ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 2 Issue 2 **March 2006**

Exporting Article 82 EC to Singapore: Prospects and Challenges

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Section 47 of Singapore's recently enacted Competition Act 2004 prohibits commercial conduct which 'amounts to the abuse of a dominant position in any market in Singapore', effectively transplanting a legal standard which originated from Article 82 EC into the domestic legal landscape. This article identifies and explains the key modifications which have been made by Singapore legislators to the Anglo-European legal framework for Article 82 EC, while exploring the difficulties that are likely to arise from the wholesale importation of established Article 82 EC jurisprudence into this branch of Singapore's new Competition Law in light of the following domestic economic characteristics: (1) a broad spread of government-linked companies occupying entrenched positions of market leadership in most major economic sectors; (2) the small size of the Singapore's domestic market and the substantial presence of export-driven industries serving regional and international markets; (3) monopolistic and oligopolistic market conditions in several significant high-value tertiary industries, exacerbated by a recent wave of merger and consolidation activity; (4) the co-existence of separate sectoral regulatory frameworks for the telecommunications, media and energy industries which have been excluded from the scope of the Act, along with a host of other statutorily-prescribed exceptions; and (5) a deeply-entrenched laissez faire business culture which has given market-leading undertakings considerable commercial freedom prior to the introduction of the new Competition Law.

INTRODUCTION

The recent introduction of Competition Law to Singapore's legal system heralds a new era of commercial jurisprudence for the small island nation and the Asian region. In the 40 years since its independence from British colonial rule, Singapore's economic development has been supported by a strong common law tradition and a progressive legal framework based on regulatory models drawn from other developed countries from around the world. With the Competition Act 2004 coming into force on 1 January 2005, Singapore has joined the ranks of many mature market economies in using a legislative instrument to promote market efficiency, complement sectoral deregulation, attract foreign investment, and propel economic growth.[1] While the new laws were

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[1] The Singapore Competition Commission was established on 1 January 2005 to draft the Guidelines necessary to administer the Competition Act 2004. The Act will be implemented in phases, with the prohibitions against anti-competitive agreements and conduct which abuses a dominant position coming into force on 1 January 2006, and the remaining provisions concerned with mergers and acquisitions taking effect at least 12 months thereafter. See the Competition Commission of Singapore Guideline on the Major Provisions 2005, at paragraph 1.3, available online at http://www.ccs.gov.sg/Guidelines/index.html.

passed pursuant to Singapore's obligations under a Free Trade Agreement with the United States that was signed in 2003,[2] the regulatory model eventually adopted was taken from the United Kingdom's Competition Act 1998 and its European roots.[3]

Section 47 of Singapore's Competition Act 2004 prohibits any conduct which 'amounts to the abuse of a dominant position in any market in Singapore', reflecting a legislative choice to transplant the legal standard articulated in Article 82 EC into the domestic legal landscape. But just how will the various conceptual intricacies associated with Article 82 EC take root in Singapore, whose geo-political and socio-economic circumstances are considerably different from those found within the European Community?

Given the theoretical scope and flexibility inherent in the notion of an 'abuse of dominance', it will be interesting to predict the direction in which this branch of the new Competition Law will develop in light of the following features of Singapore's commercial environment and legal landscape: first, there exists a broad spread of government-linked companies occupying entrenched positions of market leadership in most major economic sectors;[4] second, Singapore has a small domestic economy and a substantial number of export-driven industries serving regional and international markets; third, there are high degrees of market concentration in several significant high-value tertiary industries, exacerbated by a recent wave of merger and consolidation activity; fourth, separate sectoral regulation currently exists for the telecommunications, media and energy industries[5] which have been carved out from the scope of the Act, along with a host of other statutory exceptions identified in the Act; and fifth, the absence of legal prohibitions against anti-competitive behaviour prior to the Competition Act 2004 has fostered a relatively *laissez faire* commercial culture in which

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[2] See Chapter 12 of the US-Singapore Free Trade Agreement, entitled 'Anti-Competitive Business Conduct, Designated Monopolies, and Government Enterprises', available from the Singapore Ministry of Trade and Industry's website at http://www.fta.gov.sg/fta/pdf/FTA_USSFTA_Agreement_Final.pdf.

[3] Many of Singapore's other commercial law statutes have been modelled closely after corresponding English legislation. Most of these statutes are available online at the Attorney General's Chambers' website at http://statutes.agc.gov.sg/.

[4] Established by the Singapore Government in 1974, Temasek Holdings is a holding company with stakes in most major sectors of the economy, with more than 50% of its S$90 billion portfolio invested in Singapore-based assets. Among its shareholdings in 2004 were stakes in the telecommunications and media sector (SingTel [68%], ST Telemedia [100%], MediaCorp [100%]), the banking sector (DBS [28%]), property developers (CapitaLand [45%], Raffles Holdings [36%]), the airline sector (Singapore Airlines [57%]), the shipping sector (Neptune Orient Lines [68%]), the energy sector (Singapore Power [100%], Power Seraya [100%], Senoko Power [100%], Tuas Power [100%]), and the engineering and infrastructure sectors (ST Engineering [55%], Keppel Corp [32%], SembCorp Industries [51%]). For more detailed information relating to the Singapore government's corporate stakeholdings in Singapore and in neighbouring countries, see http://www.temasek.com.sg/our_investments/linked_companies.htm.

[5] The telecommunications, media and energy industries are subject to sector-specific competition laws which include prohibitions against conduct which amounts to the abuse of a dominant position. See sub-section 8.2 of the Telecom Competition Code 2005, sub-section 6.4 of the Media Market Conduct Code, and section 51 of the Electricity Act 2001.

local businesses have become accustomed to a high degree of unfettered commercial freedom[6] in their dealings with rivals, suppliers, distributors and customers.

It is clear that the transplantation of Article 82 EC into Singapore's legal system will require the Competition Commission of Singapore (CCS) to carefully scrutinise the basic policies underpinning the array of principles which have evolved from the decisions of the European Commission, the Court of First Instance and the European Court of Justice: how markets are defined and how market power is measured; which quantitative thresholds of market share indicate a position of dominance; how to distinguish between the exercise and abuse of a dominant position; how broadly or narrowly to define the scope of the dominant undertaking's 'special responsibility'; which forms of competitive behaviour (pricing and output decisions, vertical restraints, refusals to deal etc.) to prohibit a dominant undertaking from engaging in; how situations of collective or joint dominance should be dealt with, and so forth.

