



**Working Paper Series No.025**

**Application of Competition Laws to Government  
in Asia: The Singapore Story**

Deborah HEALEY

University of New South Wales, Australia  
Asian Law Institute, National University of Singapore, Singapore

[d.healey@unsw.edu.au](mailto:d.healey@unsw.edu.au)

ASLI Visiting Fellow  
(05 September 2011 – 05 October 2011)

**March 2011**

The **ASLI Working Paper Series** is published electronically by the Asia Law Institute, whose Secretariat is based at the Faculty of Law, National University of Singapore.

© Copyright is held by the author or authors of each Working Paper. ASLI Working Papers cannot be republished, reprinted, or reproduced in any format without the permission of the paper's author or authors.

**Note:** The views expressed in each paper are those of the author or authors of the paper. They do not necessarily represent or reflect the views of the Asia Law Institute or of the National University of Singapore.

Citations of this electronic publication should be made in the following manner: Author, "Title," ASLI Working Paper, No. #, Date, [www.law.nus.sg/asli/pub/wps.htm](http://www.law.nus.sg/asli/pub/wps.htm). For instance, Chan, Bala, "A Legal History of Asia," ASLI Working Paper, No. 101, December 2010, [www.law.nus.sg/asli/pub/wps.htm](http://www.law.nus.sg/asli/pub/wps.htm).

**Asia Law Institute**

c/o Faculty of Law,  
National University of Singapore  
Eu Tong Sen Building  
469G Bukit Timah Road,  
Singapore 259776  
Tel: (65) 6516 7499  
Fax: (65) 6779 0979  
Website: <http://law.nus.edu.sg/asli>  
Email: [asli@nus.edu.sg](mailto:asli@nus.edu.sg)

**The Asian Law Institute (ASLI)** was established in March 2003 by a group of leading law schools in Asia. Its goal is to facilitate academic exchanges as well as research and teaching collaboration among colleagues from the thirteen founding institutions. The establishment of ASLI stems from the recognition that the diversity of legal traditions in Asia creates an imperative for Asian legal scholars to foster greater engagement with each other through collaborative research and teaching. The acronym "ASLI", which means "indigenous" in the Malay and Indonesian languages, represents the commitment of the founding institutions to establish a truly home-grown law institute in Asia. The ASLI membership has grown beyond the founding members and includes 35 new member institutions.

# APPLICATION OF COMPETITION LAWS TO GOVERNMENT IN ASIA: THE SINGAPORE STORY

DEBORAH HEALEY\*

Singapore has an established competition law, the *Competition Act*,<sup>1</sup> based on its unique political economy. This paper looks at the approach of the Singapore *Competition Act* to the government and its activities to ascertain whether it is effective in creating a level playing field for government and private sector participation. It is generally accepted that competition law should be applied to all market participants and that exemptions or exclusions should be relatively limited, transparent and well-justified. Application of competition law to government is ideally based on the principle that commercial or business activities of the government should be caught, but non-commercial activities need not be, because that they do not form part of the market. The Singapore Government is involved in the economy as regulator and a market participant by way of government departments, statutory bodies and ownership or control of commercial entities. A closer inquiry is required to determine whether the Singapore approach to the government is appropriate given the political economy of the jurisdiction. The likelihood of enforcement of a competition law against a government entity will also be a key issue in determining its effectiveness and to this end the independence and behaviour of the Competition Commission of Singapore are relevant and will also be examined briefly.

The article asks two basic questions: firstly, does the *Competition Act* appropriately deal with government activities? Secondly, is the Competition Council of Singapore equipped to take action against the Singapore government and its entities for breaches of the Act?

## I. COMPETITION LAW AND GOVERNMENT: THE PRINCIPLES

Most developed and many developing jurisdictions have competition laws.<sup>2</sup> At its most basic, competition law “consists of rules that are intended to protect the process of competition in order to maximise consumer welfare.”<sup>3</sup> The theory behind competition law is that market competition within a jurisdiction leads to efficiency in the delivery of goods or services which benefits consumers, and increases output and economic growth. Competition is at its best when all market participants operate from a level playing field and compete to supply goods and services to others.<sup>4</sup>

---

\* Senior Lecturer, Faculty of Law, University of New South Wales.

<sup>1</sup> Cap. 50B, 2006 Rev. Ed. Sing.

<sup>2</sup> All Organisation for Economic Cooperation and Development (“OECD”) countries, for example, have competition laws. See OECD, *OECD Annual Report 2007* (Paris: OECD, 2007), online: OECD <<http://www.oecd.org/dataoecd/1/53/38484866.pdf>>; International Competition Network, “Member Directory”, online: International Competition Network <<http://www.internationalcompetitionnetwork.org/members/member-directory.aspx>>; UNCTAD, *Directory of Competition Authorities*, UN Doc. TD/B/COM.2/CLP/56 (2007), online: UNCTAD <[http://www.unctad.org/en/docs/c2clpd56\\_en.pdf](http://www.unctad.org/en/docs/c2clpd56_en.pdf)>.

<sup>3</sup> Richard Whish, *Competition Law*, 6th ed. (Oxford: Oxford University Press, 2009) at 1.

<sup>4</sup> Alison Jones & Brenda Sufrin, *EC Competition Law: Text Cases and Materials*, 4th ed. (Oxford: Oxford University Press, 2011) at 2.

Anti-competitive conduct occurs in a market in a number of ways. Private firms may engage in conduct which restricts competition by way of arrangement between competitors (horizontal arrangements) or arrangements between suppliers and their customers (vertical arrangements) or by misuse of their market power. Private firms may also accrue undue market power by acquiring other businesses in order to distort competition. Conduct falling within these categories is the subject of consideration by most competition laws.

Governments may restrict competition by regulation which benefits them or their private business supporters. It has been said that:<sup>5</sup>

The state is potentially the best friend of the would-be monopolist. The state can erect and enforce entry barriers. The state can enact legislation that hampers the ability of competitors to vie for crucial inputs or the business of big customers. The antitrust cases have many examples of private parties who enlisted or attempted to enlist the aid of the state in supporting an anticompetitive scheme. In other examples, antitrust defendants have attempted to justify their conduct by claiming that a state or the federal government authorized it.

The business conduct of the government itself or the entities which it controls may distort competition in the same manner as private business entities. In this context, the Organisation for Economic Cooperation and Development (“OECD”) has also stated:<sup>6</sup>

Governments may create an uneven playing field in markets where [a State-owned enterprise (“SOE”)] competes with private firms, as they have a vested interest in ensuring that state-owned firms succeed. Accordingly, despite its role as regulator the government may, in fact, restrict competition through granting SOEs various benefits not offered to private firms. While in some areas this preferential treatment will be direct and obvious, there may also be indirect preferential treatment through other means.

In Australia, the influential *Hilmer Review of Competition Law* considered the role of market participants and their capacity to impact competition in the jurisdiction. It found that:<sup>7</sup>

By far the most systematic distortions appear to arise when government businesses participate in competitive markets. In particular, government businesses were often seen as enjoying a unique set of competitive advantages by virtue of their ownership, including exemption from tax.

Methods of ensuring that government bodies do not obtain an advantage over private enterprises include the application of competition law to government businesses, and

---

<sup>5</sup> Keith N. Hylton, *Antitrust Law: Economic Theory & Common Law Evolution* (New York: Cambridge University Press, 2003) at 352-353. Hylton at 353 cites Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: The Free Press, 1978) at 347-364.

<sup>6</sup> See OECD, Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options*, OECD Corporate Governance Working Papers No. 1, (2011) at 1, online: OECD <<http://www.oecd.org/dataoecd/29/43/46452890.pdf>> [Capobianco & Christiansen].

<sup>7</sup> Austl., Commonwealth, Independent Committee of Inquiry, *National Competition Policy* by Frederick G. Hilmer *et al.* (Canberra: Australian Government Publishing Service, 1993) at 293, online: National Competition Policy <<http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report%2C%20The%20Hilmer%20Report%2C%20August%201993.pdf>> [*Hilmer Review of Competition Law*].

effective governance, improving independence, accountability and disclosure, and privatisation of government businesses.<sup>8</sup> The application of competition law is a particularly important basic tool to ensure a level playing field between the government and private sector in the marketplace. Private businesses are also rightly unhappy about the advantages which may accrue to government businesses in the absence of these initiatives.

