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THE *COMPETITION ACT 2004*: A LEGISLATIVE LANDMARK ON SINGAPORE'S LEGAL LANDSCAPE

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I. INTRODUCTION

On 1st January 2006, two statutory prohibitions against anti-competitive commercial conduct were brought into force in Singapore, marking the commencement of a new Competition Law regime for the tropical island state.[1] Sections 34 and 47 of the Singapore *Competition Act* took effect after a year-long public consultation process was carried out by the Competition Commission of Singapore (CCS) to obtain feedback on various draft Guidelines relating to the interpretation and application of these statutory provisions.[2]

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1 *Competition Act* (Cap. 50B, 2006 Rev. Ed. Sing.) [*Competition Act*] was passed by Parliament on 19th October 2004, assented to by the President on 4th November 2004, and first implemented on 1st January 2005—when the provisions establishing the Competition Commission of Singapore (CCS) were first brought into force. The Ministry of Trade and Industry, which was the principle government agency responsible for the introduction of the *Competition Act*, proposed a phased approach to the implementation of the new Competition Law. The CCS was established in Phase I—a year ahead of the substantive provisions of the Act coming into force. During this 12-month transition period, the CCS had to draft and issue the Guidelines necessary to interpret the new statutory prohibitions and the new legal principles they articulated. Phase II of the implementation process commenced on 1st January 2006, while the remaining provisions relating to the regulation of merger activities are slated to come into force at least 12 months thereafter. See the *Second Public Consultation Paper on the Draft Competition Bill* (at para. 27, issued on 26th July 2004) and the Draft Guidelines Consultation Paper (at paras. 1-2, issued on 31st March 2005) put out by the CCS. All official publications issued by the CCS are available online: Competition Commission of Singapore <http://www.ccs.gov.sg/PublicConsultation/Archives/index.html.>

2 See s. 7(1) of the *Competition Act*, *supra* note 2, which enables the Commission to exercise any of the powers specified in the Second Schedule of the *Competition Act*: para. 3 of the Second Schedule grants the CCS the power "to issue or make arrangements for approving codes of practice relating to competition and to give approval to or withdraw from such codes of practice". S. 61 of the *Competition Act* provides that the CSS may "cause to be published in the *Gazette* guidelines indicating the manner in which the Commission will interpret, and give effect to" the provisions of the *Competition Act*.

Section 34 of the *Competition Act* prohibits:

"agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore".

Section 47 of the *Competition Act* prohibits:

"any conduct on the part of one or more undertakings which amount to the abuse of a dominant position in any market in Singapore".

These two statutory provisions introduced a new layer of behavioural restraints on the commercial conduct of undertakings to the extent that such conduct is detrimental to competition in Singapore markets. The former prohibition forbids collaborative, co-operative or collusive behaviour between two or more firms that has anti-competitive objectives or effects on a relevant market within Singapore. The latter prohibits unilateral conduct by a firm occupying a dominant position which amounts to an abuse of its position of market dominance. The CCS has issued Guidelines to accompany each of these statutory prohibitions,[3] as well as several other more general Guidelines to facilitate the implementation of the other related provisions of the *Competition Act*.[4] These Guidelines comprise non-binding explanatory statements that outline the approach which the CCS will take when interpreting and applying the broadly-worded statutory language used in sections 34 and 47 of the *Competition Act*.

The addition of Competition Law to the domestic legal framework is a matter of some significance for all commercial undertakings operating in and out of Singapore. The *Competition Act* establishes a general Competition Law which applies across all industry sectors, except for those specifically excluded in the Third Schedule of the *Competition Act*.[5] This reflects an important shift in Singapore's hitherto relatively *laissez faire* commercial environment in which undertakings have been free to

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[3] See the *CCS Guideline on the Section 34 Prohibition*, the *CCS Guideline on the Section 47 Prohibition*, and the *CCS Guideline on Market Definition* (which is integral to the application of the first two Guidelines), online: Competition Commission of Singapore < http://www.ccs.gov.sg/Guidelines/index.html.>.

[4] The following Guidelines were also issued by the CCS during the first year of its existence (in 2005): the *CCS Guideline on the Powers of Investigation*, the *CCS Guideline on Enforcement*, the *CCS Guideline on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases*, the *CCS Guideline on Filing Notifications for Guidance or Decision*, the *CCS Guideline on Transitional Arrangements*, the *CCS Guideline on the Appropriate Amount of Penalty*, and the *CCS Guideline on the Treatment of Intellectual Property Rights*.

[5] Those industry sectors which are already subject to existing sectoral competition laws are exempted from the scope of the Section 34 and Section 47 prohibitions. See paragraph 5 of the Third Schedule of the *Competition Act*, *supra* note 2. The sectoral competition codes which were implemented in Singapore before the *Competition Act* are identified at *infra* note 10. The commercial activities of undertakings which are regulated by these sectoral competition codes are not subject to the statutory prohibitions in sections 34 and 47 of the *Competition Act*. Other commercial activities are also excluded from the scope of these statutory prohibitions under para. 6 of the Third Schedule because they are subject to sector-specific regulatory controls: the supply of postal services (by persons regulated under the *Postal Services Act* (Cap. 237A, 2000 Rev. Ed. Sing.)), the supply of piped potable water, the supply of wastewater management services, the supply of schedule bus services (by persons regulated under the *Public Transport Council Act* (Cap. 259B, 2000 Rev. Ed. Sing.)), the supply of rail systems (by persons regulated under the *Rapid Transit Systems Act* (Cap. 263A, 2004 Rev. Ed. Sing.)) and the supply of cargo terminal operations (by persons regulated under the *Maritime and Port Authority of Singapore Act* (Cap. 170A, 1997 Rev. Ed. Sing.)). In addition, paragraph 7 of the Third Schedule exempts certain

compete, or not to compete, in whatever manner that suited their commercial objectives. Apart from the standard licences, permits and registration procedures which all undertakings doing business in Singapore are required to comply with, there have never been significant legal restraints[6] on what sorts of dealings these undertakings are allowed to have with their competitors, customers and trading partners. The *Competition Act* substantially alters the ground-rules of the playing field, prohibiting the conclusion of anti-competitive agreements[7] and placing special responsibilities on dominant firms not to engage in conduct that might be harmful to competition.[8] Furthermore, the legal norms articulated by the *Competition Act* can only be fully understood in light of the economic principles on which they are premised. The philosophical foundations and operational mechanics of the regulatory framework created by the *Competition Act* are therefore quite unlike any other piece of domestic legislation presently in force. Ultimately, consumers stand to benefit, albeit indirectly, from the existence of laws which facilitate the competitive process between commercial undertakings in the market: elementary economic theory predicts that healthy competition between rival suppliers of goods and services tends to result in lower prices for consumers.

This note seeks to outline the legislative background to the *Competition Act* and to present a bird's-eye view of Singapore's new Competition Law. To this end, the sections below will introduce the origins and objectives of the *Competition Act*, highlight the noteworthy aspects of its statutory provisions, outline the legal and policy framework supporting the Act, and explain the unique administrative role performed by the competition regulator. It is hoped that the discussion below will provide a helpful roadmap for the uninitiated legal professional to find his or her bearings around this new frontier of Singapore's legal landscape.

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clearing house activities (which are regulated under the *Banking (Clearing House) Regulations* (2004 Rev. Ed. Sing.), r.1) from these statutory prohibitions.