This paper will examine some of these issues, paying particular attention to those features of the Singapore economy which are likely to pose challenges to the wholesale importation of Article 82 EC jurisprudence. The attractiveness of the Article 82 EC legal standard as a legal instrument to circumscribe the behaviour of dominant undertakings will be considered, while the key modifications which Singapore legislators have made to Chapter II of the UK Competition Act 1998 will be examined and explained below. The first modification involves a rewording of the first example of specific conduct which amounts to an abuse of a dominant position.[7] The second involves an expansion of the definition given to the concept of a 'dominant position'. In addition, the Singapore Competition Commission will probably face difficult regulatory challenges in interpreting and applying the Article 82 EC standard – which has been developed primarily in the context of single-firm dominance scenarios and a multi-state Common Market – to a commercial landscape characterised by oligopolistic concentrations and transnational geographical markets which extend beyond its regulatory jurisdiction. A fundamental issue of regulatory philosophy will have to be addressed, consciously or otherwise, by the Competition Commission of Singapore: to what extent can a behavioural standard (prohibiting *conduct* which amounts to an 'abuse of a dominant position') be effectively applied to a market whose *structural* features dictate how firms behave when in competition with each other?

THE PROHIBITION OF CONDUCT AMOUNTING TO AN 'ABUSE OF A DOMINANT POSITION' UNDER SECTION 47 OF THE SINGAPORE COMPETITION ACT 2004

Before examining the issues arising from the transplantation of the language used in Article 82 EC into Singapore's legal framework, it may be useful to scrutinize the relevant legislative provisions which set out the features of this statutory prohibition.

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[6] Until the enactment of the Competition Act 2004, the only area of Singapore Law which dealt with competition-related matters was limited to the Common Law restraint of trade doctrine as applied to contractual restrictions in employment and sale of business transactions. See, for example, *National Aerated Water v Monarch* [2000] 2 SLR 24.

[7] See text accompanying n 38.

Section 47 of the Act is framed in the following manner:[8]

> '(1) Subject to section 48, any conduct on the part of ***one or more undertakings*** which amounts to the ***abuse of a dominant position*** in any market in Singapore is prohibited.
>
> (2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in –
>
> (a) ***predatory behaviour towards competitors;***[9]
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
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> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
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> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
>
> (3) In this section, "dominant position" means ***a dominant position within Singapore or elsewhere***.'[10]

Section 48 of the Competition Act 2004 provides that the prohibition in section 47 'shall not apply to such matter as may be specified in the Third Schedule'. The Third Schedule of the Act excludes the following categories of subject matter from the Section 47 prohibition:

- Tasks performed by undertakings 'entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly'.[11]
- Conduct carried out 'in order to comply with a legal requirement' – any requirement 'imposed by or under any written law'.[12]

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[8] Section 47 is the principal provision of 'Part III (Competition), Division 3 (Abuse of dominant position)' of the Competition Act 2004.

[9] Emphasis added. The legislative language used in this example is a deliberate departure from section 18(2)(a) of the UK Competition Act 1998 and Article 82(a) of the EC Treaty. See text below accompanying n 38.

[10] Emphasis added. The legislative language here is different from that found in Section 18(3) of the UK Competition 1998, which defines 'dominant position' to mean 'a dominant position within the United Kingdom … or any part of it'. See text accompanying n 45.

[11] See Article 86(2) EC. The CCS has indicated that it intends to apply this exclusion very narrowly, and that an undertaking seeking to benefit from the exclusion have to satisfy the CCS that (i) it has been entrusted with the operation of a 'service of general economic interest or having the character of a revenue-producing monopoly', and (ii) show that the application of the Section 47 prohibition would obstruct the performance, in law or in fact, of the particular task entrusted to it. Further details explaining the scope of this exclusion can be found in Paragraphs 12.1 to 12.8 (Annex D) of the *CCS Guideline on the Section 47 Prohibition*. The Guideline is available online from the Competition of Singapore's website at http://www.ccs.gov.sg/Guidelines/index.html.

[12] See Schedule 3, Section 5, of the UK Competition Act 1998.

- Activities specified in an order by the Minister where necessary in order to avoid conflict with Singapore's international obligations.[13]
- Activities specified in an order by the Minister where he is satisfied that 'there are exceptional and compelling reasons of public policy why the section 47 prohibition ought not to apply in particular circumstances'.[14]
- Agreements, or conduct, that are subject to competition regulation under 'other written law, or code of practice issued under any written law' which gives another regulatory authority jurisdiction over such matters.[15]
- Agreements or conduct relating to 'any specified activity', which are defined in the Third Schedule to refer to the supply of statutorily regulated postal services, piped potable water, wastewater management services, regulated scheduled bus services, regulated rail services, and regulated cargo terminal operations.
- Agreements or conduct relating to statutorily regulated clearing house activities

Despite the extensive list of exceptions which qualify the scope of the Section 47 prohibition, the broad similarities between its basic legislative structure and Article 82 EC remain in tact. Merely acquiring or occupying a position of dominance in the market is unobjectionable, it is the *abuse* of dominance which is prohibited.[16] The typical scenario in which this prohibition might apply involves the unilateral conduct of a single undertaking that constitutes the abusive conduct, though the legislation contemplates the possibility of a dominant position being held jointly or collectively by two or more undertakings.[17] All but the first of the examples of abusive conduct included in Section 47(2) have been reproduced from the text of Article 82 EC.[18]

COMPARING THE SECTION 47 PROHIBITION WITH ARTICLE 82 EC – KEY SIMILARITIES AND DIFFERENCES

Many aspects of Singapore's enactment of the Section 47 prohibition also draw inspiration from the sizeable body of European jurisprudence which has developed around Article 82 EC. The substantive principles which buttress this statutory provision are reflected in the Competition Commission of Singapore's Guideline on the Section 47 Prohibition ('the CCS Guideline'), a non-binding explanatory statement prepared by the regulator that sets out the framework of legal principles relevant to the interpretation and application of these statutory provisions.

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13 See Schedule 3, Section 6, of the UK Competition Act 1998.

14 See Schedule 3, Section 7(4), of the UK Competition Act 1998 which enables the Secretary of State to exclude the application of the Chapter II prohibition if he 'is satisfied that there are exceptional and compelling reasons of public policy' for doing so.

15 See n 5 and text accompanying n 59.

16 See Paragraph 2.1 of the *CCS Guideline on the Section 47 Prohibition* which explicitly states that the Section 47 prohibition 'does not prohibit undertakings from having a dominant position or striving to achieve it'.