Clearly the broad issue of the application of competition law to the government is acute in economies where the government plays an important role, as it does in Singapore. Logically, the larger the role of the government in the economy, the greater is the scope for distortions in the market if appropriate government activities are not covered by competition laws and addressed by other mechanisms. A robust competition law will apply to the market activities of the government in the same way it applies to the private sector.

None of this means that there is a bias against government involvement in business. It, however, means that if the government does compete in the market, its businesses should not be advantaged by way of exemptions, or other special rights or priorities granted merely by virtue of its ownership.

## II. GOVERNMENT AND COMPETITION LAW IN OTHER JURISDICTIONS

From an economic viewpoint, ill-considered, broad or inappropriate exemptions encourage misallocation of resources, leading to inefficiency, which impedes the competitive process and detracts from the economic benefits which should ensue following the introduction of a competition law. There is economic recognition that steps such as exemption or administrative approval may occasionally be required to correct market failure and hence that competition law should not be applicable to particular market participants to that extent. Market failure occurs when markets do not work efficiently for a number of reasons such as: asymmetric information; agency relationships; moral hazard; externalities; free-riding and public goods. In some circumstances, remedying market failure constitutes a public benefit and should be considered in that light by allowing limited exemptions.<sup>9</sup> It is generally agreed, however, that any exemptions granted should be individual in nature and should be granted on a transparent basis weighing up the anti-competitive detriments and the public benefits to ensure proper justification and implementation in the least anti-competitive way.

Diverse international sources consistently confirm these views, advocating that a competition law should be one of general application with minimal, transparent, well-defined, well-considered, and well-supported exemptions. The United Nations Conference on Trade and Development (“UNCTAD”), for example, has set out “best practice” advice and recommends that it be of general application and apply equally to private and public (state-owned) enterprises equally.<sup>10</sup> The OECD “Competition Assessment Toolkit” endorses a

---

<sup>8</sup> See Capobianco & Christiansen, *supra* note 6.

<sup>9</sup> S.G. Corones, *Competition Law in Australia*, 5th ed. (Pymont, N.S.W.: Lawbook Co, 2010) at 19.

<sup>10</sup> R. Shyam Khemani, “Application of Competition Law: Exemptions and Exceptions” (2002) UNCTAD Series on Issues in Competition Law and Policy (UNCTAD/DITC/CLP/Misc.25). Any exemptions granted should be for a limited time, with a sunset clause and with provision for periodic review, which would include analysis of the impact on economic efficiency and consumer welfare, and identify overriding benefits that serve the consumer or broader economic interests. Exemptions should be as least restrictive of competition as possible and should be generic in nature.

similar market-wide view of application.<sup>11</sup> The laws of many countries contain exemptions which are not logically or economically sound.<sup>12</sup> There are a large number of United States (“US”) exemptions, for example, and their impact has been described as being one where economic benefits “flow to small concentrated interest groups” at the expense of the rest of the population.<sup>13</sup>

A brief consideration of the approach of competition law towards the government in a selection of countries with well-established competition laws follows to determine how the Singapore approach compares before considering its unique political economy.

### A. *European Union (“EU”)*

A number of provisions are relevant when considering the application of EU laws to the government and its activities. All ‘undertakings’ are caught by the law, and this includes public authorities, municipalities and other entities entrusted with regulatory or administrative functions when they are engaged in ‘economic activity’. ‘Economic activity’ does not necessarily require a profit motive or economic purpose.<sup>14</sup> Non-economic or non-commercial activities, or public authorities exercising their powers, are not generally caught. An entity may be an ‘undertaking’ for part of its functions, however, and not for others.<sup>15</sup> Entities which are engaged in activities which are categorised by the law as involving ‘solidarity’, such as social security, pensions or health care not provided in a market context are not ‘undertakings’. Where these services are provided in a market context, however, the entities or providers are ‘undertakings’ for the purposes of the law.

The obligations of EU Member States under *The Treaty on the Functioning of the European Union*, including the extent to which they may be liable under Art. 101 (anticompetitive arrangements) and Art. 102 (abuse of dominance) for granting special and exclusive rights to ‘undertakings’, are not entirely clear.<sup>16</sup> The ability of Member States to grant special or exclusive rights to an entity which it owns or controls (or which it otherwise places in a privileged position) is constrained by various Treaty provisions. While the *TFEU* applies to SOEs, the numbers of which are considerably less in Europe these days than they were previously because of a number of significant reforms, there are exemptions from the general application of the provisions where services are “of general economic interest” or where revenue-producing monopolies are involved and the application of competition rules would obstruct the performance of particular assigned tasks. A competition test applies.<sup>17</sup> State aids provisions also prohibit the grant of aid which distorts competition and affects inter Member State trade because they are incompatible with the internal market (Art. 107(1)).

---

<sup>11</sup> Version 2.0 (Paris: OECD, 2011) vol. 1 online: OECD <[http://www.oecd.org/document/48/0,3746,en\\_2649\\_37463\\_42454576\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/48/0,3746,en_2649_37463_42454576_1_1_1_37463,00.html)> at 36. The OECD Toolkit also notes the less than compelling rationale for many exemptions.

<sup>12</sup> Khemani, *supra* note 10.

<sup>13</sup> U.S., Antitrust Modernization Commission, “Antitrust Modernization Commission: Report and Recommendations” (2007) at 335.

<sup>14</sup> Associations of football clubs may be undertakings despite the fact that some of the member clubs are in fact amateur. See Whish, *supra* note 3 at 85 (referring to *Piau v. Commission*, T-193/02, [2005] E.C.R. II-209).

<sup>15</sup> So, for example, a public authority may have power to adopt by-laws on parking and also to run a commercial car park. Only the latter would be caught. See Whish, *ibid.* at 83.

<sup>16</sup> 25 March 1957, [2010] O.J. C 83/199, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>> [*TFEU*].

<sup>17</sup> *Ibid.*, art. 106(2). See *Corbeau*, C-320/91 [1993] E.C.R. I-2533; (1995) 4 C.M.L.R. 621.

There are some exceptions and the European Commission also has a broad discretion to declare that certain aid is not incompatible with the market (Art. 107(3)). In summary, most commercial activities of SOEs are subject to the competition provisions of the *TFEU*. Other provisions may restrict the extent to which Members grant special or exclusive rights to SOEs (or other entities). State aids which distort competition are also likely to be prohibited.

### **B. United States**

US antitrust law contains a wide range of exemptions implemented or implied under laws and by courts, and limitations on the full application of antitrust law as a consequence of industry regulation. The Antitrust Modernization Commission reviewed antitrust law in 2007,<sup>18</sup> and concluded that statutory exemptions should be granted rarely and basically along the similar lines as those recommended by the OECD above. The government is rarely involved in business in the US for historical reasons, so the question is not so relevant in that jurisdiction.

Issues of local protectionism and barriers to trade at state level are addressed by Commerce Clause litigation under the US Constitution<sup>19</sup> and not by its antitrust or competition laws.<sup>20</sup>

### **C. Australia**

The overall philosophy and application of Australian competition law was considered in depth in a significant review in 1993.<sup>21</sup> The outcome of the *Hilmer Review of Competition Law* recognised the critical market impact of existing exemptions for government bodies:<sup>22</sup>

[M]any of the current exemptions... including some government-provided services such as electricity and port services and private professional services [involve undertakings] which are largely sheltered from international competition, yet provide key inputs to businesses that must contend with domestic and international competition.

While recognising that some markets contained features which meant that competitive market conduct was not likely to maximise economic efficiency, the Report was clear that the *TPA* (now the *Competition and Consumer Act 2010*)<sup>23</sup> should apply to all market participants as a matter of policy, and any exemptions should be granted only on demonstrated public interest grounds and following a transparent process of review and justification.<sup>24</sup> All

---

<sup>18</sup> See *supra* note 13.

<sup>19</sup> U.S. Const.

<sup>20</sup> Robert H. Bork & Daniel E. Troy, "Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce", (2001-2002) 25 Harv. J.L. & Pub. Pol'y 849, online: <<http://www.constitutions.org/lrev/bork-troy.html>>.

<sup>21</sup> At that time, the Australian economy had stalled and there was a general recognition that a whole range of regulation needed review.

<sup>22</sup> *Hilmer Review of Competition Law*, *supra* note 7 at 86. The Report set out "Agreed Principles" for application of the then *Trade Practices Act 1974* (Cth.) [*TPA*] and reviewed each of the current exemptions against them.

<sup>23</sup> (Cth.) [*CCA*].

