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Book Review of Competition Law and Policy in Singapore, by Cavinder Bull, Lim Chong Kin, Academy Publishing, Singapore, 2009

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BOOK REVIEW

Competition Law and Policy in Singapore

edited by Cavinder Bull SC, Lim Chong Kin and Richard Whish, Academy Publishing, Singapore, 2009. pp. xlix + 290.

It has been five years since the Singapore Parliament passed the Competition Act in October 2004. The Competition Commission of Singapore ("CCS"), established on 1 January 2005, is thus one of youngest regulatory agencies in the Singapore business landscape. In the first few years after its establishment, one of the major challenges facing the Commission was that of educating the legal and business community as well as the general public about the benefits and implications of the Competition Act ("the Act") for the conduct of business in Singapore. The CCS has been active in efforts to inform the local legal and business communities on the Act through its website, its outreach programs such as seminars and information sessions and through publications such as *The CCS Guidelines 2005*, *A Practical Guide to the Competition Act*, *Promoting Healthy Competitive Markets — A Guide to the Competition Act*, and *Cartels and the Competition Act — A Guide for Consumers and Businesses*. Thirteen sets of guidelines issued by the Commission are available for download at its website.

However, given deeply entrenched business attitudes and practices, as well as the relative newness of the Act, it was not surprising that the CCS has had to intervene on a number of occasions to inform businesses and trade associations of the illegality of openly fixing price or providing price guidelines. From the perspective of academia, economics and business courses at the Singapore universities typically utilize textbooks by US authors with the treatment of competition issues (not surprisingly) viewed only from US perspectives in general and antitrust law in particular. Prior to the introduction of competition law, instructors would 'dismiss' these sections from the syllabus as 'irrelevant' in the Singapore context. With the enactment of the Competition Act, this ought not to be and is (hopefully) no longer the case. The need for a Singapore competition law book that would be easily accessible to academics (across the disciplines of law, economics and business), business managers and legal practitioners locally was keenly felt.

The present book, co-authored by a team of six, and published by Academy Publishing (the publication arm of the Singapore Academy of Law) is therefore most timely. That six contributors have been brought together to produce the book is no mean task, and Cavinder Bull and Lim Chong Kin (who are the General Editors as well as contributors) have done a truly excellent job in this regard. Indeed, although five of the authors hail from Drew and Napier, the editors have also secured the participation of Professor Richard Whish, the leading competition law authority in Europe and also a former Director of the UK Office of Fair Trading. Professor Whish's two chapters on "Anti-competitive Agreements" and "Abuse of a Dominant Position" contribute, in no small measure, to the overall excellence of the volume.

The book consists of six substantive chapters. Chapter 1, entitled "Competition Policy and Law", is an insightful account of the origins of the Singapore competition law regime, encompassing the policy considerations, the process of examination of other competition policy systems, the enactment of the Act itself, and the establishment of legal commands and an appropriate institutional framework. Although Singapore is known for its liberal trade policy and free market system, it is a relatively late adopter of competition law. The chapter details the recommendations by the 2001 Economic Review Committee and the landmark US–Singapore Free Trade Agreement concluded in 2003 that resulted in the enactment of the Competition Act in 2004.

The Act is closely modelled on the UK's Competition Act of 1998 (which is based, in turn, on Articles 81 and 82 of the European Community (EC) Treaty), albeit taking into account the specific domestic economic characteristics, in particular Singapore's small and very open economy. The three main prohibitions of the Act, *viz.*, anti-competitive agreements, abuse of dominant position and mergers that substantially lessen competition are dealt with under Sections 34, 47 and 54 of the Act, respectively. Unlike UK's Office of Fair Trading ("OFT"), fair trading and consumer protection issues continue to be handled separately by the Consumers Association of Singapore.

The telecommunications, public transport, media and energy sectors have sectoral regulators and are thus excluded from the Act. The Act also does not apply to agreements entered into or conduct of the government, statutory bodies or entities acting on their behalf. The chapter also provided details of the phased implementation of the Act from 1 January 2005 to 1 July 2007. Chapter 1 is thus invaluable in its account of the origins and implementation process of Singapore's competition regime.

Chapter 2 on "Market Definition" is written by the sole economist in the team, Ms Ng Ee Kia, who was formerly the Director of the Economic Analysis Unit at the CCS. As part of the start-up team for the Commission, she is certainly eminently qualified for the task. In the chapter, Ms Ng takes the reader through the purpose of market definition in competition assessment, and the nuts and bolts of market definition — product market, geographical market, as well as temporal markets as set out in the CCS guidelines (which follow closely the guidelines issued by the UK's OFT).

The Hypothetical Monopolist Test that is used by many competition authorities for determining the relevant market is also used by the CCS. However, of significance is the fact that the CCS considers an increase of approximately 10% above the competitive/prevailing price to be "small but significant", while the US and UK authorities use a 5% increase. The chapter also reviews other issues and common problems in defining the market and provides an excellent overview of the economic framework used by competition authorities in determining the competition constraints for parties under investigation.