17 See discussion below at text accompanying notes 60 to 69.

18 The deliberate departure from the legislative language used in the European and UK models will be examined in the section below. See n 9 and text accompanying n 38.

Firstly, the Guideline recognises that dominant undertakings, by virtue of the market power they possess, have 'the potential to significantly impact competitive conditions in Singapore'.[19] This provides the policy justification for prohibiting dominant undertakings from engaging in commercial behaviour that would have a detrimental impact on the competitive process. An even stronger statement of this policy was found in the draft version of the Guideline, where there was explicit recognition of the European notion of a dominant undertaking being placed 'under a special responsibility not to distort competition'.[20] This change in the language used to describe the jurisprudential basis for subjecting dominant undertakings to behaviourial restrictions not imposed on their non-dominant competitors should not have a significant effect on the substantive scope of the Section 47 prohibition. It is likely that the stringency of the restrictions placed on dominant undertakings should vary according to their degree of dominance, with incrementally onerous 'responsibilities' towards the competitive process thrust upon those firms which possess progressively greater levels of market power.[21]

Secondly, the Guideline describes conduct which amounts to an abuse of a dominant position as instances of 'exclusionary behaviour' – where the dominant undertaking behaves in a way which excludes its competitors from competing effectively in a relevant market.[22] This terminology is used to encompass a wide range of business behaviour, including predatory pricing, certain discount schemes, refusals to supply and certain vertical restraints.[23] Broad similarities exist between the definitions given to these categories of potentially abusive conduct in the CCS Guideline and well known precedents from the European Competition Law framework. For example, the factors identified in paragraphs 11.3 to 11.10 of the CCS Guideline as relevant to assessing whether or not an undertaking's behaviour amounts to predatory pricing closely resemble the principles which can be found in the European case law: pricing below

[19] See paragraph 4.1 of the *CCS Guideline on the Section 47 Prohibition*.

[20] This language was not included in the current (revised) version of the CCS Guideline. See Paragraph 4.2 of the CCS Draft Guideline on the Section 47 Prohibition, available from the archives of the Competition Commission's website at: http://www.ccs.gov.sg/PublicConsultation/Archives/index.html. This idea of a 'special responsibility' owed by the dominant firm towards the competitive process was first articulated by the European Court of Justice in Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission* [1985] 1 CMLR 282 at para 57 ('a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market').

[21] This is consistent with the emerging concept of 'super-dominance' in the European case law, where an undertaking approaching the status of an actual or quasi-monopoly has a particularly onerous special responsibility imposed upon him, such that it is more likely to be found to have abused its dominant position than a dominant undertaking with a lesser degree of market power. See Cases C-395 & 396/96P *Compagnie Maritime Belge v Commission* [2000] CMLR 1076 and Case T-228/97 *Irish Sugar v Commission* [1999] 5 CMLR 1300.

[22] See paragraph 4.3 of the *CCS Guideline on the Section 47 Prohibition*, which also provides that, 'such conduct may be abusive to the extent that it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market'.

[23] A more detailed exposition of the various types of commercial conduct which may amount to an abuse can be found in Annex C (paragraphs 11.1 to 11.31) of the *CCS Guideline on the Section 47 Prohibition*.

average total cost of production,[24] intention to harm competition by eliminating a competitor, and the feasibility of recouping losses.[25]

A conscious effort appears to have been made by the CCS to avoid all references in the Guideline to the European concept of 'exploitative' abuses of a dominant position – where the undertaking exploits his market power to the detriment of consumers by, for example, imposing unfair prices or other trading conditions.[26] This reflects an intention to reject part of the historical and philosophical roots of the European model, whose creators expressed an unwillingness to tolerate acts of consumer exploitation by dominant undertakings by including descriptions of such conduct as examples of abusive conduct in sub-paragraphs (a) and (b) of Article 82.[27] Singapore's decision to limit the scope of the Section 47 prohibition to exclusionary behaviour, or anti-competitive conduct which is detrimental to the competitive process rather than to consumers directly, is further evidenced by the rewording of the example sub-paragraph (a) to remove the reference to 'unfair purchase or selling prices'. This is discussed further below.[28] Furthermore, the CCS's treatment of price discrimination as an instance of abusive conduct is likely to differ considerably from the approach taken in Europe: geographical price discrimination and its negative impact on market integration is not a real concern for a small country like Singapore. Paragraph 11.15 of the CCS Guideline makes it abundantly clear that, 'price discrimination may raise issues under the Section 47 prohibition only where there is evidence that it is used to harm competition'. In other words, price discrimination by a dominant undertaking, on its own, will not amount to an abuse of a dominant position. Price discrimination amounts to abusive conduct only if, for example, it is used as a device to engage in predatory or

[24] The modified version of the Areeda-Turner test adopted by the ECJ in Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359 has been incorporated into the CCS Guideline.

[25] While the ECJ did not require proof of the dominant undertaking's chances of recouping its losses was deemed unnecessary (on the facts of the case, at least, given the near monopoly position it enjoyed in the aseptic market) in Case C-333/94P *Tetra Pak International SA v Commission (Tetra Pak II)* [1997] 4 CMLR 662, this factor has been implicitly endorsed in *Compagnie Maritime Belge* (by the Advocate General, at paragraph 136: op cit n 21) and *AKZO* (by the ECJ, at paragraph 71 of its judgment: op cit n 24).

[26] See, for example, the (unsuccessful) action brought by the European Commission against UBC for what the former considered to be excessive pricing of the latter's bananas in Case 27/76 *United Brands v Commission* [1978] 1 CMLR 429.

[27] The very small number of cases involving allegations of unfair pricing suggests that the European Commission does not consider this category of exploitative abusive conduct to warrant a lot of its attention. Its preference to focus its attention on anti-competitive abusive conduct was made clear in its 1994 Competition Report: XXIVth Report on Competition Policy (Commission, 1994), part 207.

[28] See text accompanying n 38.

selective pricing[29], to implement an exclusionary discount scheme[30], or to apply a margin squeeze[31] which distorts competition in a downstream market.