<sup>24</sup> *Hilmer Review of Competition Law*, *supra* note 7. The approach of this Committee was endorsed by a subsequent review of the legislation in 2003: Austl., Commonwealth, Trade Practice Review Committee, *Review of the Competition Provisions of the Trade Practices Act* by Sir Daryl Dawson, Curt Rendall & Jillian Segal (Canberra: Canprint Communications, 2003) at c.1, online: Trade Practices Act Review

government bodies are now caught under the CCA to the extent that they are carrying on business activities.<sup>25</sup>

### III. GENERAL CONCLUSIONS ON APPLICATION TO GOVERNMENT

The general view, therefore, is that government bodies should be caught by competition law if they are carrying on business activities as they will then have the capacity to impact on the marketplace. The implications of this conclusion in the context of the Singapore *Competition Act* and Singapore as a jurisdiction are discussed below.

### IV. THE SINGAPORE ECONOMY IN SNAPSHOT

Singapore is a republic with a unicameral system of government headed by a President elected for a fixed term of six years. The Prime Minister is the head of the political party with the majority of seats in Parliament, and is appointed by the President, as are Cabinet members (on his advice).<sup>26</sup> The economy is innovation driven and recently ranked second in the world for competitiveness,<sup>27</sup> moving up from third position in 2010.<sup>28</sup> Singapore is ranked very highly for efficiency in goods and labour markets, leads the world in financial market development, and has been described as having “impeccable” infrastructure.<sup>29</sup> Its strong focus on education has also been noted.<sup>30</sup> Singapore’s Gross Domestic Product (“GDP”) per capita is above most other advanced economies.<sup>31</sup> While Singapore was the hardest hit of the Association of Southeast Asian Nations (“ASEAN”) countries by the global crisis of 2008-9 because it was the “most open economy” out of all the ASEAN members, it recovered more rapidly than most other ASEAN countries.<sup>32</sup> Its institutions have been ranked first worldwide for their lack of corruption and their efficiency.<sup>33</sup>

### V. THE ROLE OF THE GOVERNMENT IN THE POLITICAL ECONOMY OF SINGAPORE

As in all countries, the government is involved in the political economy of Singapore in a number of ways aside from its primary role.

Government entities in Singapore can be categorised by their method of establishment and governance. “Traditional” government is identified as government departments and “other

---

<<http://tpareview.treasury.gov.au/content/report.asp>>. See also Ray Steinwall, “The Dawson Committee on Competition, Economic Efficiency, Universality and Public Policy” (2003) 26 U.N.S.W.L.J. 226, online: AustLII <<http://www.austlii.edu.au/au/journals/UNSWLJ/2003/12.html>>.

<sup>25</sup> *NT Power Generation Pty Ltd v. Power and Water Authority* [2004] HCA 48 [*NT Power*].

<sup>26</sup> See *Constitution of the Republic of Singapore* (1999 Rev. Ed.), art. 25 [*Singapore Constitution*].

<sup>27</sup> Klaus Schwab, ed., *The Global Competitiveness Report 2011-2012*, (Geneva: World Economic Forum, 2011), online: <[http://www3.weforum.org/docs/WEF\\_GCR\\_Report\\_2011-12.pdf](http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf)> [*2011 Report*].

<sup>28</sup> Klaus Schwab, ed., *The Global Competitiveness Report 2010-2011*, (Geneva: World Economic Forum, 2010), online: <[http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2010-11.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf)>.

<sup>29</sup> *Ibid.*

<sup>30</sup> *2011 Report*, *supra* note 27 at 11-12.

<sup>31</sup> *Ibid.* at 316.

<sup>32</sup> Marn-Heong Wong, Rakhi Shankar & Ruby Toh, *ASEAN Competitiveness Report 2010*, (Singapore: Lee Kuan Yew School of Public Policy, Asia Competitiveness Institute, 2011) at 8, online: Lee Kuan Yew School of Public Policy <[http://www.spp.nus.edu.sg/docs/ASEAN\\_Competitiveness\\_Report\\_2010.pdf](http://www.spp.nus.edu.sg/docs/ASEAN_Competitiveness_Report_2010.pdf)>. See also generally Mark Williams, “The Lion City and the Fragrant Harbour: The Political Economy of Competition Policy in Singapore and Hong Kong Compared” (2009) 54 *Antitrust Bulletin* 517.

<sup>33</sup> See *2011 Report*, *supra* note 27 at 11.



organs of state” such as the Judiciary, Parliament and the Public Service Commission.<sup>34</sup> These bodies are not involved in business activities other than the business of running the country and are unlikely to have a direct impact on the market as participants, although they clearly have an impact in other ways such as policy and regulation which are outside the scope of consideration here.

Statutory boards are autonomous government agencies established under specific Singapore Acts of Parliament which establish them as separate legal entities and specify their purpose and their powers. Statutory boards are thus separate from the formal traditional government structures described above. Statutory bodies do not generally enjoy the privileges and immunities of government departments. The activities of statutory boards are overseen by a Government Minister who represents Parliament on the board of the entity and represents the board of the entity before Parliament. Directors of statutory boards in Singapore are usually senior civil servants, business people, and professionals. The employees of statutory boards are not civil servants. Many statutory boards are expected to generate their own funds.<sup>35</sup> The relationship between the Government and its statutory boards and their subsidiaries is set out in the *Singapore Constitution*.<sup>36</sup> There are some 64 statutory boards which range from those running polytechnics to regulatory authorities such as the Casino Authority, the Energy Market Authority and the Competition and Consumer Commission of Singapore (“CCS”). Other statutory boards regulate professions and industries, such as family physicians and estate agents. Brief analysis of their described activities suggests that they do not, in the main, carry on business activities, although there is no reason, for example, why the polytechnics could not compete with private colleges or educational institutions fulfilling the same educational functions.<sup>37</sup> Whether those statutory boards which regulate particular industries or professions act as “gatekeepers” for the members and impose regulations which are more onerous than necessary to minimise new entrants who might compete against incumbent members, thus behaving in an anti-competitive way, or are merely regulators who provide reasonable minimum filters on entrants is beyond the scope of this paper.

A brief analysis of the activities of statutory boards reveals that many of these bodies have commercial subsidiaries: for example, the Singapore Sports Council has SISTIC.com Pte Ltd, which is discussed in more detail below.<sup>38</sup> This immediately raises questions about the appropriateness of control by a statutory body of a significant commercial business. Other statutory boards appear to be engaged in very wide ranging commercial entrepreneurial

---

<sup>34</sup> See the Singapore Government Directory, online: <<http://www.sgdi.gov.sg>>.

<sup>35</sup> See Barbara Leith Lepor, ed., *Singapore: A Country Study* (Washington, GPO: for the Library of Congress, 1989) at “Statutory Boards”, online: <<http://countrystudies.us/singapore>>.

<sup>36</sup> See the *Singapore Constitution*, *supra* note 26, for example, Part V - The Government, particularly s. 22A *et seq.* For a full description of statutory boards see also David Seth Jones, “Financial Reforms of Statutory Bodies in Singapore: Control and Autonomy in a Centralized State” (2006) 6 *Public Organization Review* 259.

<sup>37</sup> See generally Ian Thynne, “Statutory Boards: How Distinctive and In What Ways?” (2006) 6 *Public Organization Review* 171.

<sup>38</sup> Where this is the case, the statutory board presents consolidated financial accounts for the Group. Although there is some financial explanation of the subsidiary activities, there is apparently no requirement for disclosing transactions and balances of related party transactions. See, for example, Singapore Sports Council, “The Singapore Sports Council Annual Report 2008/2009” at 70 (Note 12 to Financial Accounts), online: <[http://www.ssc.gov.sg/publish/Corporate/en/about/financial\\_information/annual\\_report\\_05\\_060.html](http://www.ssc.gov.sg/publish/Corporate/en/about/financial_information/annual_report_05_060.html)>.

activities themselves. JTC Corp, for example, is Singapore's "leading industrial infrastructure specialist spearheading the planning, promotion and development of a dynamic industrial landscape."<sup>39</sup> While no doubt some JTC Corp initiatives are governmental in nature, the breadth and number of these activities appear to be more like those of a large-scale property developer than a traditional government-linked agency.

The Government has ownership and involvement in many industries in Singapore and overseas through its Government Linked Companies ("GLCs"). Ownership is mainly held by two unlisted companies, Government of Singapore Investments Co ("GIC") and Temasek Holdings Pte. Ltd ("Temasek"). Obtaining detailed financial information on either of these bodies is difficult,<sup>40</sup> but a brief discussion of their activities serves to underscore the important role of the government in Singapore's business sector.