Chapter 3 on "Anti-competitive Agreements" is by Professor Richard Whish of King's College London, a renowned authority on competition law in the EC and UK and author of the text and practitioner's reference *Competition Law*, first published in 1985 and now into its 6th edition (Butterworths, 2008). This chapter examines the Section 34 prohibition in detail and also explains the exclusions from Section 34 that the Act contains. Of note is the fact that the prohibition applies only to horizontal agreements and excludes all vertical agreements. Moreover, agreements having "net economic benefits" may be excluded.

The chapter (as well as the one following) integrates references to the guidelines and decisions not only of the CCS but also, where relevant, to cases, decisions and jurisprudence of the competition authorities and courts of the EC and UK, noting that "it is natural that the large body of case law that has accumulated over many years will, at least, have an influence in Singapore" (p. 66). The chapter includes analysis of the early decisions of the CCS to grant a block exemption for liner shipping agreements, as well as to grant exclusions to two airline agreements (Qantas and British Airways Joint Services Agreement and Qantas and Orangestar Co-Operation Agreement). In addition, it describes the first infringement decision involving bid-rigging by a group of pest control companies as well as CCS' actions with regard to the issuance of price recommendations by the Singapore School Transport Association, the Singapore Medical Association as well as the Institute of Estate Agents.

Chapter 4 on "Abuse of a Dominant Position" is also authored by Professor Whish. The economics and jurisprudence of establishing abuse of dominant position have constituted a very complex and controversial area of competition law — as illustrated by recent high profile decisions of the European Commission regarding Microsoft and Intel. The chapter discusses the CCS guidelines on assessing dominance (with a market share of above 60% as a starting point), making clear that "it is not abusive to be or to become dominant" (p. 138). This assurance is especially important for businesses operating in a small domestic economy where many markets are highly concentrated and many government-linked companies occupy positions of market leadership.

Professor Whish's analysis of the list of unilateral conduct of firms with substantial market power that may amount to abuse under Section 47 of the Act contains many useful references to EC case-law and jurisprudence. Certainly, competition authorities tread a difficult balance as under-application of the law may deter third party investments in innovation while over-application may deter investment by the dominant firm. The learned author notes, in particular, the similarities between Section 47 and Article 82 — with one important distinction — Section 47 is silent on high or excessive prices in its treatment of predatory behaviour (pp. 147–148). Professor Whish is generally supportive of this deliberate deviation as "it is certainly not the function of a competition authority to establish itself as a price regulator" (p. 147), but points out that in some situations, an excessive price may be a different way of achieving the effect of a refusal to supply.

Chapter 5 on "Mergers", written by Lim Chong Kin and Yu Ken Li, is a comprehensive treatment of Singapore's merger control framework, which came into effect on 1 July 2007. It provides explanations of what would constitute an anti-competitive merger prohibited by Section 54 of the Act, as well as the various circumstances when exclusions and exemptions would be allowed. After a study of international practices, the CCS had decided on a voluntary merger notification system so as not to impose unnecessary costs on businesses. However, in cases where there are serious concerns that an anticipated merger or merger has resulted, or may be expected to result in a substantial lessening of competition, parties are encouraged to notify the CCS and apply for a decision. The chapter also provides details of the notification process as well as the structural and behavioural remedies that CCS may impose.

The final chapter, by Cavinder Bull and Chia Voon Jiet, is a substantial treatment of "Investigations, Enforcement and Rights of Private Action". In contrast with the position in the UK, a CCS decision to reject a third party complaint and not undertake a formal investigation is not appealable to the Competition Appeal Board ("CAB"). The Act confers on the CCS wide investigative powers to compel the production of documents and information, interview witnesses, and search premises including the right to conduct 'dawn raids'. These powers as well as safeguards and limitations are described in the chapter, as are the CCS leniency and leniency-plus programs for whistleblowers.

Unlike the UK, US and more recently Australia, participation in a cartel under Singapore's competition law does not constitute a criminal offence. The CCS is empowered to impose financial penalties for infringement of Sections 34, 47 or 54 and its guidelines on the appropriate amounts of financial penalties follow closely the approach of the EC and UK OFT. A decision made by the CCS is appealable to the CAB whose decisions are also appealable to the High Court, and thereafter to the Court of Appeal, in limited circumstances (as detailed in the chapter). The chapter concludes with discussions on rights of private action (Section 86 of the Act), and the possibility for judicial review of the conduct of the CCS or CAB (which is not expressly mentioned in the Act).

In conclusion, *Competition Law and Policy in Singapore* is a valuable contribution to the competition law literature and is certainly a landmark in the short history of competition law in Singapore. This book has comprehensively examined the evolution of competition law in Singapore. The intricacies of the Singapore competition law system, the economic basis, and relevant foreign and local cases have been drawn together systematically and in a manner accessible to both practitioners and non-specialists. The general editors and authors are to be congratulated for producing an excellent work which simultaneously benefits law and economics students, the business and legal communities as well as the general public. As competition law evolves and matures in Singapore, this book (and undoubtedly subsequent editions) will be the natural first port of reference — and not only in Singapore. William Kovacic, the former Chairman of the US Federal Trade Commission, who wrote the Foreword for the book, views the Singapore experience as having "broader, global significance" for other jurisdictions, containing lessons on how best to "go about designing and implementing a new competition law" (p. viii). I am in agreement with his views and would commend the book highly to anyone interested in understanding competition law in general and its application in the Singapore context in particular.

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*The views expressed here are personal and do not reflect those of the Commission.