Thirdly, the Guideline incorporates the concept of the 'objective justification' as a legitimate defence for engaging in conduct which might otherwise amount to an abuse of dominance. Given that block exemptions are not available in relation to the Section 47 prohibition, an undertaking whose allegedly abusive conduct does not fall within the exclusions of the Third Schedule can only validate its actions if it is, 'able to objectively justify its conduct'.[32] The CCS Guideline articulates a number of related principles which appear to have been extracted from European case law. For example, the following illustration from paragraph 4.4 of the Guideline reaffirms the dominant undertaking's entitlement to engage in legitimate business behaviour and protect its own commercial interests, but qualifies this assertion with principles that bear a strong resemblance to the decisions which have been taken by the European Commission and Courts:

> 'For example, a refusal to supply might be justified by the poor creditworthiness of the buyer. However, the dominant undertaking will still have to show that it has behaved in a proportionate manner in defending its legitimate commercial interest.[33] It should not take more restrictive measures than are necessary to do so. The CCS may also consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct.[34] It will still be necessary for a dominant undertaking to show that its conduct is proportionate to the benefits claimed. Such conduct will not be allowed if its primary purpose is to harm competition.'

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[29] It would amount to abuse of a dominant position where a discriminatory pricing structure is used to set predatory prices or to implement, in the case of an undertaking with a very high market share, selective price cuts to lure customers away from the competitors of the dominant undertaking.

[30] The discriminatory prices charged could arise from a scheme of 'fidelity discounts' (see paragraph 11.13 of the *CCS Guideline on the Section 47 Prohibition*) aimed at maintaining the loyalty of selected customers, thereby creating an exclusionary effect which forecloses the market to competitors.

[31] A 'margin squeeze' may be executed through a price discrimination practice whereby the dominant undertaking charges its competitors, in a downstream market, higher prices for raw materials than the prices at which those raw materials are available to the dominant undertaking's own downstream operations. The strategy here is to 'squeeze' these downstream competitors out of the market by raising their costs of production and disable them from setting competitive selling prices. See *Napier Brown-British Sugar* [1990] 4 CMLR 196.

[32] See paragraph 4.4 of the CCS Guideline on the Section 47 Prohibition, which also requires the undertaking to show that 'it has behaved in a proportionate manner in defending its legitimate commercial interest' and that it has not taken 'more restrictive measures than are necessary to do so'.

[33] This is reminiscent of the European Commission's decision in *BBI/Boosey & Hawkes: Interim Measures,* OJ 1987, L282/35, [1988] 4 CMLR 67, which endorsed the principle of 'proportionality' as a limit on the dominant firm's ability to act when defending its commercial interests.

[34] The reference to 'benefits' arising from the dominant firm's commercial behaviour is ambiguous, but could potentially encompass justifications relating to public interest objectives and efficiency gains from the allegedly abusive conduct. It remains to be seen whether the CCS will adopt the restrictive approach of the European case law towards, for example, claims that tie-ins by a dominant firm are valid on grounds of ensuring public safety. See Case T-30/89 *Hilti AG v Commission* [1992] 4 CMLR 16, and Case C-333/94P *Tetra Pak International SA v Commission (Tetra Pak II)* [1997] 4 CMLR 662.

Fourthly, the Guideline makes it clear that an abuse of a dominant position can take place in a related market that is distinct from the market in which the position of dominance is held. The Section 47 prohibition can therefore be infringed by a dominant undertaking which engages in conduct in a related market, either to strengthen its existing dominant position or to gain a competitive advantage in the related market by leveraging upon its existing dominant position. Using scenarios which bring to mind classic examples from European case law, the following table sets out a few scenarios in paragraph 4.6 of the CCS Guideline to illustrate the various categories of conduct which fall within the rubric of 'Abuse in Related Markets':

Scenarios	Market A	Market B
Y may be dominant in Market A and use a predatory strategy to eliminate competitors from Market A.	Dominance Abuse Effect	
Y may be dominant in Market A, and it provides the raw material essential to production in Market B, in which it is also a market player. To strengthen its own position in Market B, it may abuse its dominant position in Market A, by refusing to supply the raw material in question to its competitors in Market B.[35]	Dominance Abuse	Effect
Y may be dominant in Market A, but not dominant in the related Market B. Y may offer special discounts in Market B, to buyers who remain loyal to it in Market A, so as to help maintain its dominant position in Market A.[36]	Dominance Effect	Abuse
Y may be dominant in Market A. It may try to leverage its market power in Market A to Market B, by tying the sale of its products in Market A to the sale of its products in the related Market B.[37]	Dominance	Abuse Effect

STRUCTURAL MODIFICATIONS TO THE LEGAL ARCHITECTURE OF ARTICLE 82 EC

The first major change made to the language used in Article 82 EC when it was imported into Singapore has significant implications on the basic character of behavioural restrictions placed on dominant undertakings which fall within the scope of Section 47 of the Competition Act 2004. A conscious effort was made by the draftsman to reword the first example of abusive conduct in Section 47(2)(a) of the Act[38] when

[35] Recall Cases 6 & 7/73 *Istituto Chemioterapico Italiano Spa & Commercial Solvents v Commission* [1974] 1 CMLR 309.

[36] Recall Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] 5 CMLR 32.

[37] Recall Case C-333/94P *Tetra Pak International SA v Commission (Tetra Pak II)* [1997] 4 CMLR 662.

[38] See text accompanying n 9.

the other portions of Article 82 EC were imported into Singapore's statute books. The notion that an abuse of dominance could be established from the conduct of a firm which charged 'unfair selling prices' was viewed as an uncomfortably broad proposition. The selling price could be 'unfair' either because it is exploitatively high to the detriment of consumers,[39] or extremely low to the extent that it has the effect of driving competitors out of the market.

The proponents of the Act took the view that dominant undertakings should not be prohibited from charging high prices if they were minded to do so. A statutory prohibition of this sort was deemed unnecessary given the existence of sectoral regulators responsible for supervising those industries involved in the provision of basic utilities and public services. These firms would have to obtain the approval of their respective government regulators before raising their prices in any event. For those dominant undertakings which are not subjected to any form of price regulation, the existence of such a fetter on their price-setting freedom was seen as fundamentally contradictory to the operation of free market principles. Enacting a Competition Law entailed a commitment to the efficacy of the market's ability to respond to excessively high prices: the maintenance of these price levels by a dominant undertaking would serve as a signal, according to basic economic theory, for new firms to enter the market, assuming there are no barriers to market entry, and bring prices down subsequently. This reliance on the self-correcting mechanisms of the market implicitly reflects a belief that no significant barriers to market entry exist in most sectors of the Singapore economy, as well as the recognition that it would be politically unpalatable for the Competition Commission to function as a *de facto* generic price regulator with quasi-consumer-watchdog functions.[40]

Extremely low price levels maintained by a dominant undertaking, on the other hand, were readily recognised as a very legitimate threat to the integrity of the competitive process – especially if they were in furtherance of below-cost pricing strategies aimed at eliminating competitors from the market in the short term, thereby enabling the dominant undertaking to subsequently raise its prices to recuperate its initial losses. The need to identify and retain predatory pricing as an example of abusive conduct resulted in the rewording of Sub-Section 47(2)(a) which now declares 'predatory behaviour towards competitors' as an example of commercial conduct which falls within the scope of the statutory prohibition. The language used in this example of prohibited conduct extends beyond classic textbook scenarios of below-average-variable-cost predatory pricing, potentially encompassing any conduct by the dominant undertaking

[39] See *United Brands v Commission*, op cit n 26.