6 The common law doctrine prohibiting unreasonable restraints of trade is one aspect of Singapore's commercial laws which address has had some impact on regulating the anti-competitive effects of non-compete clauses in contractual agreements. See *National Aerated Water Co Pte Ltd v. Monarch Co, Inc*, [2000] 2 S.L.R. 24.

7 The legal consequences of violating the statutory prohibition may have a very serious impact on the commercial relationship between the parties involved. For example, s. 34(3) of the *Competition Act*, *supra* note 2, renders any agreement or decision which has infringed s. 34(1) void to the extent that it infringes that subsection. See also *infra* note 509.

8 Dominant undertakings are not allowed to engage in certain forms of commercial behaviour, which other firms are free to pursue, if such behaviour is likely to eliminate, weaken or discourage competition in any market connected to these undertakings. The prohibition in s. 47 of the *Competition Act*, *ibid*., is applicable only to undertakings in possession of a "dominant position", prohibiting conduct which "protects, enhances or perpetuates the dominant position of an undertaking in ways unrelated to competitive merit". See para. 2.1 of the *CCS Guideline on the Section 47 Prohibition*, *supra* note 4. The jurisprudential notion of a "special responsibility" on the dominant firm not to further distort competition through its commercial conduct was imported from the case-law of the European Court of Justice: See *Nederlandsche Banden-Industrie Michelin v. Commission*, C-322/81, [1985] 1 C.M.L.R. 282 at para. 57 ("a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market"). This concept was referred to in the draft version of the CCS's S. 47 Guideline (*CCS Draft Guideline on the Section 47 Prohibition*) at para. 4.2 ("A dominant undertaking is under a special responsibility not to distort competition"), available from the archives of the CCS' website ("Public Consultation for the First Set of Draft Guidelines of the Competition Act"), online: Competition Commission of Singapore <http://www.ccs.gov.sg/PublicConsultation/Archives/index.html.>. This reference was subsequently removed, without explanation, from the final version of *the CCS Guideline on the Section 47 Prohibition*.

II. The Origins and Objectives of the *Competition Act*

Exposing commercial undertakings to the rigours of competition compels them to operate as efficiently as possible, lowering their costs and prices, or improving the quality of their products or services, as part of an ongoing struggle to attract and retain consumers in the market. Firms which face stiff competition are therefore more responsive to their consumers, more willing to innovate and engage in research and development activity, and are more likely to optimise the resources which are at their disposal. In an economically rational world, market forces would operate to ensure that only the most efficient undertakings remained in competition with each other, while their less efficient competitors would have to exit the market. The threat of potential competition from would-be competitors who may choose to enter the market in the future also exerts competitive pressure on incumbent undertakings to continue operating as efficiently as possible, creating incentives for them to engage in regular innovation to enhance the quality, variety and desirability of their products and services.

However, the reality of competition between market players can prevent the market mechanism from operating effectively if these undertakings engage in various forms of commercial conduct which could distort the competitive process. Such conduct contributes to the phenomenon which economists refer to as "market failure".

Larger firms may, for example, by virtue of their significant market shares and the market power which results therefrom, be able to bully their smaller rivals into submission and deter them from competing aggressively, or force them out of the market altogether through modes of competitive conduct that are not based "on the merits" of their respective goods or services. These large players are able to exploit the commercial advantages which accrue to them because of their positions of market dominance—their deeper pockets, their control over resources, or the influence they wield over suppliers and distributors, for example—to the detriment of their smaller rivals.

Competition Law is therefore necessary to provide a framework of ground-rules in such situations: while rigorous competition is strongly encouraged (because of the benefits which society as a whole derives from having competition), competitors should not be permitted to slug it out in a free-for-all. The principles of economic Darwinism which buttress the competitive struggle between commercial rivals do not go so far as to condone economically irrational or inefficient behaviour that is inconsistent with the public interest in having contestable markets.

Besides regulating overly aggressive modes of competitive behaviour by dominant undertakings, it is equally important for the Law to address the converse situation: where competitors cooperate with each other to eliminate the competitive friction between them. Such agreements between competitors weaken or eliminate any incentives they may otherwise have to behave more efficiently, improve the quality of their goods or services, or lower their prices.

Competition Law places limits on the economic freedom of commercial undertakings to choose what modes of conduct to engage in when competing with each

other, or to enter into collaborative arrangements which result in a reduction in competition between them. The principal objective of the Law is to protect the integrity of the competitive process—ensuring that all impediments to effective competition between competitors are removed— rather than protecting any individual competitor.

A. *Singapore's Economic Policies for the 21st Century*

Early indications of the Singapore Government's interest in adopting a general Competition Law can be traced back to around 2001, shortly after the telecommunications, media, energy and banking industries were liberalised to allow new players to enter these previously-protected sectors of the domestic economy. Sector-specific competition laws were introduced to facilitate the structural changes to these industries, placing legal restraints on dominant incumbent firms to prevent them from exploiting their positions of market dominance through conduct which could deter market entry or eliminate competition from smaller rivals.[9] Competition regulation was therefore a necessary accompaniment to the economic policies adopted by the Singapore Government for these industries, and the introduction of a general Competition Law was a natural extension of sectoral regulation as the rest of the economy opened up progressively.[10]

In Singapore's case, the decision to introduce a general Competition Law flowed directly from a conscious strategy by the Government to expose domestic industry players to greater levels of competition, thereby strengthening their competitiveness in regional and international markets. Greater exposure to competition would make these undertakings more resilient and better prepared to face the challenges of operating in globalised market conditions.[11] The need for such world-class undertakings was therefore recognised as a vital aspect of Singapore's continued economic prosperity into the 21st century. At the same time, attracting foreign investment in key economic sectors required a Competition Law framework to be put in place to make the legal environment more attractive to new market entrants which were willing to

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[9] Industry-specific Competition Codes were systematically introduced during this period to regulate competition in newly-liberalised market segments. Administered by the Info-Communications Authority (IDA), and available online from the "Policy and Regulation" webpages of the IDA website, the *Telecom Competition Code* took effect on 29 September 2000 to address competition law issues specific to the telecommunications industry. Cs8 and 9 of the recently-amended *Telecom Competition Code 2005* regulate conduct which amounts to an abuse of a dominant licensee's position and anti-competitive agreements respectively. Similarly, the *Media Market Conduct Code*, administered by the Media Development Authority (MDA), was introduced on 1 April 2003 to regulate competition in the television and newspaper markets pursuant to the two statutory prohibitions against anti-competitive conduct in ss. 20 and 21 of the *Media Development Authority of Singapore Act* (Cap. 172, 2003 Rev. Ed. Sing.). Cs. 6 and 7 of the *Media Market Conduct Code* regulate conduct which amounts to an abuse of a dominant licensee's position and anti-competitive agreements respectively. Amendments were also made by to the *Electricity Act* (Cap. 89A, 2002 Rev. Ed. Sing.), administered by the Energy Market Authority (EMA), to regulate competition in the power generation and retail industry from 1 January 2003 onwards. Ss. 50 and 51 of the *Electricity Act* prohibit anti-competitive agreements and the abuse of a dominant position respectively.

[10] See Irene Ng, "BG Lee to media: Fight fair; Govt studying need for competition law to ensure fair play as more industries are liberalised" *The Straits Times[of Singapore]* (22 May 2001) p. 1.