GIC was set up in response to the perceived need for an entity dedicated to the task of investing Singapore's growing reserves for better long-term returns in what "in retrospect, was the prototype Sovereign Wealth Fund."<sup>41</sup> Former President and Founding Chairman of GIC, Mr. Lee Kuan Yew stated recently in a speech at the 30<sup>th</sup> Anniversary Dinner for GIC that the reasons why GIC is "vital to the national economy" are:<sup>42</sup>

First, Singapore is highly exposed to the vagaries of the global economy. Our national reserves are a buffer or shock absorber for Singapore in downturns like that of 2009. Second, a strong national balance sheet fosters investor confidence and hence enhances the stability of the Singapore dollar. Third, income from our reserves supplements government's revenues.

GIC manages funds on behalf of the Singapore Government in a fund owner/fund manager relationship. The GIC Report, which is the annual report of the fund, contains information about asset mix, location of investments and 20-year rate of return on investments. Investments are outside of Singapore as a rule. The GIC Report does not, however, give any specific information about individual investments, including financial information.<sup>43</sup> GIC's accounts are consolidated into the Government's accounts, independently audited and presented to the President.<sup>44</sup> As a matter of principle, 50% of the long-term expected real return on the reserves of GIC and the Monetary Authority of Singapore may be taken into the Government's annual budget. As at March 2011, the portfolio's 20-year rate of return in excess of global inflation was 3.9%. Investments include real estate, private equity,

---

<sup>39</sup> See JTC, online: <<http://www.jtc.gov.sg/Pages/Default.aspx>>. JTC Corp was formerly the Jurong Town Corporation and was originally engaged in building houses for workers. See also activities of the Agency for Science, Technology and Research, online: <<http://www.a-star.edu.sg/Industry/CollaboratioOpportunities/tabid/224/Default.aspx>>.

<sup>40</sup> Garry Rodan, "Do Markets Need Transparency? The Pivotal Cases of Singapore and Malaysia" (2002) 7 *New Political Economy* 23 at 28.

<sup>41</sup> Government of Singapore Investment Corporation Pte Ltd, "Report on the Management of the Government's Portfolio for the Year 2010/11" online: GIC <[http://www.gic.com.sg/data/pdf/GIC\\_Report\\_2011.pdf](http://www.gic.com.sg/data/pdf/GIC_Report_2011.pdf)> [*GIC Report*] at 4.

<sup>42</sup> *Ibid.* at 6.

<sup>43</sup> *Ibid.*

<sup>44</sup> See ie Singapore, "Overview of United States (USSFTA)", online: ie Singapore <[http://www.fta.gov.sg/fta\\_ussfta.asp?hl=13](http://www.fta.gov.sg/fta_ussfta.asp?hl=13)> [*USSFTA*].

infrastructure, and a variety of funds under the control of external managers. Investments are worldwide, with a growing trend of investing in Asia and South America.<sup>45</sup>

Temasek, the second government fund investment vehicle, has been described as “a behemoth, comparable with some of the world’s largest conglomerates, such as General Electric (GE) of the United States and Germany’s Siemens AG (SI).”<sup>46</sup> It has S\$193b under investment as at 2011.<sup>47</sup> The Government’s role in Temasek is that of a shareholder but Temasek is accountable to the President as a Fifth Schedule company under the *Singapore Constitution*, and appointment or removal of a board member or the Chief Executive Officer requires the approval of the President of Singapore at his discretion. In addition, Temasek is able to use Singapore’s reserve funds. A 2004 constitutional amendment allows the Government to transfer reserves to key statutory boards and companies, and among them, with the approval of the President.<sup>48</sup> While the responsibility for commercial performance of Temasek lies with the corporation itself, the Ministry of Finance reviews and approves corporate plans of the holdings.<sup>49</sup>

Temasek and Temasek-linked companies constitute the bulk of Singapore’s GLCs. GLCs are responsible for most telecommunications, power, water and gas services, port operations, and the development of industrial estates and housing. They also compete in sectors such as travel agencies, food supplies, property development, heavy industries; as defence, construction, engineering and trading firms.<sup>50</sup> Approximately 75% of Temasek’s holdings are Singapore-based.<sup>51</sup> Temasek is not the sole shareholder in all its investments. It owns 100% of MediaCorp Pte Ltd, Singapore Press Holdings, Singapore Power Limited, Mapletree Investments Pte Ltd, Surbana Corporation, for example, but only 55% of Singapore Telecommunications, Singapore Airlines Limited and SMRT Corporation Ltd. It does, however, have a “golden share” in Singapore Airlines Limited.<sup>52</sup>

Temasek-linked companies are managed under the guidance of boards of directors and, if listed, are subject to the rules of disclosure of the Singapore Stock Exchange. Temasek itself is an exempt private company with the Ministry of Finance as shareholder. It is not a listed company, which means it is not subject to the same rules of financial disclosure as a listed company. It has since 2004 published financial data about consolidated accounts in the *Temasek Review*.<sup>53</sup> The *Temasek Review* provides information about Temasek’s structure and investments but “omit flows between subsidiary investments”.<sup>54</sup> Singapore has investments in more than 500 entities with Annual Revenue or Total Assets of more than S\$50m, excluding

---

<sup>45</sup> *GIC Report*, *supra* note 41 at 9.

<sup>46</sup> Ho Khai Leong, “Corporate Governance Reform and the Management of GLCs: Pressures, Problems and Paradoxes” in Ho Khai Leong, ed., *Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations* (Singapore: Institute of Southeast Asian Studies, 2005) 269 at 276.

<sup>47</sup> Temasek, “Temasek Review 2011”, online: Temasek Holdings <[http://www.temasekreview.com.sg/downloads/full\\_temasek\\_review\\_2011.pdf](http://www.temasekreview.com.sg/downloads/full_temasek_review_2011.pdf)> at 6.

<sup>48</sup> See Ho, *supra* note 46 at 278.

<sup>49</sup> See *ibid.* at 279.

<sup>50</sup> See *USSFTA*, *supra* note 44.

<sup>51</sup> See Williams, *supra* note 32 at 526.

<sup>52</sup> All of these companies are listed as “Major Portfolio Companies” in the “Temasek Review 2011”, *supra* note 47 at 83 *et seq.*

<sup>53</sup> See *ibid.* generally.

<sup>54</sup> WTO, *Trade Policy Review: Report by the Secretariat*, WTO Doc. WT/TPR/S/202/Rev.1 at 21, online: WTO <[http://www.wto.org/english/thewto\\_e/countries\\_e/singapore\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/singapore_e.htm)> [*WTO Report*].

investments made by GIC.<sup>55</sup> Foreign investment in some GLCs is subject to restrictions, depending upon their industry sector. As at December 2007 it was estimated that the top six Singapore-listed GLCs accounted for 20% of the total capitalisation of the Singapore Exchange.<sup>56</sup>

Under the Free Trade Agreement (“FTA”) with the US, Singapore is obliged to ensure that its government enterprises will act in accordance with commercial considerations in their purchases and sales of goods, and will not enter into agreements (including dealings with parent, subsidiaries or enterprises with common ownership) which “restrain competition on price or output or allocate customers for which there is no plausible efficiency justification”.<sup>57</sup> The FTA requires government enterprises to agree that they will not engage in exclusionary practices that substantially lessen competition in a market in Singapore to the detriment of consumers. The Government must take no action directly or indirectly to influence decisions of government enterprises except as consistent with the FTA. Interestingly, under the FTA, Singapore agrees to continue reducing its aggregate ownership and other interests that confer effective influence in entities organised under the laws of Singapore.<sup>58</sup>

All of these requirements impose constraints on the way in which the Singapore government and its entities can engage in conduct which might impact upon competition in the jurisdiction.

Importantly, another term of the FTA with the US (and the FTA with Australia) requires Singapore to enact general competition legislation by 2005 which would cover government enterprises.<sup>59</sup>

There is a general scepticism outside Singapore about the links between the Government and the GLCs, and the degree of influence which the former has over them. As has been said:<sup>60</sup>

---

<sup>55</sup> *USSFTA*, *supra* note 44, calculation based on “Other information” therein. See also the *USSFTA*, clause 2(g) of art. 12.3, online: <[http://www.fta.gov.sg/ussfta/chapter\\_12\\_us.pdf](http://www.fta.gov.sg/ussfta/chapter_12_us.pdf)>.

