion' to 'reasonable grounds for believing'. A similar change is also suggested in s 45(5) which also uses the term 'reasonable suspicion'.

The Committee further suggests that similar changes should be made to ss 46(2)(b), 46(5), 52(2)(b), 52(5), 53(2)(b), 53(5), 59(2)(b), 59(5), 60(2)(b) and 60(5).

### **Mechanism for representation**

Section 45(4)(c) provides that the Commission will give notice to the party that it is removing the immunity as from the date specified in the notice. However, the section does not provide for aggrieved parties who have been served a notice to have a right to be heard. The Committee notes that a decision to remove the immunity without hearing representations from the parties can have a severe effect on the agreement between the parties. It therefore suggests that there should be an avenue by which an aggrieved party can make representations before the Commission.

The Committee suggests that the Commission should provide for a mechanism for representations from aggrieved parties before taking its decision.

The Committee also suggests that a similar provision providing for a right to be heard should be inserted under s 46 which provides for the effect of a decision that section 34 prohibition has not been infringed.

## **8. Section 48 - Excluded cases**

### **Effect of the s 47 prohibition**

S 48 provides that :

*'[t]he section 47 prohibition shall not apply to any matter specified in the Third Schedule'*

In the Third Schedule, while all the sections 1 to 7 clearly state that *'the section 47 prohibition shall not apply...'*, section 8 of the Third Schedule relating to vertical agreements only provides that :

*'(1) The section 34 prohibition shall not apply to any vertical agreement, other than such vertical agreement as the Minister may by order specify'*

The inference from the wording of section 8 above, appears to be that while the section 34 prohibitions are not applicable to vertical agreements, section 47 prohibitions will nonetheless apply. This contradicts section 48 which states that the section 47 prohibition shall not apply to any matter specified in the Third Schedule.

The Committee suggests that the authorities should clarify the intention of the section 47 prohibition on vertical agreements by way of a guidance note.

## **9. Section 54 - Mergers**

### **'Substantial Lessening of Competition'**

Section 54 (1) provides that:

*'Mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services are prohibited.'*

The Committee is of the view that mergers by nature will always result in a 'lessening of competition' as they will involve the combination of two or more independent players in a market. By using the term 'a substantial lessening of competition', it appears that the Bill seeks to define a particular criterion or threshold level wherein mergers would be deemed to be anti-competitive and therefore would be prohibited from taking place. The Committee suggests that if this is the intention of the Bill, then a guideline should be issued that specifies the extent of such a threshold level?

It is also not clear from the wording of s 54(1) whether the Bill seeks to be more restrictive or less restrictive in relation to mergers. The Committee suggests that it may perhaps be better to use the terminology used in s 34 - 'prevention, restriction or distortion of competition' rather than the term 'a substantial lessening of competition'. This will provide more clarity to the provision and also provide uniformity to the provisions dealing with anti-competitive conduct.

The Committee also suggests that some guidelines be issued relating to the threshold levels necessary for meeting the level of 'decisive control' as provided under ss 54(3) and (4).

### **Flexibility to have lesser sanctions in cases of large scale mergers**

The Committee notes that s 54 completely prohibits any merger that results in or is likely to result in a substantial lessening of competition within any market in Singapore. While the Committee is in broad agreement with the Bill's intention that any such mergers that result in restriction of competition should not be tolerated, the Committee considers that that in some cases of large scale mergers which may possibly have a global effect, the Competition Commission must have the flexibility to invoke lesser sanctions and not only total prohibition. This may be possible by empowering the Commission to allow partial exemption such as by exempting the merged entity on the undertaking that it would divest some or partial parts of its operations.

**10. Section 69 - Enforcement of decision of Commission**

**Modification/ termination of an agreement that infringes the s 34 prohibition**

Section 69 (1) provides that the Commission may, when it has made a decision that a section 34 prohibition has been infringed, give such directions as it thinks appropriate to bring the infringement to an end. Section 69(2)(a) further provides that in cases where the agreement infringes the section 34 prohibition, the Commission may require parties to modify or terminate the agreement.

The Committee notes that as section 34 (3), is worded, it clearly provides that agreements prohibited under section 34 are void. As such, it is not clear how the Commission plans to direct parties to modify/ terminate an agreement which is already deemed to be void under section 34. Perhaps, the intention of the Bill is to make such agreements voidable? The Committee suggest that this issue should be looked into and clarified.

**11. Section 71 - Appealable decisions**

**Third parties interested/affected by the decision should be able to intervene in proceedings**

The Bill under s 71 only provides for a party to an agreement to apply to the Board against, or with respect to, that decision. The Committee is of the view that there may be instances where third parties who are not parties to the agreement, but who are affected by the agreement or who have an interest in the agreement, may wish to apply to the Board against, or with respect to that decision.

As such, the Committee suggests that the Bill should include a provision to provide parties who are not parties to an agreement with the right to apply to the Board to be heard.

**12. Section 74 - Appeals to High Court and Court of Appeal**

**Matters relating to the cost of proceedings**

Section 74 (4) provides that the Rules Committee may make rules regulating all matters relating to the cost of proceedings in appeals to the High Court or t the Court of Appeal under this section. The Committee considers that this section is unnecessary as rules relating to costs of proceedings apply as a matter of course and are no different in the case of competition law issues than in any other issues.



**13. Section 75 - Rights of private action**

**Reliance on decisions**

The Committee notes that any person who seeks to bring a private action may rely upon the decisions mentioned in ss 75 (3) (a) - (d). As these decisions will be relied upon as precedents and as a source for authoritative guidance, the Committee wishes to know if the intention of the Bill is to make the decisions of the Commission and the Minister open to the public. If this is the intention, then the Committee suggests that in view of the confidential nature of many such proceedings, it may be better to release sanitised reports of such decisions to the public.

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