[11] At a speech given by the then Deputy Prime Minister Lee Hsien Loong, it was noted that the Government had a role to play in promoting competition, and that "competition will strengthen the players and produce winners who can hold their own, and our economy will be resilient and internationally competitive". See Lee Hsien Loong, Address (New Economy @ Singapore Conference, 2nd August 2001) at para. 20.

compete with domestic incumbents.[12] The economic liberalisation process entailed the eradication of government-imposed restraints on foreign participation in previously protected sectors of the economy. Introducing a general Competition Law complements this process by empowering the competition regulator with the authority to deal with anti-competitive private conduct that may have a chilling effect on market entry by foreign firms.

In December 2001, then Prime Minister Goh Chok Tong set up the Economic Review Committee (ERC)[13] to review Singapore's economic policies and to propose appropriate strategies to promote the further growth and development of Singapore's economy. One of the sub-committees[14] was tasked with reviewing the role of Government-Linked Companies (GLCs) in Singapore and expressed strong support for the Government's plans to introduce a general Competition Law which would apply to all GLCs. In its report entitled "Recommendations on Government in Business", the sub-committee noted the desirability of giving private enterprise a greater role in the growth of the external wing of Singapore's economy, rather than relying entirely on GLCs which have traditionally performed this role. Competition Law, it was argued, would be instrumental in creating the legal environment conducive for small and medium enterprises to compete with the resource-rich GLCs:

> A generic competition law that covers all sectors will institutionalise and give teeth to Government's longstanding procompetition policy. It will form part of our enabling infrastructure for entrepreneurship and ensure fair play between all enterprises, including multinational companies (MNCs), GLCs and small and medium sized enterprises (SMEs)… Generic competition law will institutionalise a regime where GLCs do not enjoy unfair privileges, and must compete on equal footing in the market, just like any other commercial entity. The Government's approach to govern GLCs should be in line with this policy.[15]

These statements draw attention to an important structural feature of Singapore's economy: the presence of sizeable GLCs which are viewed as extremely formidable competitors by their smaller rivals, or would-be rivals. A general Competition Law was therefore seen as an important legal instrument to facilitate competition in those

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[12] *Ibid*. at para. 18, where the then Deputy Prime Minister observed the following: "In addition, we need to put in place a clear, coherent competition policy framework. This will ensure a level playing field for new entrants into a market, and prevent dominant firms in an industry from exploiting their market power to stifle competition or jack up prices".

[13] The ERC was chaired by then Deputy Prime Minister Lee Hsien Loong, and comprised Ministers, members of the public sector, private sector and academia. The ERC's final report was released on 4th February 2003, where one of its key recommendations for creating a pro-enterprise environment and an entrepreneurial society in Singapore was to "Encourage Growth of Enterprising Start-Ups" by pursuing a comprehensive package of policies, including: "Enacting a generic competition law to institutionalise a regime where no company enjoys unfair privileges, and must compete on equal footing in the market with others." See the ERC's Main Report c. 9 at 119, online: Ministry of Trade and Industry <http://app.mti.gov.sg/default.asp?id=507>.

[14] The Entrepreneurship and Internationalisation Subcommittee (EISC), chaired by Minister of State for Trade and Industry Raymond Lim, prepared two reports which were subsequently incorporated into the ERC's Main Report. See the EISC Reports, online: Ministry of Trade and Industry <http://app.mti.gov.sg/data/pages/507/doc/ERC_EISC_FinalReport2.pdf.>.

[15] See the EISC report, *Recommendations on Government in Business*, paras. 8-12, online: Ministry of Trade and Industry <http://app.mti.gov.sg/data/pages/507/doc/ERC_EISC_MainReport.pdf.>.

markets in which GLCs operate. The recognition of this role which a general Competition Law could have within Singapore's economic setting is readily apparent from the Parliamentary exchanges which took place shortly after this report was released, when a proposed Charter of Government-Linked Companies was debated.[16]

The ERC's recommendations in its final report regarding the enactment of a general Competition Law in Singapore should therefore be understood in light of these broader and closely interconnected policy objectives: to encourage entrepreneurship and foster a pro-enterprise commercial environment in Singapore, and to address the competition-related concerns of private enterprise which compete in the same markets as GLCs.[17] The Singapore Government accepted the ERC's recommendation that a general Competition Law was desirable to "reinforce [Singapore's] pro-enterprise and pro-competition policies, enhance the efficiency of [Singapore's] markets, and strengthen [Singapore's] economic competitiveness", and the Second and Third Readings of *Competition Bill* were swiftly passed on 19th October 2004.[18]

The "internal" policy considerations which led to the government's decision to introduce a generic Competition Law were therefore viewed primarily as necessary regulatory accompaniments to the structural reforms which were to be introduced across various sectors of the domestic economy. The role of Competition Law as an instrument to protect consumer-related interests was not at the forefront of the policy debate because consumer complaints relating to price-hikes had hitherto been dealt with, on a case-by-case basis, by the government-sponsored Consumers' Association of Singapore whose activities have historically been targeted at industry-specific practices which affect consumers adversely.

B. *The US-Singapore Free Trade Agreement 2003*

The legislative and policy developments which took place in the background leading up to the enactment of the *Competition Act* ran in parallel with Singapore's

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[16] Sing. *Parliamentary Debates*, vol. 75, col. 805 (Tuesday 27th August 2002). Member of Parliament Leong Horn Kee set out 10 recommendations on the future shape of GLCs, and number 6 on his list was to "Give Priority to enacting a Competition Law", because "this law will help to set the groundrules on competition between all companies, i.e. the GLCs, TLCs, NLCs, MNCs and private companies" (at col. 823. After several other Members of Parliament raised similar competition-related concerns about the significant presence of GLCs in various segments of the Singapore economy, then Deputy Prime Minister Lee Hsien Loong agreed that the enactment of a Competition Law was a priority: "On unfair market practices, which means cartels, predatory pricing, abuse of dominance, the Government does not condone these, whether by GLCs or by private companies. MTI intends to enact a competition law and all companies, including GLCs, will be subject to this law. There will be some sensitive activities which should be exempted from the law, as in all competition regimes around the world." See Sing. *Parliamentary Debates*, vol. 75, (Part II of First Session) at col. 1043 (28th August 2002).

[17] This was something which the Senior Minister of State for Trade and Industry, Dr Vivian Balakrishnan, took pains to emphasise during the Second Reading of the *Competition Bill*: "The Bill will apply to commercial and economic activities carried on by private sector entities in all sectors, regardless of whether the undertaking is owned by a foreign entity, a Singapore entity, the Government or a statutory body. However, as the intent of competition law is to regulate conduct of market players, it will not apply to the Government, statutory bodies or any person acting on their behalf". See Sing. Parliamentary Debates, vol. 78 (part V of First Session), at col. 863 (19th October 2004).

[18] *Ibid.*

Free Trade Agreement negotiations[19] with the United States of America. The U.S.-Singapore Free Trade Agreement (USSFTA) was passed by the U.S. Congress on 31st July 2003 and came into force on 1st January 2004. Chapter 12 of the USSFTA, entitled "Anticompetitive Business Conduct, Designated Monopolies, and Government Enterprises", set out the parameters of the Competition Law framework which Singapore was obliged to implement in recognition of the fact that anti-competitive conduct by commercial undertakings "has the potential to restrict bilateral trade and investment", and that "proscribing such conduct, implementing economically sound competition policies, and engaging in cooperation" between the parties to the USSFTA was necessary to achieve the benefits of the Agreement.[20] Article 12.2(1) of the USSFTA required Singapore to "adopt or maintain measures to proscribe anti-competitive business conduct with the objective of promoting economic efficiency and consumer welfare", to enact general competition legislation by January 2005 and not to "exclude enterprises from that legislation on the basis of their status as government enterprises".