<sup>56</sup> See *WTO Report*, *supra* note 54 at 56 (fn. 53).

<sup>57</sup> *USSFTA*, *supra* note 44, clause 2(d)(ii)(A) of art. 12.3.

<sup>58</sup> See *ibid.*, clause 2(f) of art. 12.3.

<sup>59</sup> See *ibid.*, clause 1 of art. 12.2, fn. 12-1. Under art. 12.3 of the *USSFTA*, Singapore is also obligated to make public a consolidated report for various entities setting out the percentage of shares and voting rights that the government and its enterprises cumulatively own (clause 2(g)(i)(A)), “a description of any special shares or special voting rights” (clause 2(g)(i)(B)), details of government officials serving as officer or board members (clause 2(g)(i)(C)), and the annual revenue or total assets of the organisation (clause 2(g)(i)(D)). The definition of “covered entity” includes Singapore entities in which “effective influence exists, or is rebuttably presumed to exist, whose annual revenue or total assets are greater than SGD 50 million”: see clause 1(b) of art. 12.8 of the *USSFTA*. This requirement excludes government entities which invest the reserves of the Government of Singapore or holding investments of that entity, and Temasek Holdings (Pte) Ltd: see clause 1(d) of art. 12.8 of the *USSFTA*.

<sup>60</sup> See Williams, *supra* note 32 citing U.S., Dep’t of Commerce, *Singapore*, (2008) at 3, online: <[http://singapore.usembassy.gov/uploads/images/uWEK7j2J2BM0mCVrI2DqRg/NTE\\_2008\\_Singapore.pdf](http://singapore.usembassy.gov/uploads/images/uWEK7j2J2BM0mCVrI2DqRg/NTE_2008_Singapore.pdf)> (raising government procurement issues).

Issues concerning market access as well as a perception that the playing field is tilted in favour of GLCs are matters that have concerned both domestic and overseas competitors as regards the domestic Singapore market.

Some of the contentious issues arising from the operations of GLCs in Singapore identified by Ho Khai Leong are as follows:<sup>61</sup>

- GLCs habitually recruit the majority of the talent pool so that the private sector is “exhausted of able managers and employees”;
- GLCs crowd out the private sector;
- GLCs are given preferential treatment in tenders along with multinational corporations at the expense of local companies;
- GLCs have been half hearted in their divestment exercise;
- Issues linked to transparency such as fostering trust in GLCs, the government and Temasek;
- Political appointments; and
- The dual role of the state as owner and regulator.

There have been many calls to increase privatisation of GLCs to increase their flexibility and accountability. The Singapore Democratic Party in 2001 proposed the scaling back and privatisation of GLCs, stating:<sup>62</sup>

Scale back the GLCs. Pretend as they might, GLCs cannot provide, much less sustain, economic development in Singapore. They must be dismantled and, in their place, local private companies must be allowed to surface and be given the chance to compete internationally, with the government playing only a supporting role.

By way of contrast with commonly held views about the role of GLCs and advantages they may receive because of their government links, some evidence suggests that GLCs are not given preferential treatment and operate on a commercial basis.<sup>63</sup> Examples given of this non-favouritism include “in two recent high-profile cases of land site tenders for the large integrated resort projects at Sentosa Island and Marina Bay, GLCs such as Capitaland competed against private sector enterprises and lost out in the bidding process.”<sup>64</sup>

The Government and its entities clearly occupy a significant place in many Singapore markets. It would be inappropriate if government bodies were not caught by the *Competition Act* (also referred to henceforth as “the Act”), but most classified as ‘undertakings’ are. This means that overt activities which constitute breaches of the Act will be caught as long as the CCS takes action against the government body. It is impossible, however, in an article of this nature to reach definite conclusions on the impact the preponderance of statutory boards and GLCs in certain industries has on competition, and the impact of the relationships between them. What can be said, however, is that the pervasive nature of statutory boards and GLCs

---

<sup>61</sup> See Ho Khai Leong, *supra* note 46 at 280 *et seq* (quote taken from 281).

<sup>62</sup> *Ibid.* at 297, citing the Singapore Democratic Party’s “5-Point Economic Plan for Singapore” (link given no longer available online).

<sup>63</sup> See Williams, *supra* note 32 at 528, citing Fang Feng, Qian Sun & Wilson H.S. Tong, “Do Government-linked Companies Underperform?” (2004) 28 J. Banking & Fin. 2461.

<sup>64</sup> See *WTO Report*, *supra* note 54 at 56.

in the Singapore economy suggests at least that particular attention should be given to the way they are treated under the Singapore *Competition Act*.

## VI. ENACTMENT AND SCOPE OF THE SINGAPORE *COMPETITION ACT*

The *Competition Act* of Singapore was enacted in 2004 and became operative in 2006, although its merger provisions did not become operative until 2007.<sup>65</sup> It is based on the UK *Competition Act 1998*<sup>66</sup>, which was derived from the pre-2004 EU competition law provisions. The Act draws on European concepts of markets, dominance and market power, although it does not slavishly follow the UK *Competition Act* or other EU laws. The prohibitions are based on economic concepts and a set of guiding principles which are said to recognise international best practice in the context of Singapore's characteristics of being a small open economy with a fairly competitive domestic economy. The Act takes a relatively light-handed approach to competition regulation and the drafting recognises that "[r]egulatory costs should be kept to a minimum", on the basis that to do otherwise would reduce Singapore's international competitiveness.<sup>67</sup>

The Act is directed at the conduct of 'undertakings', which means that it applies to individuals or entities carrying on business, unless they are exempt under its provisions.<sup>68</sup> The prohibitions cover fairly standard competition law areas of horizontal agreements, abuse of dominance and mergers. Horizontal agreements are prohibited if they have the object or effect of preventing competition within Singapore. Agreements which fix prices or trading conditions, limit or control production, technical development or investment, share markets or sources of supply or impose supplementary obligations are listed as specific examples of agreements which would fall within the prohibition.<sup>69</sup> Block exemptions for horizontal agreements are available from the Minister on recommendation of the CCS,<sup>70</sup> if the agreements: (a) improve "production or distribution", or promote "technical or economic progress", and (b) do not impose "restrictions which are not indispensable to the... objectives" or which do not "afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the [relevant] goods or services".<sup>71</sup> Abuse of a dominant position is prohibited in Singapore markets.<sup>72</sup> Parties may hold the dominant position in Singapore or elsewhere.<sup>73</sup> Examples of abuse listed are "predatory behaviour towards competitors"; "limiting production, markets or technical development to the prejudice of consumers"; applying dissimilar conditions to similar customers and disadvantaging them; or making contracts subject to unnecessary supplementary obligations.<sup>74</sup> The list is not, however, exhaustive.

---

<sup>65</sup> See *supra* note 1.

<sup>66</sup> (U.K.), 1998, c. 41[UK *Competition Act*]

<sup>67</sup> See Sing., Ministry of Trade and Industry, "Competition Bill Consultation Paper" (2004) at 2, online: MTI <[http://app.mti.gov.sg/data/pages/367/doc/frm\\_LEG\\_Competition\\_Consultation\\_Paper.pdf](http://app.mti.gov.sg/data/pages/367/doc/frm_LEG_Competition_Consultation_Paper.pdf)>.

<sup>68</sup> *Competition Act*, *supra* note 1, s. 2(1).

<sup>69</sup> *Ibid.*, s. 34.

<sup>70</sup> *Ibid.*, s. 36.

<sup>71</sup> *Ibid.*, s. 41. This provision is virtually identical to the UK *Competition Act*, *supra* note 66, s. 9.

<sup>72</sup> *Competition Act*, *ibid.*, s. 47.

<sup>73</sup> This provision is very similar to UK *Competition Act*, *supra* note 66, s. 18, except that the latter does not mention "predatory behaviour" (*Competition Act*, *ibid.*, s. 47(2)(a)) but talks of imposing unfair prices or trading conditions.

<sup>74</sup> *Competition Act*, *ibid.*, s. 47(2).

Mergers and acquisitions are prohibited if they result in a “substantial lessening of competition” in a market for goods or services in Singapore.<sup>75</sup>

## VII. LIMITATIONS ON THE APPLICATION OF THE ACT

There are a number of significant limitations on the application of the Act, some general and others which apply, or are more likely to apply, to government entities. These are considered below.