[40] This is a role which the Competition Law authorities have had to assume in light of the cultural and historical background to Article 82 EC. See discussion above at text accompanying notes 26 to 28. In its action against the French organizers of the 1998 World Cup, the Commission made it clear that its jurisdiction in enforcing Article 82 EC extended to the behaviour of the French body which issued tickets in a way which discriminated against fans who were not resident in France, even though the dominant undertaking received no commercial advantage from the way it behaved: 'Article 82 can properly be applied, where appropriate, to situations in which a dominant undertaking's behaviour directly prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition'. See *1998 World Cup* [2000] 4 CMLR 963 at para 100.

which is specifically targeted towards the elimination of particular competitors through means unrelated to the efficiencies enjoyed by the dominant undertaking. Fidelity or loyalty rebates, or certain selective price-matching or price-beating schemes,[41] would also fit into this category of unlawful predatory conduct.[42] Where the commercial conduct in question involves below-cost pricing, it appears from paragraphs 11.3 to 11.10 of the CCS Guideline that the analytical structure adopted by the ECJ in *AKZO*[43] will be adopted when determining if the Section 47 prohibition is violated or not.

The other significant change made to the legal architecture of Article 82 EC lies in the broader definition given to the concept of a 'dominant position'[44] under the Competition Act 2004. The deliberate inclusion of a specific statutory provision in Section 47(3) which defines 'dominant position' to mean a dominant position held 'within Singapore *or elsewhere*'[45] dramatically extends the breadth of the Section 47 prohibition. As drafted, the new law could be used against commercial entities which, while lacking sufficient market power in the domestic market to enjoy a dominant position within Singapore, nevertheless occupy a position of market dominance in a market outside of Singapore. Under this expansive notion of 'dominance', a firm could qualify as a 'dominant undertaking' without having a significant market presence, or any market presence at all, within Singapore. This state of affairs could potentially arise in at least two types of markets. Firstly, the dominant position may be held by an undertaking in a foreign market geographically situated in another country or territory which is unconnected to Singapore.[46] Secondly, the dominant position could be held by an undertaking in a transnational market which encompasses a number of adjacent sovereign states which include the island of Singapore, but with most of its customers located outside of Singapore and with only a token presence within the Singapore national market.[47]

The extra-territorial dimensions to such a broadly-drafted statutory provision create potentially difficult, but interesting, conceptual challenges to the interpretation,

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41 See *Irish Sugar v Commission*, op cit n 21.

42 See paras 11.11–11.13 (discounts) and 11.14–11.17 (discriminatory pricing) in Annex C of the *CCS Guideline on the Section 47 Prohibition*.

43 Following the test for predatory pricing articulated by the ECJ in *AKZO* (op cit n 24), pricing ones goods or services below the undertaking's average variable cost will be presumed to be predatory (unless there is some objective justification – such legitimate loss-leading price strategies or short-run promotions to introduce new products), while pricing above its average variable cost but below its average total cost will only be predatory if the pricing strategy is part of a plan to eliminate a competitor (i.e. a 'predatory intent').

44 Paragraph 3.3 of the *CCS Guideline on the Section 47 Prohibition* defines a 'dominant position' as one in which the undertaking has 'substantial market power', and 'market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels'.

45 See text accompanying n 10.

46 For example, it could be a foreign firm which is the market leader in China or have a dominant position in the Middle Eastern regional market.

47 For example, it could be a multi-national firm which operates in the various member states which comprise the ASEAN (Association of South East Asian Nations) grouping of countries, competing in the region against other firms serving the same area, but with most of its business coming from clients outside of Singapore.

application and enforcement the Section 47 prohibition. Apart from the usual blend of public and private international law concerns regarding the extra-territorial application of national laws by the Singapore Competition Commission – whether there is a proper basis for prescriptive or subject matter jurisdiction, adjudicatory jurisdiction and enforcement jurisdiction – there are a number of fundamental questions regarding the operational scope of the provision which need to be resolved. These include, for example, the question of whether the conduct impugned as an abuse of a dominant position has to take place within Singapore, or can a violation of Singapore's Competition Law be established from conduct which is carried out in the territory where the firm enjoys its dominant position, or any other foreign place beyond Singapore's territorial boundaries? Is the Section 47 prohibition violated so long as there are adverse *effects* on competition felt within Singapore, regardless of where the conduct which amounts to an abuse of a dominant position takes place?[48]

It seems clear that that the legislative intent behind the statutory prohibitions in the Competition Act 2004 was to extend their reach to undertakings operating both within and beyond Singapore's national limits, regardless of where the prohibited conduct actually occurred. Section 33 of the Act makes this apparent by declaring that the statutory prohibitions against anti-competitive conduct will apply notwithstanding that:

> '(a) an agreement referred to in section 34 has been entered into outside Singapore;
>
> (b) any party to such agreement is outside Singapore;
>
> (c) **any undertaking abusing the dominant position** referred to in section 47 **is outside Singapore**;
>
> (d) a merger referred to in section 54 has taken place outside Singapore;
>
> (e) any party to such merger is outside Singapore; or
>
> (f) any other matter, practice, or action arising out of such agreement, dominant position or merger is outside Singapore'

The practical and legal ramifications arising from the scope of the Section 47 prohibition have yet to be encountered in Singapore, but they clearly raise issues which fall outside the traditional parameters of Article 82 EC, whose scope of application has always been understood by the European Commission and the Courts to be confined to economic entities who occupy a dominant position within the European Community

[48] It is unclear to what extent the CCS intends to adopt a full-blown 'effects doctrine' when determining the extent to which the Section 47 prohibition should apply extra-territorially, or whether it will seek to localize the anti-competitive behaviour by attributing it to a domestic undertaking – via, for example, the 'single economic entity' doctrine, see Case 48/69 *ICI v Commission (Dyestuffs)* [1972] ECR 619. Paragraph 2.6 of the *CCS Guideline on the Section 47 Prohibition* acknowledges that 'the section 47 prohibition will also apply where the conduct is engaged in by entities which form a single economic unit, where the single economic unit is dominant in a relevant market'. An explanation of the 'single economic unit' concept can be found in paragraphs 2.7 and 2.8 of the *CCS Guideline on the Section 34 Prohibition*. Similarly, the ECJ did not take the opportunity to embrace the 'single economic entity' doctrine wholeheartedly in *Wood Pulp (I)* [1985] 3 CMLR 474, preferring instead to establish jurisdiction on the basis that there was 'implementation' of the unlawful agreement within the European Community.

or a substantial part of it.[49] Whatever limited experience European Competition Law has had with issues of extra-territoriality has so far extended only to cartel agreements in violation of Article 81 EC[50] and the application of the EC Merger Regulation.[51] It remains to be seen whether the legal principles developed from these cases may be transplanted, adapted and applied effectively to a statutory prohibition that has been modelled after Article 82 EC.