The pervasive presence of GLCs throughout Singapore's economy was a clearly a matter of some concern to the United States and the American businesses[21] they represented. Article 12.3(2)(d) of the USSFTA reflected the competition-related concerns quite clearly:

> Singapore shall ensure that any government enterprise:
> …
> (ii) does not, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership:
>
> (A) enter into agreements among competitors that restrain competition on price or output or allocate customers for which there is no plausible efficiency justification, or
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> (B) engage in exclusionary practices that substantially lessen competition in a market in Singapore to the detriment of consumers.

It is not surprising that Singapore's general Competition Law is partly rooted in these trade-related obligations: an effective Competition Law framework is consistent with a comprehensive trade policy that seeks to eliminate all barriers to trade and

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[19] Sceptics have speculated that the USSFTA negotiations had a significant role in the studies carried out by the Ministry of Trade and Industry as to the feasibility of a general Competition Law for Singapore, but a spokesman for the Ministry was reported to have quashed this suggestion by stating that "the process of reviewing, improving and adopting new laws and regulations to control anti-competitive practices is not related to our FTA negotiations" and that "Singapore recognises that every country has the right to adopt its own approach to ensuring efficient and fair competition in its markets". See Jake Lloyd-Smith, "All eyes on city-state as government loosens grip" *South China Morning Post* (3rd August 2001).

[20] See art. 12.1 of the *U.S.-Singapore Free Trade Agreement*, United States and Singapore, 6 May 2003, at 133.

[21] These concerns are more fully expressed in the feedback given by the American Chamber of Commerce (29th May 2004) and the U.S. Government (14th May 2004) in the public consultation processes which preceded the enactment of the *Competition Act*, *supra* note 2. The submissions are available from the online archives of the Competition Commission of Singapore, *supra* note 9. Similar concerns were also expressed in relation to the structural makeup of the Competition Commission of Singapore, which has been constituted as a statutory board under the auspices of the Ministry of Trade and Industry, given that a number of senior civil servants also serve as directors of many GLCs. See text accompanying notes 64 and 65.

investment, including anti-competitive commercial conduct which would weaken the contestability of domestic markets. Anti-competitive exclusionary conduct by private undertakings could, if unchecked by a general Competition Law, deter market entry by foreign firms. These trade-facilitation objectives that underlie Singapore's obligations under the USSFTA to introduce a general Competition are consonant with the broader package of economic policies recommended by the ERC to the Singapore Government. Attracting foreign trade and investment with a pro-competition legal framework is a necessary part of the market liberalisation process, through which domestic incumbents are compelled to behave as efficiently as possible as a result of engaging in the competitive process.

C. *Transplanting the Anglo-European Competition Law Framework*

The *Competition Act* was drafted after a survey was carried out by the Ministry of Trade and Industry of the competition legislation found in the United Kingdom, Australia, Ireland, the United States and Canada.[22] Given Singapore's historical and jurisprudential ties with the United Kingdom, and the healthy affinity which Singapore has towards the commercial law statutes of the United Kingdom, the Act was modelled substantially on the *UK Competition Act 1998*,[23] taking into account the legislative amendments made to the *UK Act* in 2004. The *UK Act* was, in turn, modelled after the European Competition Law framework as set out in the *EC Treaty*[24] and the various Regulations issued by the Directorate General of the European Commission.

Sections 34 and 47 of the *Competition Act* are substantially similar to the statutory prohibitions found in sections 2 and 18 of the *UK Act*, whose origins can be traced back to Articles 81 and 82 of the *EC Treaty*. The transplantation of these statutory prohibitions against anti-competitive conduct was not done mechanically: a number of modifications and amendments, with potentially significant consequences, were made by those responsible for drafting the *Competition Act* to take into account Singapore's "specific economic characteristics and requirements, in particular, the fact that [it is] a small open economy".[25] It may be useful to set out a few of the major features of the *Act* which mark deliberate departures from the UK and European legislative models:

- No individual exemptions may be obtained from the CCS in respect of the statutory prohibition against multi-party conduct which has its object or effect the prevention, restriction or distortion of competition.[26] Unlike the Anglo-European

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[22] See supra note 18.

[23] *Competition Act 1998* (U.K.), 1998, c. 41 [*UK Act*].

[24] *Treaty establishing the European Community*, 25 March 1957, 298 U.N.T.S. 3., otherwise known as *Treaty of Rome* [EC Treaty], was first signed on 25th March 1957 and has been revised several times since. The *Treaty* established the common market of the European Community.

[25] Another point stressed in the Second Reading of the *Competition Bill* by the Senior Minister of State for Trade and Industry. See *supra* note 198.

[26] Contrast with ss. 4 and 5 of the *UK Act*, *supra* note 23, (before it was amended in 2004) and art. 81(3) of the *Treaty of Rome*, *supra* note 24 (before the entry into force of EC, *Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, [2003] O.J.L. 1/1 [*EC Council Regulation*]).

legislative framework, where a system for individual exemptions was administered by the European Commission for a number of decades before it was replaced with a "directly applicable exception system"[27] in which Article 81(3) of the *EC Treaty* was applied directly by national competition authorities and the courts of Member States, the proponents of Singapore's new competition legislation decided not to give the CCS any jurisdiction to grant individual exemptions from the very outset.[28] In denying the CCS any jurisdiction to grant exemptions from the statutory prohibition against anti-competitive agreements in individual cases, the architects of the *Competition Act* have closed off a significant channel through which the competition regulator might have had opportunities to demarcate the scope of the Section 34 prohibition. Instead, the Section 34 statutory prohibition has been designed to be entirely self-executory[29] and undertakings are expected to rely on self-assessment as the principle strategy for achieving compliance with the new law.[30]

- All vertical agreements,[31] unless otherwise specified by the Minister, are exempted from the statutory prohibition against multi-party conduct which has its object or

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[27] See para. 4 of the preamble of *EC Council Regulation*, *ibid.* which applied from 1st May 2004. In particular, art. 1(2) of *EC Council Regulation* provides that "Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required".

[28] This was explained in para. 10 of the *Second Public Consultation on the Draft Competition Bill*, *supra* note 2: "The earlier draft Bill had provided for the Commission to grant individual exemptions for anti-competitive agreements if they satisfy certain criteria… This provision will be removed because, as some contributors have pointed out, such a system could impose significant resource costs on the Commission. Moreover, with the provision of block exemptions, there should be sufficient flexibility for exempting anticompetitive agreements that have net positive economic outcomes. Such an approach is also in line with international developments".

[29] Agreements which fall within the scope of the Section 34 prohibition are nevertheless be protected from the nullifying effects of the statute if, when balanced against their pro-competitive objectives and effects, they "have a net economic benefit". See para. 2.24 of the *CCS Guideline on the Section 34 Prohibition*, *supra* note 4, discussed below at *infra* note 41. S. 35 of the *Competition Act*, *supra* note 2, prevents the application of the Section 34 prohibition to "such matter as may be specified in the Third Schedule [of the *Competition Act)*". Para. 9 of the Third Schedule of the *Competition Act* declares that the Section 34 prohibition "shall not apply to any agreement which contributes to… improving production or distribution; or… promoting technical or economic progress, but which does not… impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or… afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question".