### A. *Government and Statutory Boards Exempt*

Conduct of “the Government” or a statutory board (“[bodies] corporate established... under any written law”)<sup>76</sup> or persons acting on their behalf, are exempt.<sup>77</sup> This means that entities noted previously as “traditional government”: government departments and other state organs, are not caught by the Act. The wording “the Government” suggests that it is activities of the Government as a Government which are exempted. This suggests that Government bodies carrying on business will be caught as undertakings. The extent to which bodies are “the Government” may raise issues. The position is clearer in relation to many corporatised bodies. GLCs will necessarily be caught if they are carrying on business because they are ‘undertakings’ and are not considered part of the Government.

Statutory boards are also expressly exempt, with some interesting consequences discussed below.

### B. *Specified Activities*<sup>78</sup>

The Third Schedule also provides that ss. 34 and 47 do not apply to “specified activit[ies]”, which are listed<sup>79</sup> as follows: the supply of ordinary letter and postcard services under the *Postal Services Act*;<sup>80</sup> supply of water and wastewater management services; supply of scheduled bus services under the *Public Transport Council Act*;<sup>81</sup> supply of rail services under the *Rapid Transit Systems Act*;<sup>82</sup> and cargo terminal operations under the *Maritime and Port Authority of Singapore Act*.<sup>83</sup> The first two categories might be described as traditional activities of government. Special provisions in relation to them in competition laws are not unusual. Supply of bus and rail services and cargo terminal operations would, however, be contestable activities in many jurisdictions and competition laws would often apply to them.

### C. *Relationship with Sector Regulators*

Section 33(2) deals with the relationship between the Act and other industry specific regulation. It gives neither the CCS nor competing regulatory authority precedence, such that

---

<sup>75</sup> *Ibid.*, s. 54(1).

<sup>76</sup> *Ibid.*, s. 33(6).

<sup>77</sup> *Ibid.*, s. 33(4). The Minister may, however, prescribe particular activities, agreements or conduct of a statutory body by order in the Gazette and the Act will apply to it: *ibid.*, s. 33(5).

<sup>78</sup> *Ibid.*, Third Schedule, s. 6.

<sup>79</sup> *Ibid.*, Third Schedule, s. 6(2).

<sup>80</sup> Cap. 237A, 2000 Rev. Ed. Sing.

<sup>81</sup> Cap. 259B, 2000 Rev. Ed. Sing.

<sup>82</sup> Cap. 263A, 2004 Rev. Ed. Sing.

<sup>83</sup> Cap. 170A, 1997 Rev. Ed. Sing.

they theoretically operate in parallel. This means that at best there is a potential splintering of regulation between the two authorities, and at worst a situation where the specific regulator is given precedence in circumstances where the CCS may have broader power, or an inconsistent power. The Minister, however, may make regulations to co-ordinate the exercise of the powers of the two conflicting authorities, or to provide procedures for specified cases or categories, and designate whether one authority should exercise power,<sup>84</sup> and whether this exercise is concurrently or conjunctively.<sup>85</sup> The Third Schedule at s. 5 also states that, in respect of anti-competitive agreements and abuse of dominance, where there is any other written law or code of practice issued under it relating to competition giving a sector regulator jurisdiction in the matter, the sector regulator shall prevail.

Both the *Electricity Act*<sup>86</sup> and the *Gas Act*<sup>87</sup>, for example, contain competition provisions so these would override the Act itself. Part VII of the *Electricity Act* and Part IX of the *Gas Act* prohibit agreements which have as their object or effect the prevention, restriction or distortion of competition in the market in Singapore. Specified practices include price fixing, limiting or controlling electricity generation or gas production, technical developments or investment in the respective industries, the sharing of markets or sources of supply of electricity or gas; and the direct or indirect acquisition of shares in or the assets of an electricity licensee or gas licensee. The Electricity Market Authority may, with the approval of the Minister of Trade and Industry grant exemptions from these provisions although this has not been done to date. Large financial penalties exist for breach of these provisions.<sup>88</sup>

#### D. *Other Exemptions*

There are also a number of general exemptions from the provisions of the Act. Several of these are targeted at conducts which usually falls within the government's domain. Sections 35 and 48 exempt certain agreements specified in the Third Schedule from the prohibitions on horizontal conduct and abuse of dominance which would otherwise apply under ss. 34 and 47. Some of these have already been discussed above. These exemptions are for "[s]ervices of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking".<sup>89</sup>

This provision is similar to the *UK Competition Act* and existing EU provisions. This provision often applies to government bodies because of the general nature of their duties and obligations, but also applies to private market participants.

#### E. *Agreements with Net Economic Benefit*<sup>90</sup>

---

<sup>84</sup> *Competition Act*, *supra* note 1, s. 33(3). See however *Competition Act*, *ibid.*, Third Schedule, s. 5. See also Cavinder Bull, Lim Chong Kin & Richard Whish, eds., *Competition Law and Policy in Singapore* (Singapore: Academy Publishing, 2009) at 107.

<sup>85</sup> *Competition Act*, *ibid.*, s. 33(3).

<sup>86</sup> Cap. 89A, 2002 Rev. Ed. Sing..

<sup>87</sup> Cap. 116A, 2002 Rev. Ed. Sing.

<sup>88</sup> Steps have been taken to diversify the electricity market, including divesting of various electricity suppliers by the government and the development of a national electricity market: *WTO Report*, *supra* note 54 at 77-78.

<sup>89</sup> *Competition Act*, *supra* note 1, Third Schedule, s.1.

<sup>90</sup> *Ibid.*, Third Schedule, s. 9.



Agreements which contribute to improving production or distribution, or promoting technical or economic progress, and which do not impose restrictions which are dispensable to the attainment of the objectives or allow the undertakings the opportunity to eliminate competition in respect of a substantial part of the goods or services concerned are not subject to s. 34. This exemption is similar to the *UK Competition Act* provisions.

#### F. *Vertical Agreements*<sup>91</sup>

All vertical agreements are exempted from s. 34 prohibitions unless specified by the Minister. This is said to be justified by the small size of the Singapore economy. It is also supported by changes in economic thinking which place less focus on vertical restrictions as anti-competitive conduct. Vertical restrictions agreed to or imposed by an entity with significant market power, however, can still be caught under s. 47 (abuse of dominant position) such that the most damaging conduct will presumably still be subject to the Act.<sup>92</sup>

#### G. *Excluded Mergers*<sup>93</sup>

The merger law does not apply to any merger approved under a written law or a code of practice issued under any written law relating to competition. It also does not apply to any entity listed in s. 6(2) of the Third Schedule, which were noted above under “Specified Activities”.<sup>94</sup>

#### H. *Compliance with Written Legal Requirements*<sup>95</sup>

A “legal requirement” is defined as one imposed by any written law.<sup>96</sup> This appears to be a reasonable exemption except that bodies set up under specific laws are likely to have significant written legal requirements imposed on them so there may be a need to check, as the CCS says that it does, that anti-competitive requirements are not enshrined in legislation to by-pass the *Competition Act*.

#### I. *Compliance with International Obligations*<sup>97</sup>

This exemption seems sensible; however, it is not a common exemption so it would be interesting to know what motivated it – why Singapore sees a need for a general exemption when other countries do not. “An international arrangement relating to civil aviation and designated by an order made by the Minister is to be treated as an international obligation for the purposes of this [provision].”<sup>98</sup> This power to designate in respect of international aviation may arise because of the express aim of Singapore to be a world airline hub. It may also be directed at the conduct of Singapore Airlines, a 51% owned GLC. This goes some way to shielding arrangements it might enter from the glare of competition law, should the Minister choose to gazette any particular conduct.

---

<sup>91</sup> *Ibid.*, Third Schedule, s. 8.

<sup>92</sup> As to this, see the SISTIC case below as an example.

<sup>93</sup> *Competition Act*, *supra* note 1, Fourth Schedule, ss. 1-2.

<sup>94</sup> See *supra* Part VII(B).

<sup>95</sup> *Ibid.*, Third Schedule, s. 2.

<sup>96</sup> *Ibid.*, Third Schedule, s. 2(3).

<sup>97</sup> *Ibid.*, Third Schedule, s. 3.

<sup>98</sup> *Ibid.*, Third Schedule, s. 3(6).

## J. *Public Policy*<sup>99</sup>

The Minister may by order exclude a particular agreement or any agreement or conduct of a particular description, or in particular circumstances, from the application of the provisions on horizontal arrangements or the abuse of dominance if there are “exceptional and compelling reasons of public policy” why it should not apply.<sup>100</sup> This is a very broad power to exempt from key prohibitions of the Act. In effect this gives the Minister carte blanche to override the application of the Act. No guidance has been given as to what these reasons might be. “Public policy” is a very broad term. “Exceptional” suggests that there is an intention that the power will not be exercised often.<sup>101</sup> If it is exercised very sparingly and in well-justified circumstances it will not significantly impact on the outcomes of the Act, but concerns about the basis for its application must remain.