Why was it necessary to enlarge the geographical scope of this prohibition by specifically modifying the definitional aspects of Article 82 EC? As a small and open economy highly dependent on imports to meet domestic consumption, Singapore is vulnerable to anti-competitive conduct perpetrated by foreign-based firms which may have an adverse impact on the local economy.[52] For example, a foreign manufacturing firm occupying a position of market dominance outside of Singapore, but with an operational presence within Singapore, might engage in exclusive dealing arrangements with foreign suppliers of raw materials which could have adverse foreclosure effects on its competitors in Singapore. To some extent, the breadth of the prohibition against abusive conduct provides a mechanism for ensuring that foreign firms which enter the Singapore market are not able to leverage upon their market power outside of Singapore to the detriment of the domestic incumbents. This would provide some assurance to local small and medium enterprises which may not be able to compete effectively against large foreign multi-national entities seeking to establish themselves within the Singapore market.

These changes to the definitional parameters of the Article 82-inspired prohibition against conduct which amounts to an abuse of a dominant position demonstrate a conscious effort by competition policy-makers in Singapore to update this branch of European Competition Law in accordance with contemporary economic thinking, as well as to adjust its scope of application in response to the imperatives of the domestic and regional economic landscape. It is unclear at this stage, however, whether the Competition Commission of Singapore will be able to effectively enforce this prohibition in situations where the dominant undertakings concerned operate entirely

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[49] European case law suggests that the geographic market may be confined to a single Member State, or even just a part of it. See *Nestlé/Perrier* [1993] 4 CMLR M17 and *Michelin (II)* [2002] 5 CMLR 388.

[50] Well known examples include the *Dyestuffs* and *Woodpulp (I)* cartel cases, op cit n 48.

[51] High-profile examples the extra-territorial application of the European Merger Regulation include *Gencor/Lonrho* [1999] 4 CMLR 1076, *Boeing/McDonnell Douglas* [1997] OJ L336/16, and *GE/Honeywell* (Case No COMP/M.2220).

[52] A number of foreign-based undertakings operating within Singapore have questioned the propriety of adopting such a broad definition of 'dominant position' during the public consultation process for the *CCS Guideline on the Section 47 Prohibition*. In response, the CCS issued the following statement: 'A number of contributors have asked why the section 47 prohibition should apply to an undertaking that is dominant in a market outside of Singapore. This is because as a small open economy, Singapore is vulnerable to anti-competitive conduct emanating from overseas. We need to be able to enforce against dominant undertakings, when their conduct distorts competition in a relevant market in Singapore, regardless of whether they are dominant in a market in Singapore or elsewhere.' See paragraph 13 of the "Guidelines Policy Paper" issued by the Competition Commission of Singapore, issued to accompany the First Set of Guidelines of the Competition Act, available online at:
http://www.ccs.gov.sg/Guidelines/Guidelines+Published+and+Policy+Paper.htm.

outside of Singapore.[53] Putting aside the jurisprudential and jurisdictional problems of extending the reach of the Section 47 prohibition beyond Singapore's territorial boundaries, the Competition Commission of Singapore is likely to encounter other, more immediate, challenges in its application of the Article 82 EC framework to the domestic economic environment. The next section of this paper will highlight the structural features of Singapore's domestic economy and explain their likely impact on the scope of the new statutory prohibition against conduct which amounts to an abuse of a dominant position.

CONTEXTUALISING THE SECTION 47 PROHIBITION, AND ITS ARTICLE 82 EC ROOTS, WITHIN SINGAPORE'S DOMESTIC ECONOMIC ENVIRONMENT

With a total population of 4.24 million people (of which only 3.49 million individuals are citizens and permanent residents)[54] housed within a land area of 699 square kilometres, Singapore is largely dependent on imports to meet the consumption demands of its small domestic market. Manufacturing and service-related industries make up significant segments of Singapore's export-oriented economy.[55] A number of high profile consolidations have also taken place in various segments of the rapidly maturing economy – these mergers have produced monopolistic, duopolistic and oligopolistic market conditions over the last 5 years in the public transportation, banking, television and newspaper industries. These characteristics of the domestic economy are likely to have some impact on how the new 'abuse of dominance' prohibition is understood and applied in Singapore.

One of the obvious differences between the commercial landscapes of Singapore and the European states (both individually and collectively) is the large disparity in the size of their respective domestic economies. This will have a significant impact on the market share thresholds used as tentative indicators of the market power to identify those firms which qualify as 'dominant' undertakings. Any market share thresholds used in smaller economies as presumptive indicators of dominance will necessarily have to be higher than those used in larger economies. This is because undertakings operating in smaller economies ought to have some allowance to grow sufficiently in order to properly benefit from economies of scale.

European jurisprudence involving the application of Article 82 EC to the European Community indicates that a dominant position can exist if an undertaking enjoys a

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[53] Investigatory and prosecutorial steps may require the cooperation of national competition authorities in other jurisdictions, who may or may not recognise the extra-territorial application of Singapore's Competition Law. Within the South-East Asian region, only 4 of the 10 ASEAN (Association of South East Asian Nations) member countries (Indonesia, Thailand, Vietnam and, most recently, Singapore) have Competition Law regimes currently in place, though this is expected to increase over time in line with the regional grouping's efforts at achieving some form of economic integration by the year 2020.

[54] Based on 2004 figures (last updated on 22 June 2005) available from the Singapore Department of Statistic's website at http://www.singstat.gov.sg/keystats/annual/indicators.html.