[30] This should be contrasted with the Anglo-European competition law framework, in which the European Commission has had significant experience in dealing with requests for individual exemptions under art. 81(3) of the *EC Treaty, supra* note 24, before *EC Council Regulation*, *supra* note 26, was implemented. The jurisprudence which has been accumulated from these cases offers undertakings, and their legal advisers, a body of guiding principles from which to draw upon when evaluating the competition-related issues arising from their agreements and other restrictive practices.

[31] Para. 8(2) of the Third Schedule of the *Competition Act*, *supra* note 2, defines "vertical agreement" to mean "any agreement entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers".

effect the prevention, restriction or distortion of competition.[32] The breadth of this exception is considerably wider than the scope of European Commission's block exemption for vertical agreements, Commission Regulation 2790/1999, in which market share and turnover thresholds have been set out, alongside a "black-list" of commercial restraints which disqualifies certain categories of vertical agreements from taking the benefit of the block exemption.[33] As a result, resale price restrictions and market-dividing arrangements that are found in vertical agreements will not contravene the Section 34 prohibition under Singapore's new competition legislation.

- Unlike the equivalent English and European legislative provisions, the Section 47 prohibition does not include "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" as an example of conduct that may constitute an abuse of a dominant position. Instead, the narrower phrase of "predatory behaviour towards competitors" was chosen by the drafters of the *Competition Act*.[34] This specific departure from the language found in Article 82 of the EC Treaty and section 18(2) of the *UK Act*—the other 3 limbs of Article 82 and section 18(2) were faithfully replicated in the *Competition Act*—means that the CCS does not have to perform the politically unpalatable task of assessing whether or not the prices charged by a dominant undertaking are excessive or not.[35] The scope of the Section 47 prohibition is therefore deliberately narrower than the corresponding legal framework found in the Anglo-European regulatory model.
- Specific provisions were drafted into the *Competition Act* to give it an explicit extra-territorial reach, thereby empowering the Competition Commission of Singapore to take action against undertakings, even if the anti-competitive

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[32] See s. 35 and para. 8 of the Third Schedule of the *Competition Act*, *ibid*. MTI has taken the view that "there is a general consensus amongst economists that the majority of vertical agreements have net pro-competitive effects. As such, it would be more appropriate to… exclude vertical agreements, subject to the safeguard clawback provision. This will reduce regulatory costs, and is now the approach adopted by many jurisdictions. Vertical agreements involving a dominant player remain covered by the prohibition against abuse of dominance". See para. 12 of the *Second Public Consultation on the Draft Competition Bill*, *supra* note 2,. The UK position previously excluded vertical agreements (except price-fixing agreements) from the statutory prohibition in s. 2 of the *UK Act*, *supra* note 23—see s. 50 of the *UK Act* and the *Competition Act (Land and Vertical Agreements Exclusion) Order 2000/310*, S.I. 2000/310, which has now been repealed—but has had to conform with the stricter European approach towards vertical agreements which have as their *object* the restriction of competition. See *Etablissements Consten SA & Grundig–Verkaufs-GmbH v. Commission* [1966] E.C.R. 299 at 342-343.

[33] See arts. 2(4), 3(1), 3(2), 4 and 5 of EC, *Commission Regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices*, [1999] O.J.L. 366/21. In contrast, the statutory exemption for vertical agreements in the Third Schedule of the *Competition Act*, *ibid.*, is currently unqualified.

[34] Contrast s. 47(2)(a) of the *Competition Act*, *ibid*., with s. 18(2)(a) of the *UK Act*, *ibid.*, and art. 82(a) of the *EC Treaty*, *supra* note 24.

[35] The concept of "Predatory Behaviour" and its application to a dominant undertaking "Pricing Below Cost" are elaborated upon in paras. 11.3 to 11.10 of the *CCS Guideline on the Section 47 Prohibition*, *supra* note 4. Discriminatory pricing is dealt with in para. 11.14 of the *CCS Guideline on the Section 47 Prohibition* as part of another facet of the Section 47 prohibition found in s. 47(2)(c) of the *Competition Act*, *ibid.*—conduct which consists of "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".

activities or conduct occur outside of Singapore's territorial limits[36] or the dominant position held by an undertaking is in a market outside of Singapore,[37] as long as there is a negative effect on competition within Singapore.[38] For example, if a foreign-based undertaking occupies a position of market dominance in its home market, but is a new entrant and small player within Singapore's domestic market, the literal wording of the Section 47 prohibition permits the competition regulator to challenge its anti-competitive commercial practices, whether carried out within or beyond Singapore's territorial limits, as an abuse of a dominant position.[39]

These are just some of the more visible differences between the Singapore Competition Law model and the jurisdictions from which its lineage can be traced, and it is likely that they will have a significant practical impact on how the new statutory prohibitions will be interpreted and administered by the Competition Commission. The substantive differences between these laws were the result of deliberate policy choices to depart from the Anglo-European model so as to better reflect the domestic economic circumstances in which Singapore's general Competition Law is to be applied. More importantly, it also means that the many precedents found in the Anglo-European jurisprudence have to be interpreted critically—to determine if they have policy foundations which are consistent with the spirit of the Singapore model—before they can be applied in the local context.[40]

III. The Unusual Creature that is Singapore's New Competition Law

Apart from understanding the underlying objectives and policies of the *Competition Act*, the legal advisor treading into this territory should also be aware of differences—both conceptual and practical—between the legal and policy framework concerned with competition-related issues and other areas of private commercial law. What makes Competition Law different from, and in some ways more challenging than, other sub-species of commercial law are its peculiar characteristics and the special demands which are placed on the legal advisor.

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[36] See s. 33 of the *Competition Act*, *ibid*. While the Anglo-European model of Competition Law does have clear examples of how the European Commission and Courts have given the prohibitions against anti-competitive conduct an extraterritorial scope of application, it has not codified its position with the same clarity as that found in the Singapore *Competition Act*.

[37] See s. 47(3) of the *Competition Act*, *ibid*.

[38] See para. 2.2 of the *CCS Guideline on the Section 34 Prohibition*, *supra* note 4, and para. 3.1 of the *CCS Guideline on the Section 47 Prohibition*, *supra* note 4.

[39] The way in which the Section 47 prohibition has been drafted is a notable extension of the jurisprudence from the Anglo-European model, where non-EC based undertakings had to have a dominant market position *within the Common Market* before they could be considered to have violated Article 82 of the *EC Treaty*, *supra* note 24. For a further discussion of the differences, see: Ong, B., "Exporting Article 82 EC to Singapore: Prospects and Challenges" (2005) 2(2) Competition Law Review 99 at 109-112.

[40] A number of participants in the public consultation exercise who responded to the CCS' request for feedback on its draft Guidelines suggested that the CCS indicate clearly which areas of Anglo-European caselaw would or would not apply to the Singapore context. However, the CCS, predictably, was unwilling to do so and would only state that "these cases are persuasive authority" and that because the Singapore context would in some respects be different from that in the UK and the EC, "it is not practicable or appropriate for the CCS to so indicate". See Competion Commission of Singapore, policy statement, Competition Commission of Singapore Guidelines (29th July 2005), online: Competition Commission of Singapore <http://www.ccs.gov.sg/Guidelines/Guidelines+Published+and+Policy+Paper.htm.>.