## K. *Clearing Houses*<sup>102</sup>

Sections 34 and 47 of the Act do not apply to agreements or conduct which relates to “clearing and exchange of articles undertaken by the Automated Clearing House established under the *Banking (Clearing House) Regulations*<sup>103</sup>” or “any activity of the Singapore Clearing Houses Association in relation to its activities regarding the Automated Clearing House.”

## VIII. ENFORCEMENT OF THE ACT BY THE CCS

The CCS is established under the Act as a separate legal identity.<sup>104</sup> It consists of a Chairman and between two to 16 members appointed by the Minister for a three to five year term.<sup>105</sup> The functions and duties of the CCS, put simply, are to promote “efficient market conduct”, “overall productivity, innovation and competitiveness” in Singapore markets; eliminate anti-competitive practices; and to advise the Government and public authorities on “national needs and policies” on competition.<sup>106</sup> At all times the CCS must take account of Singapore markets and “the economic, industrial and commercial needs” of the country.<sup>107</sup>

There are a number of issues raised by the express duties of the CCS and also by its supervision by the Minister for Trade and Industry.

The focus on the economic, industrial and commercial needs of the country appears to override usual assumptions that competition is the best regulator of the market. The fact that the Minister is currently the Minister for Trade and Industry may also lead to a conflict of objectives by the CCS. Another key issue in relation to the CCS has been the feeling that it would be unlikely to “take on” the government over competition law issues, particularly given the prominence of the government and its entities in the local economy. The SISTIC

---

<sup>99</sup> *Ibid.*, Third Schedule, s. 4.

<sup>100</sup> *Ibid.*, Third Schedule, s. 4(1).

<sup>101</sup> The power to make orders is broad - they may be retrospective: *ibid.*, Third Schedule, s. 4(5).

<sup>102</sup> *Ibid.*, Third Schedule, s. 7.

<sup>103</sup> Cap. 19, R. 1, 2008 Rev. Ed. Sing.

<sup>104</sup> *Competition Act*, *supra* note 1, s. 3.

<sup>105</sup> *Ibid.*, s. 5; First Schedule, ss. 1, 3.

<sup>106</sup> *Ibid.*, s. 6(1).

<sup>107</sup> *Ibid.*, s. 6(2).

case, one of the few competition cases taken to date, is thus interesting given the nature of the parties involved.

## **IX. ABUSE OF DOMINANCE IN TICKETING BY A GLC**

The SISTIC case is one of the few cases which have been determined to date under the Singapore Act. It is currently on appeal before the Competition Tribunal. It is particularly relevant to this paper for a number of reasons. It illustrates the fact that the CCS is prepared to take action under the Singapore Act against a GLC. The decision discusses clearly the application of the exemption contained in s. 33(4) for aspects of government conduct. It illustrates an important issue in relation to government involvement in business activities – the power of a market incumbent and the creation of barriers to entry by strategic behaviour. Finally it underscores the substantial involvement of government entities in the Singapore market.

The CCS issued an infringement decision against SISTIC.com Pte Ltd (“SISTIC”) for abuse of dominance under s. 47 of the *Competition Act* in relation to its exclusive agreements for ticketing services with venues. These included agreements between SISTIC and The Esplanade Co Ltd (“TECL”), and SISTIC and the Singapore Sports Council (“SSC”) for the venue it owned, the Singapore Indoor Stadium (“SIS”). Each of these agreements required the venue owner to use SISTIC as the sole ticketing provider at its venues. There were 17 other similar agreements of which the complaint was made against but the identities of those other parties were surprisingly undisclosed.

### ***A. The Parties***

SISTIC was a ticketing services provider, providing ticketing services to event promoters and selling tickets to consumers with a 90% market share in the ticketing services market in Singapore, of which 60-70% related to the exclusive agreements. It was set up in 1991 as a department under the SSC to provide ticketing services. It was later corporatised in 2000. At the time of the hearing, SISTIC was owned 65% by the SSC and 35% by TECL. SISTIC was also a ticketing solutions supplier in Singapore and overseas. TECL managed several of the most important arts venues, and was a public company limited by guarantee set up as a charitable organisation and had ‘Institute of Public Charter’ status, meaning that it had a not-for-profit status. TECL operated on a cost recovery basis and relied on non-operating income such as grants and sponsorships for a proportion of its expenditure. 30% of events at The Esplanade venue were organised by TECL itself as event organiser. SSC was a statutory board under the oversight of the Ministry of Community Development, Youth and Sports (“MCYS”) staffed by SSC officers. The Chairman of the SSC held a concurrent appointment as the Chairman of SISTIC, and another council member of the SSC was also concurrently a director of SISTIC. SIS promoted 10% of events held in it.

### ***B. The Agreements in Question***

SISTIC charged event organisers, venue operators and consumers for the provision of its services. The ticketing agreements which were the subject of these proceedings were for three or four years terminable on six months’ notice with automatic renewal. There was also an “exclusive use of ticketing system agreement” between SISTIC and TECL. The other 17 agreements were similar. In each agreement SISTIC offered some form of discount for exclusivity.

### C. *Exclusion for Government or Statutory Bodies*

As previously noted in this paper, s. 33(4) of the *Competition Act* provides that the conduct of the Government or a statutory body, or a person acting on behalf of the Government or a statutory body is excluded from the application of the Act. The nature of the bodies involved in this complaint required a thorough consideration of the application of the Act to each.

With respect to the first agreement, the parties were TECL and SISTIC, both corporatised government bodies. TECL was owned by the Ministry of Information Communications and the Arts (“MICA”), and SISTIC was owned by the SSC and the MICA via TECL. Neither TECL nor SISTIC was part of the Government nor were they individually a statutory body. The contractual terms were commercial. There was no suggestion that either TECL or SISTIC was acting on behalf of the Government or a statutory body. The CCS was satisfied that the s. 33(4) exclusion did not apply to SISTIC. With respect to the second agreement between SISTIC and SIS, SISTIC was a corporate entity and SIS a division under the SSC, which was in turn a body set up under s. 3 of the *Singapore Sports Council Act*<sup>108</sup>. This meant that SIS was part of a statutory body within s. 34(4)(b). SIS itself was therefore not caught by the Act. Since the CCS was investigating the abuse of dominance, *i.e.* the unilateral conduct of SISTIC and its imposition of terms on others, the exclusion did not affect SISTIC’s conduct.<sup>109</sup>

### D. *“Single Economic Entity” Doctrine*

Arguments were made that some of the interlinked parties formed part of a single economic entity and that arrangements between them were not subject to the Act. Looking at the first agreement, SISTIC was 65% owned by the SSC and 35% owned by TEFL. The question then was whether SISTIC and TECL, and SISTIC and SIS formed a single economic entity for the purposes of competition law. In the CCS Guidelines it was stated that two entities form a single economic entity if the subsidiary has “no real freedom to determine its course of action... and, although having a separate legal personality, enjoys no economic independence.”<sup>110</sup> The answer to this question will depend on the facts and circumstances of each case. The CCS considered a range of issues such as shareholding structure, power of directors, the intention behind the provision and the intentions of the companies themselves. SISTIC’s board of seven directors included two nominated by the SSC, including its Chairman, and one nominated by TECL. The other four directors were independent. The CCS concluded that the SSC had been dealing with SISTIC at arm’s length. The CCS concluded that the two were not a single economic entity. It also reached the same conclusion in relation to SISTIC and TECL.

### E. *Decision on Competition Issues*

The CCS found that the agreements harmed competition by restricting the promoters’ choice of ticketing services providers to perpetuate SISTIC’s dominant position. This allowed

---

<sup>108</sup> Cap. 305, 1985 Rev. Ed. Sing.

<sup>109</sup> If there had been an allegation of an anti-competitive agreement between the CCS and SISTIC the position may well have been different.

<sup>110</sup> See Sing., CCS, *CCS Guidelines on the Section 34 Prohibition* at para. 2.7, online: <[http://app.ccs.gov.sg/cms/user\\_documents/main/pdf/S34\\_Jul07FINAL.pdf](http://app.ccs.gov.sg/cms/user_documents/main/pdf/S34_Jul07FINAL.pdf)>; see generally the CCS’s guidelines, online: CCS <[http://app.ccs.gov.sg/CCS\\_Guidelines\\_.aspx](http://app.ccs.gov.sg/CCS_Guidelines_.aspx)>.