[55] Singapore's Gross Domestic Product in 2004 was S$180,554 million, of which 27% was attributable to the manufacturing sector, while the financial and business services sector contributed 23.5%. Of the total working population of 2.07 million persons, 17.3% were employed in manufacturing industries, 5.2% in financial services and 12.3% in business services. Information available from the website identified in n 54.

market share of 40% upwards.[56] In contrast, the Guidelines issued by the Competition Commission of Singapore indicate that the market share threshold which should be used as a presumptive indicator of dominance is 60% of the relevant market.[57] However, it is unclear to what extent this guideline remains relevant in cases where the relevant geographical market is defined to include territories beyond Singapore's national boundaries.[58] In cases where regional markets are involved, where the players in question may service a much larger multi-national customer base – as a result of Singapore's successful efforts in promoting itself as a regional operational hub for a number of industries – a lower market share threshold may be more a more accurate indicator of an undertaking's position of market dominance.

The potential uncertainties of identifying undertakings which occupy positions of market dominance are further compounded by the pre-existing oligopolistic market structures currently entrenched in various segments of Singapore's economy. These include the cinema, hospital, supermarket, retail petroleum and retail banking sectors. Several oligopolistic or duopolistic markets have already been exempted from the application of the Section 47 prohibition on the basis that they are already subject to adequate sectoral regulation.[59] Where oligopolistic market structures exist, no individual firm is likely to clearly qualify as a dominant undertaking because, by definition, their market shares should fall below 50% and would be very similar to the market shares of their rivals. It is therefore likely that the Competition Commission of Singapore will have to further develop a regulatory framework for applying the Section 47 prohibition to markets where single-firm dominance cannot be established. Given that the Section 47 prohibition clearly envisages the possibility that the 'conduct on the part of one or more undertakings'[60] may amount to the abuse of a dominant position, thereby encompassing multiple-firm dominance scenarios within its ambit, it is quite likely that European conceptions of joint or collective dominance might be of particular relevance to Singapore's Competition Law jurisprudence. This is apparent from paragraphs 3.16 and 3.17 of the CCS Guideline:

> '**Collective Dominance**
>
> 3.16 The section 47 prohibition extends to conduct on the part of two or more undertakings, where there is an abuse of a collective dominant position. A dominant position may be held collectively when two or more undertakings

[56] See Case T-219/99 *British Airways v Commission* [2004] 4 CMLR 1008, where an undertaking was found to occupy a dominant position with a 39.7% market share when all the surrounding circumstances were taken into consideration. The ECJ has held that 'very large shares are in themselves, and save in exceptional circumstances, evidence of a dominant position … That is the situation where there is a market share of 50% … '. This effectively creates a presumption of dominance once there is a market share of 50%, unless there are 'exceptional circumstances' to indicate otherwise, see Case C-62/86 *AKZO Chemie BV v Commission* [1993] 5 CMLR 215 at para 60.

[57] See para 3.8 of the *CCS Guideline on the Section 47 Prohibition.*

[58] See discussion above at text accompanying notes 45 to 53.

[59] See n 5 and text accompanying n 15.

[60] See text accompanying n 8 above.

are linked[61] in such a way that they adopt a common policy in the relevant market. For example, the nature of the market may mean that undertakings might adopt the same pricing policy without ever explicitly agreeing on price. This is sometimes called tacit coordination.

3.17 Tacit coordination is more likely to occur when undertakings are able to align their behaviour in the market. It is more likely to occur when:

- each undertaking is able to monitor the compliance of the other undertakings with the common policy (i.e. transparency);
- the undertakings have incentives to maintain coordinated behaviour over time, so that coordination is sustainable (e.g. because deviations from the common policy are easy to detect and punish); and
- the foreseeable reactions of current and future competitors, as well as of buyers, would not jeopardise the results expected from the common policy (e.g. new entrants, 'fringe' undertakings or powerful buyers could not successfully challenge the common policy).'

The three factors identified above in paragraph 3.17 of the CCS Guideline – market transparency, retaliatory mechanisms, and the absence of competitive constraints from potential competitors or customers – are drawn from European Court of First Instance's decision in *Airtours*.[62] It seems fairly clear that the concept of a 'collective dominant position', in the context of the Section 47 prohibition, is defined in a manner similar to how it has been understood for the purposes of the European Community Merger Regulation, which has been used to block mergers that are likely to result in the creation or strengthening of a collective dominant position.[63] This is in line with the apparently consistent approach which the European courts have taken towards the issue of collective dominance when dealing with cases under Article 82 EC and the merger regulation framework.[64]

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[61] It appears that the Guideline adopts a broad approach of the types of 'links' between undertakings that might give rise to a position of collective dominance. This would probably encompass 'economic links' as understood by the European Court of First Instance in *Italian Flat Glass* (agreements and licences) and *Gencor* ('a relationship of interdependence existing between the parties to a tight oligopoly'). See Cases T-68, 77 & 78/89 *Società Italiana Vetro SpA v Commission (Flat Glass)* [1992] 5 CMLR 302 at para 358, and Case T-102/96 *Gencor Limited v Commission* [1999] 4 CMLR 971 at para 276.

[62] See Case T-342/99 *Airtours plc v Commission* [2002] 5 CMLR 317, at para 62. These factors have also been incorporated into the Horizontal Merger Guidelines (OJ 2004, C31/5, para 41) of the new European Community Merger Regulation (ECMR) (Council Regulation 139/2004/EC, OJ 2004, L24/1).

[63] See Articles 2(2) and 2(3) of the original ECMR (Council Regulation 4064/89, OJ 1989, L395/1).

[64] The cases of the Court of First Instance and the European Court of Justice demonstrate a willingness to apply principles related to the concept of collective dominance developed in the context of the ECMR to cases involving Article 82 EC, and vice versa. For example, the ECJ's ruling in Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] 4 CMLR 829 (at para 221), involving a contested merger between potash manufacturers under the ECMR, has been used to define the concept of collective dominance in Article 82 EC cases. See *Compagnie Maritime Belge* (op cit n 21, at para 41) and *Irish Sugar v Commission* (op cit n 21, at para 46). Conversely, the concept of collective dominance developed in *Italian Flat Glass* (op cit n 61, at para 358), a case brought under Article 82 EC, was applied to *Gencor v Commission* (op cit n 61, at para 273), an ECMR Decision.