Firstly, many of the core legal principles of Competition Law are premised upon underlying microeconomic concepts and theories. The legal standards used to determine whether an undertaking's behaviour falls within the scope of a statutory prohibition can only be properly applied after a sufficient economic analysis of the conduct in question has been carried out.[41] Relevant markets have to be defined and analysed to determine if the conduct complained of does in fact pose a threat to competition which warrants the attention of Competition Law.[42]

Secondly, the degree of uncertainty typically arising from the application of competition law principles may exceed the tolerance levels of the average commercial lawyer. In many cases, whether or not the conduct in question is unlawful boils down to a question of fact and degree.[43] The principal question, in many cases where "hard core" restraints are not involved, is whether the anti-competitive effects of a restraint on competition outweigh, or are outweighed by, the pro-competitive benefits which result from such conduct.[44] This uncertainty is compounded by the fact that different modes of economic analysis with different underlying assumptions, usually conducted by the rival expert witnesses of the respective parties involved, are likely to yield contradictory conclusions.

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[41] See, for example, para. 2.24 of the *CCS Guideline on the Section 34 Prohibition*, *supra* note 4, which explains that "an agreement that falls within the scope of section 34 may, on balance, have a net economic benefit if it contributes to improving production or distribution or promoting technical or economic progress and it does not impose on the undertakings concerned restrictions, which are not indispensable to the attainment of those objectives or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question". Such agreements which produce a "net economic benefit" despite their anti-competitive object or effect are able to qualify for the block exemption for individual agreements issued by the Minister under para. 4 of the Third Schedule of the *Competition Act*, *supra* note 2, which then attracts the s. 35 exception to the application of the Section 34 prohibition. Para. 10 (Annex C) of the *CCS Guideline on the Section 34 Prohibition* also sets out an analytical framework for assessing the efficiencies of agreements to determine if they are eligible for the exclusionary order for individual agreements under the Third Schedule of the *Competition Act*.

[42] See the *CCS Guideline on Market Definition*, *supra* note 4, which articulates the economic principles used in the market definition exercise necessary to determine if, for example, an agreement has an "appreciable effect on competition" for the purposes of the section 34 prohibition (see paras. 2.19-2.23, and para. 10 (Annex B) of the *CCS Guideline on the Section 34 Prohibition*, *ibid.*, or if a firm occupies a position of market dominance that might be abused contrary to the section 47 prohibition (see paras. 3.1-3.15, and para. 9 (Annex A) of the *CCS Guideline on the Section 47 Prohibition*, *supra* note 4).

[43] There is, of course, a limited category of anti-competitive "hard core" restraints that "are, by their very nature, regarded as restrictive of competition to an appreciable extent". See para. 3.2 of the *CCS Guideline on the Section 34 Prohibition*, *ibid.*, which identifies price-fixing, bid-rigging, market-sharing and limitations on production or investment as restraints which the CCS views as clear violations of the Section 34 prohibition.

[44] These restraints include conditions or restrictions which fix trading conditions, joint purchasing or selling arrangements, information-sharing, exchanging price and non-price information, restrictive advertising and setting technical or design standards: see paras. 3.13 to 3.29, as well as the tables in Annex A, of the *CCS Guideline to the Section 34 Prohibition*, *ibid.*, which sets out the multitude of factors which need to be taken into account when assessing the legality of these restraints. Furthermore, paras. 10.3 to 10.7 (Annex C) of the *CCS Guideline on the Section 34 Prohibition* set out the various factors which ought to be assessed when determining if an agreement is eligible for the exemption from the Section 34 prohibition because it has a "net economic benefit". Para. 10.4 requires that any efficiency-related claims relied upon to support the validity of the agreement must be substantiated such that "the efficiencies must be of a significant value, enough to outweigh the anti-competitive effects of the agreement". It also provides that "the greater the increase in market power that is likely to be brought about (as a result of the agreement being upheld), the more significant benefits will have to be".

Thirdly, the reach of a general Competition Law extends to every corner of the commercial world, requiring legal advisors to apply these legal principles to the multitude of different industries and commercial contexts. The Competition Law advisor has to adapt his analytical framework to the varying economic and commercial environments in which the impugned transaction or conduct might take place, sensitising himself to the specific dynamics of the competitive process in the relevant market. Conduct which is lawful in one industry may in fact turn out to be anti-competitive in a different industry setting.[45] In addition, undertakings concerned about whether their agreements or conduct may contravene the Section 34 or Section 47 prohibitions, and who wish to obtain guidance or a decision from the CCS about the legality of their commercial behaviour, are not permitted to initiate notification proceedings in respect of prospective agreements or conduct.[46]

Fourthly, the open-textured character of the legal principles articulated by the statutory prohibitions—which is necessitated by the broad range of commercial behaviour which falls within the ambit of these provisions—means that the statutory provisions of the *Competition Act* cannot, on their own, comprehensively demarcate the scope of Singapore's general Competition Law. Interpreting these statutory prohibitions requires the legal advisor to turn to the plethora of extra-statutory materials (Guidelines and Exemption Orders, for example) issued by the competition regulator to determine the legality of the commercial conduct under assessment. The Competition Commission's Guidelines contain non-binding statements of policy which reflect the regulator's prevailing thinking and may be amended from time to time.[47] These Guidelines contain references to economic concepts or policies which may either expand or limit the scope of the actual language used in the statutory provisions.[48] In addition, as with other commercial

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[45] See, for example, para. 3.2 of the *CCS Guideline on the Section 34 Prohibition*, *ibid.*, which, unsurprisingly, explains that the examples of anti-competitive restraints given in the *Guideline* "are not exhaustive" and that "the facts and circumstances of each case will need to be considered".

[46] See para. 1.7 of the *CCS Guideline on Filing Notifications for Guidance or Decision*, *supra* note 5. It is not clear whether the CCS, given its fledgling status as a competition regulator, will be able to entertain requests for informal guidance or comment on the legality of agreements or conduct which have yet to be executed. Furthermore, para. 1.6 of the *CCS Guideline on Filing Notifications for Guidance or Decision* gives the CCS a broad discretion *not* to give guidance or make a decision to undertakings (and hence not disclose anything to undertakings) when it takes the view that the agreement or conduct which has been notified does "not raise any real concerns of possible infringement under the [Competition] Act".

[47] See paras. 1.4 of the *CCS Guideline on the Section 34 Prohibition*, *supra* note 4, the *CCS Guideline on the Section 47 Prohibition*, *supra* note 4, and the *CCS Guideline on Market Definition*, *supra* note 4, which make the same disclaimer: "This guideline is not a substitute for the Act, the regulations and orders. It may be revised should the need arise. The examples in this guideline are for illustration. They are not exhaustive… In applying this guideline, the facts and circumstances of each case will be considered…".

[48] The "appreciability" concept, for example, is used to qualify the literal language used in the Section 34 prohibition and thereby limit its scope of application. This is made clear in para. 2.18 of the *CCS Guideline on the Section 34 Prohibition*, *ibid.*: "An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the *appreciable* prevention, restriction or distortion of competition unless it is excluded or exempted." (emphasis added). This has been a feature of Singapore's competition policy from the very inception of the *Competition Act*, *supra* note 4, with the Senior Minister of State for Trade and Industry Dr Vivian Balakrishnan explaining, during the Second Reading of the *Competition Bill*, *supra* note 19, that there was a need "to balance regulatory and business compliance costs against the benefits from effective competition. Instead of attempting to catch all forms of anti-competitive activities, [Singapore's] principal focus will be on those that have an *appreciable* adverse effect on competition in Singapore or that do not have any net economic benefit. In assessing whether an action is anti-competitive,

law statutes, the future decisions of the competition regulator and the judgements of the courts, which are not bound by the CCS Guidelines in any way, will have an important role defining the substantive and procedural parameters of the *Competition Act*.