SISTIC to charge higher prices for tickets (increasing its booking fees by 50% despite a downturn), and enabled it to offer incentives to attract and retain venue operators and event promoters as clients under its system of exclusive agreements.

The relevant market was said to be the market for the provision of open ticketing services in Singapore to promoters and ticket buyers. It was a two-sided market as there were two distinct groups of customers. Indirect network effects existed between the two groups of customers, involving the need for a matching service provider. SISTIC was dominant for a number of reasons, including the fact that its market share was around 90% throughout the relevant period. SISTIC created an artificial network effect by way of the exclusive agreements and perpetuated this through its website, outlets and customer database. It was not constrained by countervailing buyer power. Its fee increase of 50% demonstrated its ability to profitably sustain a price above competitive levels. It abused this power by unilaterally imposing its exclusivity restrictions on contractual partners and inducing them through individualised discounts and incentives. This prevented competitors from gaining a foothold progressively in the market by picking up residual demand. The agreements were part of its holistic strategy of concurrent foreclosures, recoupment and perpetuation of dominance.

The SISTIC decision is currently being appealed. SISTIC argues that it was not dominant in the market and had to maintain its relationships with venue operators because they could give ticketing contracts to its rivals or choose to do ticketing in-house. SISTIC is also appealing for the fine of S\$989,000 to be reduced.<sup>111</sup>

## **X. CONCLUSIONS ON COVERAGE OF GOVERNMENT BODIES IN SINGAPORE**

The SISTIC decision is illustrative of a number of competition issues raised in this paper.

The decision is a carefully considered analysis of the application of the Act to a number of entities. The Act was rightly found to apply to SISTIC but what of the SSC? It is a statutory board and exempted from the Act under s. 33(4)(b). Its activities relate mainly to the development of sports in Singapore, which is a broad remit but unlikely to be a business activity in most of its manifestations. But what if the SSC were to agree with venue operators such as TEFL and others to fix a minimum “floor” price for sale of consumer tickets to, say rock concerts, which could be held at SIS or any of their venues, to avoid competition? Is it appropriate that the SSC could be a cartel participant not subject to the law? Is this fair to other commercial entities involved in the industry? Surely the broad-brush approach to exemption for statutory boards is too sweeping? Application of the Act should be based on what the government entity is actually doing when it engages in anti-competitive conduct, not general assumptions about its overarching nature and purpose. Exclusion of government bodies based on such assumptions can lead to significant anti-competitive impact, as was shown in the *NT Power* case in Australia.<sup>112</sup> Statutory boards from time to time may engage in conduct which is very anti-competitive, particularly when they migrate from being core regulators to managing essential or other facilities which become open to access on a commercial basis. In Singapore the line between action as an arm of the government and an

---

<sup>111</sup> Jessica Lim, “Sistic challenges fine for abusing market dominance” *The Straits Times* (27 September 2011) A1.

<sup>112</sup> *NT Power*, *supra* note 25.

industry participant is further blurred because many statutory boards appear to engage in commercial behaviour and/or are linked to a large number of commercial subsidiaries. If the bottom line is that commercial subsidiaries are caught by the Act while their statutory board holding companies are not, careful judgments need to be made about the roles and relationships between them lest anti-competitive conduct escapes the net of the Act.

A brief review of data about JTC Corp, for example, suggests that it may engage in business activities in pursuing its mandate of industrial development in Singapore. While it tenders for some construction it appears to routinely provide engineering services and industrial design functions which would be contestable in many other markets. A more detailed analysis of statutory boards is required to assess whether commercial activity is really widespread, but it would be surprising if there were not commercial activities attributable to a number of them. Given their important place as gatekeepers to a number of subsidiaries it can be argued that their omission from coverage under the Act creates a potential for significant market distortion.

The SISTIC case also provides a useful example of the way the activities of statutory boards and GLCs are intertwined in Singapore. In the live entertainment industry, for example, there is almost blanket coverage of government-linked bodies, from venue operator to event organiser to ticketing service provider to ticketing infrastructure provider to the ticket buying public. It is not difficult to see how critics gain the impression that government entities dominate the sector in Singapore. Further investigation indicates that there is the well-documented propensity for government involvement throughout all levels of a number of significant industries. The SISTIC example above is just one such case. The Government's substantial holdings through Temasek in and around the aviation industry are another. From 51% of Singapore Airlines (and a golden share for the Ministry of Finance) to Singapore Airlines Cargo, to 100% of regional player Silk Air, to its stake in Tiger Airways (49% Singapore Airlines, 11% Temasek), to 90% of SIA Engineering. In June 2011 SIA Engineering Company ("SIAEC") announced that it had signed a '3+2'-year agreement with Singapore Airlines Cargo to provide comprehensive services in a move which would add S\$358m revenue to its order books. This was said to be the renewal of a long-term agreement. (SIAEC emphasised, however, its client base of 80 international carriers and aerospace equipment manufacturers and stated that 89% of its revenues were derived from outside the Singapore Airlines Group).<sup>113</sup> Temasek also owns 100% of New Aviation; and Singapore Airlines, 100% of the Singapore Flying College. In August 2011, Singapore Airlines announced that would be starting a new budget airline called "Scoot". The intricacies of government involvement in telecommunications with SingTel, "Asia's largest telecommunications group" which has interests in fixed, mobile, data, internet, information communications, technology, satellite and pay TV, as well as high fibre services with distinctive applications focussing on entertainment, convergence and productivity enhancement for home and business is outside the scope of consideration here but is another example of government involvement throughout a sector.

Although more general competition policy issues are outside the scope of this paper, it has been suggested that the presence, scale, and scope of GLCs in the Singapore domestic

---

<sup>113</sup> See SIA Engineering Company, Press Release, "SIA Engineering Company Signs \$358 million Services Agreement with SIA Cargo" (28 June 2011), online: SIAEC <[http://www.siaec.com.sg/press\\_release/2011/28Jun2011.pdf](http://www.siaec.com.sg/press_release/2011/28Jun2011.pdf)>.

economy raises the issue of “whether many markets are contestable”.<sup>114</sup> Given the ubiquitous nature of GLCs in some domestic industries it is likely that high entry barriers exist and oligopolistic behaviour may be facilitated by the market structure, as suggested by Williams.<sup>115</sup> It is likely that both structural and strategic barriers to entry exist in some industries.<sup>116</sup> Structural barriers to entry are basic industry conditions such as cost and demand which influence economies of scale and network effect. Strategic barriers are those which are intentionally created or enhanced by the incumbent firm for the purpose of deterring entry such as exclusive dealing arrangements.<sup>117</sup> A small window into the web-like relationships and dealings between the Singapore statutory boards and GLCs was opened in the SISTIC case and to the credit of the regulator the offending parties were taken to task and ultimately punished. Whether this will occur in other cases is still to be seen. The CCS only has power to act in cases where it suspects breach of the Act. It does not have power to act to deal with the barriers to entry in the absence of overt behaviour which would constitute abuse of dominance. These issues arise aside from issues related to whether government entities receive any preferential treatment in Singapore, which was briefly touched on above.

Finally, the will and ability of the CCS to take action against government entities has been raised previously. The SISTIC case was the first case relating to the abuse of dominance in Singapore. Despite fears expressed about the CCS taking action against GLCs in the context of its placement within the Ministry of Trade and Industry, along with a number of GLCs,<sup>118</sup> action was in fact taken against government bodies, albeit in response to a complaint from an event organiser. Whether the CCS will initiate action against a GLC absent a complaint is an issue which remains to be resolved. It also remains to be seen whether this is a one-off event or the start of a general trend towards even-handed enforcement of the Act against government and private business entities. As an initial example, however, it is a positive indication that government liability under the Act is not illusory.

---

<sup>114</sup> See Williams, *supra* note 32 at 532.

<sup>115</sup> See *ibid.*

<sup>116</sup> Such as, for example, Broadcasting and Telecommunications.

<sup>117</sup> However, in some situations exclusive dealing arrangements may be efficiency enhancing. See OECD, *Competition and Barriers to Entry*, Policy Brief, January 2007 (2007), online: OECD <<http://www.oecd.org/dataoecd/9/59/37921908.pdf>>.

<sup>118</sup> Williams, *supra* note 32 at 532.