While a 'collective dominant position' has been defined as arising in market conditions which are conducive towards tacit coordination between undertakings, the CCS Guideline does not make clear exactly what sort of conduct within these oligopolistic markets will actually amount to an abuse of that collective dominant position. Does tacit coordination between undertakings in an oligopolistic market, in and of itself, amount to an abuse of a collective dominant position?[65] Does conduct which amounts to the abuse of a collective dominant position have to be carried out by the oligopolistic group of undertakings in a collective fashion?[66] Or can there be a unilateral abuse of a collective dominant position by the conduct of just one of these undertakings?[67]

Given the lack of a general consensus as to whether it is even appropriate for Article 82 EC to be used to address the competition problems associated with oligopolistic markets, these are questions which have yet to be satisfactorily resolved by the European case law. It is one thing to pre-emptively forestall the creation or strengthening of oligopolistic market conditions through merger activity, it is quite another to punish non-collusive but nevertheless coordinative behaviour by undertakings operating within an existing oligopolistic environment. It will be difficult to justify why the Law should prohibit parallel commercial behaviour when it is a natural, logical and economically rational response to prevailing market conditions. On the other hand, extending the scope of the 'abuse of a dominant position' concept to encompass an 'abuse of a collective dominant position' by an individual undertaking, where it was enough for a position of collective dominance to arise when there was a 'relationship of interdependence between parties to a tight oligopoly',[68] could give the competition regulator a potentially effective tool in dealing with the sub-competitive

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[65] It seems intuitively unappealing that tacit coordination – in the form of price parallelism, for example – should in itself be a sufficient basis for establishing a violation of Article 82 EC. While undertakings operating in oligopolistic market conditions may have, in theory, the opportunity to charge supra-competitive prices for their goods or services, this will not provide a basis for establishing the abuse of a collective dominant position under the Section 47 prohibition because sub-section 47(2)(a) of the Act, unlike sub-section (a) of Article 82 EC, does not identify 'unfair' or 'excessive' prices as an example of abusive commercial conduct. See discussion above at text accompanying notes 38 to 40.

[66] The few cases in which Article 82 EC has been extended to situations of collective dominance have involved conduct by undertakings whose collective abusive action could have been dealt with under Article 81 EC. See *Italian Flat Glass* (op cit n 61: agreements to fix prices and sales quotas) and *Compagnie Maritime Belge* (op cit n 21: agreement between parties to a liner conference to use 'fighting ships' to target a competitor's customers with selective low pricing practices).

[67] In *Irish Sugar v Commission* (op cit n 21, at para 66), the CFI indicated that an individual undertaking could abuse a dominant position held collectively with one or more other undertakings: 'Whilst the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, *the abuse does not necessarily have to be the action of all the undertakings in question*. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, undertakings occupying a joint dominant position may engage in *joint* or *individual* abusive conduct' (Emphasis added). Such an approach to collective dominance could be viewed as symmetrical to the developments in the area of merger regulation where increasing attention is paid to the possibility of 'non-coordinated' or 'unilateral' effects arising from a proposed merger. See M Motta, 'EC Merger Policy and the Airtours Case' [2000] 4 ECLR 199 and the Horizontal Merger Guidelines (at paragraphs 5 and 25) of the new ECMR (op cit n 62).

[68] See *Gencor v Commission*, op cit n 61.

behaviour of undertakings which co-exist in concentrated markets.[69] Given the existing and nascent oligopolistic features present in a significant number of segments in Singapore's domestic economy, these issues will have to be eventually addressed within the policy framework developed around the Section 47 prohibition.

CONCLUSION

The journey ahead for Competition Law in Singapore is difficult to assess with any degree of certainty at this stage. Despite having grafted very substantial branches of European competition law onto the domestic legal framework, Singapore's domestic version of Article 82 EC may or may not blossom in the same hues as its progenitor. While many features of the jurisprudential canopy erected around the Section 47 prohibition bear a close resemblance to the principles which have evolved from the European case law, significant and deliberately-crafted differences can be found in the foliage of the statutory provisions and the accompanying CCS Guideline.

This paper has identified the principal similarities and differences between Article 82 EC and Section 47 of Singapore's Competition Act 2004, with particular attention paid to the deliberate modifications which have been made to the former in order to accommodate the domestic policy objectives. It remains to be seen how the new statutory prohibition will take root within the local context, though it appears that new law may have opportunities to develop in directions it probably would not have had within the European Community. Express provisions have been made for the extra-territorial application of the prohibition against conduct which amounts to an abuse of a dominant position – thereby raising a number of challenging conceptual and practical issues relating to the interpretation and enforcement of the prohibition by the Competition Commission of Singapore. By pruning away those limbs of Article 82 EC which were concerned with consumer-unfriendly exploitative abuses of market power, the streamlined statutory prohibition also has the potential to evolve into a doctrinally coherent legislative weapon to be deployed against dominant undertakings which engage in destructively anti-competitive commercial behaviour.

The discussion above has also highlighted those aspects of competition regulation which deserve special attention in light of the socio-economic circumstances which characterize the Singapore economy. Both the small size of the domestic economy and the oligopolistic structure of the various market segments raise important considerations relating to the doctrinal scope of the Section 47 prohibition. Once again, there are significant opportunities for the Competition Commission of Singapore to develop a rational and robust policy framework for dealing with the sub-competitive conduct of individual undertakings operating within oligopolistic market environments.

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[69] This would be useful to the competition regulator in a situation where it could prevent an individual member of an oligopoly from engaging in aggressive behaviour to target a new entrant with the objective of protecting and preserving the oligopoly as a whole. Alternatively, the prohibition could be applied to the actions of a single undertaking who unilaterally wishes to signal his pricing preferences to his competitors in an oligopolistic market. See G Monti, 'The Scope of Collective Dominance under Article 82' (2001) 38 CML Rev 131 at p 146.

As a regulatory model for dealing with the anti-competitive conduct of undertakings in possession of significant market power, the legislative and linguistic framework of Article 82 EC has offered a comprehensive and malleable foundation on which to build a competition law framework suited to Singapore's needs and economic goals. The modifications made to the language of Article 82 EC when the Section 47 prohibition was drafted reflect the initial stages of this process of adjustment and adaptation. The *CCS Guideline on the Section 47 Prohibition* is an important supplement to the statutory provisions contained in the main Act, though it is still very much a work in progress and will, in all likelihood, be amended several times down the road. Nourished by the domestic policy objectives which fertilise the ground on which the new laws have been planted, the Section 47 prohibition could, if the right case comes along, sprout a distinctive limb of competition law jurisprudence after the statutory provisions take effect from 1 January 2006 onwards. If and when such an opportunity presents itself, some or all of the issues canvassed in this article will, quite happily, have to be revisited.