It should therefore be apparent that this new piece of legislation will take some getting used to, not just because of the substance of the new legal prohibitions against anti-competitive conduct, but also because of its specialised cross-disciplinary character which requires an unavoidable integration of conventional legal analysis with core economic concepts and principles in order to make sense of the law. Legal advisors should also take into account the profound impact which the new Competition Law might have in other more established areas of Singapore's commercial law. Section 34 introduces a new vitiating factor in Contract Law which renders anti-competitive agreements falling within the statutory prohibition void.[49] Potential conflicts might also arise between the new Competition Law and the Law of Intellectual Property, particularly where intellectual property licences are granted on terms which contravene the statutory prohibitions in sections 34 and 47 of the *Competition Act*.[50] Further down the road, when the statutory prohibition in section 54 against mergers which substantially lessen competition comes into force, corporate lawyers facilitating merger and acquisition transactions will have to address the additional Competition Law issues which may arise when handling such deals.[51] Commercial lawyers will have to cope with an additional layer of fairly sophisticated competition law analysis when giving advice to commercial undertakings and may need to engage specialists to assist them with such matters.

[the competition regulator will] give due consideration to whether it promotes innovation, productivity or longer-term economic efficiency." (emphasis added)

[49] See para. 7.1 of the *CCS Guideline on the Section 34 Prohibition*, *ibid.* which explains that all existing agreements which infringe the section 34 prohibition are void an unenforceable only after 1st January 2006, while all agreements entered into subsequently after 1st January 2006 are void and unenforceable *ab initio* to the extent that they infringe the section 34 prohibition. Note, however, that the *CCS Guideline on Transitional Arrangements*, *supra* note 5, which interpret the *Transitional Period Regulations*, give certain agreements the benefit of longer time periods to comply with the new Competition Law after 1st January 2006. Para. 2.1 of the *CCS Guideline on the Section 34 Prohibition* provides that agreements that were made on or before 31st July 2005 are automatically given an extension till 30th June 2006 to review, renegotiate or amend their agreements to achieve compliance with the Section 34 prohibition. Parties to all other agreements made after 31st July 2005, or which are unable to comply with the *Competition Act*, *ibid.*, before the 30th June 2006 extended deadline, may apply for a further transitional period to comply with the *Competition Act* (para. 2.2 of the *CCS Guideline on the Section 34 Prohibition*), and the CCS may grant extension periods of up to one year, or possibly for a longer period in "exceptional circumstances", from the date of its decision on such applications (para. 2.7 of the *CCS Guideline on the Section 34 Prohibition*).

[50] See the *CCS Guideline on Treatment of Intellectual Property Rights*, *supra* note 5.

[51] In recognition of the complexity of the issues involved in merger regulation, and not wanting to commit itself to a fixed date for issuing the Guidelines necessary to accompany the Section 54 prohibition, the CCS has indicated that it will need at least 12 months after the Section 34 and Section 47 prohibitions come into force (on 1st January 2006) to activate the remaining statutory provisions concerned with mergers and acquisitions. This "phased implementation approach" was intended by the Government from the very outset: see Senior Minister of State for Trade and Industry Dr Vivian Balakrishnan's introduction to the Competition Bill during its Second Reading, at supra note 18.

IV. The Unique Character of the Regulatory Agency: The Competition Commission of Singapore

Another groundbreaking aspect of the *Competition Act* is the regulatory institution it creates to administer Singapore's new Competition Law. Constituted as a statutory board under the supervision of the Ministry of Trade and Industry and staffed by an equal mix of legal officers and economists, the Competition Commission of Singapore is statutorily responsible for performing a number of functions not typically carried out simultaneously by the same regulatory agency.

Firstly, the CCS operates as a quasi-legislative body responsible for formulating the bundle of Guidelines[52] which accompanies the *Competition Act*. These Guidelines articulate the policy framework which the CCS intends to adopt when interpreting and applying the provisions of the *Competition Act*. Given the pivotal role which these Guidelines play in establishing the definitional parameters of the widely drafted language found in the statutory provisions of the *Competition Act*, the CCS is therefore empowered to determine the substantive content of the new Competition Law.[53]

Secondly, the CCS is an executive body responsible for investigating and prosecuting violations of the statutory prohibitions set out in the *Competition Act*. The *Competition Act* confers upon the CCS a formidable panoply of investigative powers, enabling it to carry out searches of private property (without first having to obtain a warrant in some circumstances) and to gather evidence from persons and premises encountered in the course of its investigations.[54] The *Competition Act* also prescribes fairly stiff penalties, comprising both fines and incarceration, for failure to comply with the orders issued by the CCS in the course of its investigations. These statutory provisions give the CCS a lot more "teeth" in carrying out its investigations as compared to other sector-specific agencies whose principal enforcement tool is their power over the issuance of licences to operate in these regulated industries.[55]

Thirdly, the CCS also performs a quasi-tribunal function in making the necessary findings of fact on which an infringement of the relevant statutory prohibitions is established. The competition regulator is also responsible for determining whether, and which, principles of Competition Law are applicable to any given set of facts, and what remedies to order against undertakings which are found to have engaged in unlawful anti-competitive behaviour.[56] The most significant weapon in the CCS'

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[52] See *supra* notes 3 and 5.

[53] See *supra* note 49 and accompanying text.

[54] See ss. 62-65 of *the Competition Act*, *supra* note 2, and the *CCS Guideline on the Powers of Investigation*, *supra* note 5.

[55] See, for example, s. 25 of the *Info-Communications Development Authority of Singapore Act* (Cap. 137A, 2000 Rev. Ed. Sing.) which empowers the IDA to compel the disclosure of information and the production of documentary evidence for inspection, but does not empower it to search private premises and to seize evidence obtained in the course of such searches. S. 24 of the *Media Development Authority of Singapore Act*, *supra* note 10, merely states that the MDA "may conduct an investigation" if it has reasonable grounds for suspecting if infringing conduct has taken place, without specifying the specific powers of investigation it has at its disposal.

[56] See s. 69(2) of the *Competition Act*, *supra* note 2, which empowers the CCS to require parties to an agreement prohibited by s. 34 to modify or terminate the agreement, for persons engaged in conduct prohibited by s. 47 to modify or cease the conduct, and for mergers which violate the section 54 prohibition to be dissolved or modified. It also gives the CCS a number of general powers to require parties found

armoury is its ability to levy a financial penalty of up to 10% of an undertaking's annual turnover,[57] which could amount to a very substantial sum depending on how widely or narrowly the undertaking is defined.[58] Appeals can be made from the CCS' decisions to the Competition Appeal Board, while further appeals are available to the High Court and Court of Appeal on points of law, or in relation to the amount of a financial penalty imposed.[59] Rights of private action by third parties which suffer economic injury as a result of an undertaking's anti-competitive behaviour only arise after the CCS has successfully established a violation of the statutory prohibitions and all available avenues of appeal have been exhausted.[60]

In a nutshell, the role of the CCS involves the concurrent performance of legislative, executive and adjudicatory functions. The convergence of these functions, typically performed by a legislator, prosecutor and judge, into a single statutory body is quite unlike any other pre-existing regulatory agency on Singapore's legal landscape. The actual scope of the CCS's jurisdiction is also far wider than the regulatory ambit of the individual sectoral regulators, subjecting every industry that has not been exempted by the Third Schedule[61] to the potential scrutiny of the CCS, including those industries occupied by GLCs which are already regulated by other statutory boards that do not address competition-related issues within their respective regulatory frameworks.[62]

Given the broad range of substantial powers vested in the CCS and their extensive scope of application, the decision to house the agency as a statutory body under the Ministry of Trade and Industry was met with some consternation because "MTI has a number of statutory boards, some of whose senior executives sit on the Boards of Directors of corporate entities, particularly the Government-linked companies".[63] The decision to constitute the CCS as a statutory board under MTI, rather than an independent agency or a regulatory agency under the Prime Minister's Office, was criticised because of the perceived conflicts of interest that would arise if a situation

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to have infringed the statutory prohibitions to (i) enter into legally enforceable agreements as may be specified by the CCS, (ii) dispose of such operations, assets or shares in such manner as may be specified by the CCS, (iii) pay the CCS a financial penalty, and (iv) provide the CCS with a performance bond, guarantee or other security on terms and conditions which the CCS may determine. See also the *CCS Guideline on Enforcement*, *supra* note 5, and the *CCS Guideline on the Appropriate Amount of Penalty*, *supra* note 5.

[57] See s. 69(4) of the *Competition Act*, *ibid.*, which limits the financial penalty which the CCS can impose to a maximum of 10% of business turnover for each year of infringement by the relevant undertaking, up to a maximum of 3 years.

[58] The corporate entity identified as the "undertaking" responsible for the anti-competitive conduct in question may vary from a single local subsidiary to the parent corporation controlling an international group of companies. This could result in dramatic differences in "turnover" figures used by the CCS as the basis for assessing its fines. See Part 4 of the *CCS Guideline on Enforcement*, *supra* note 5.

[59] See ss. 72-74 of the Competition Act, *supra* note 2.

[60] See s. 86(2) of the Competition Act, *ibid*.

[61] See *supra* note 6.

[62] For example, the banking and financial services industry sectors (already regulated by the Monetary Authority of Singapore) and the airline industry (already regulated by the Civil Aviation Authority of Singapore) are also subject to Singapore's new Competition Law regime and the potential regulatory scrutiny of the CCS.

[63] See the concerns raised by Member of Parliament Mr Inderjit Singh during the Second Reading of the *Competition Bill*, supra note 18 at col. 863, Mr Singh also noted that "some of these statutory boards also have ownership and interest in GLCs that would be subject to the Competition Act".

arose where the CCS had to determine the legality of the business practices of the various GLCs. As one Member of Parliament has eloquently argued:

> In the eyes of the public, the Government in forming the Commission plays the part of a gamekeeper. Yet at the same time, the Government is also in business. It may on occasions be seen to be the poacher. This is evident in the extensive and deep engagements that our GLCs have within the Singapore economy. I am fairly certain that in the nature of things, the Commission would be asked to determine questions involving some agreements or business practices of our GLCs. When it happens, the Commission would no doubt be hard put to ensure that justice is not only done, but must be seen to be done.[64]

The Government, however, took the view that the deliberate constitution of a statutory body, and "not just another department or another policy arm of the Ministry of Trade and Industry", was adequate to meet the concerns raised by parliamentarians and that it showed the Government's agreement with them "that there is a need for independence, there is a need for integrity, and there is a need for integrity and impartialness to be seen as well". In addition, the Senior Minister of State for Trade and Industry, Dr Vivian Balakrishnan, made it clear that the CCS would be kept "as small as possible" though "the people who staff it are well qualified and know what they are supposed to do and will not waste time".[65] It appears that the decision to set up the CCS as a statutory board under the MTI was guided to some extent by fairly pragmatic considerations, such as the fact that the CCS was constituted in part by a Market Analysis Division that had previously been part of MTI. The true litmus test for determining the viability of the CCS, in its presently constituted form, as an effective and impartial administrator of competition policy will only emerge if and when it has to deal with a complaint involving the commercial dealings of a GLC. Any decision made by the CCS in such a case will almost certainly be scrutinised very closely by the legal and business communities in Singapore and beyond.

V. Conclusion

The *Competition Act* stands out on the Singapore legal landscape as an unconventional legislative instrument because of the unusual characteristics of the Competition Law framework that has emerged from its enactment. The introduction of a specific statute that is designed to protect, strengthen and promote competition in the Singapore market is an important milestone in Singapore's journey forward as a developed economy. Singapore's adoption of a general Competition Law communicates her commitment to market-driven economic policies, where the law plays a

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[64] This was the primary concern voiced by Member of Parliament Mr Sin Boon Ann during the Second Reading of the *Competition Bill*, *ibid*. Mr Sin also pointed out that constituting the CCS as a direct extension of the Government would place it in an invidious position of having to decide between the interests of other business (in strengthening the competitive processes in the market) and the interests of GLCs (which are at least indirectly tied to the interests of its shareholders, the Government). Such an arrangement might require the CCS to factor in larger issues relating to Singapore's national interests that go beyond matters of competition policy—issues which the CCS has neither the competence nor the authority to determine.

[65] See the Senior Minister of State for Trade and Industry Dr Vivian Balakrishnan's response to the concerns voiced by Members of Parliament during the Second Reading of the *Competition Bill*, *ibid*. at col. 890.

supportive role in prohibiting any conduct by undertakings that may interfere with the competitive process in any domestic market.

Competition is the fuel on which markets run, and a legal regime which recognises the value of competition to the society it serves acknowledges the utility of letting market mechanisms determine which firms should prosper and which should not. Competition Law merely facilitates the competitive process between these firms, enabling market forces to operate in favour of the more efficient firm at the expense of his less efficient rivals. Economic theory indicates that, through the rational operation of the market mechanisms, consumers are better off because of the lower prices and wider product choices available to them as a result of the competition between firms.

Singapore's incipient Competition Law is anchored in the conceptual and procedural framework established by the *Competition Act*, a broadly-structured legislative instrument that is flexible enough to accommodate a dynamic competition policy that will evolve in tandem with changes to the domestic and global economic climate.[66] The deliberate legislative departures from the Anglo-European competition law model that have found their way into the provisions of the *Competition Act*, some of which were briefly discussed above, create the possibility of interesting jurisprudential pathways which are guided by the unique combination of socio-economic, legal and policy forces that shape the Singapore economy.

[66] The Senior Minister of State for Trade and Industry Dr Vivian Balakrishnan candidly admitted, during the Second Reading of the *Competition Bill*, *ibid.* at col. 890, that the new law would be a "work-in-progress" in response to queries from parliamentarians about the wisdom of excluding certain industry sectors (which were already regulated by industry-specific sectoral competition laws) from the scope of the general Competition Law. See *supra* notes 6 and 10 and accompanying text. The concern was that sectoral regulators might apply different standards, procedures and fines when evaluating the same competition-related issues that are of concern to the CCS. The Senior Minister of State for Trade and Industry emphasized that that these exclusions were not intended to be permanent, and that the general Competition Law would apply, "as a kind of default vehicle", if a point in time was reached when there was no longer a need for competition issues in these industries to be regulated by the specialist industry regulator.