Comments on Draft Competition Bill

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1. SUMMARY OF MAJOR POINTS

With this submission we ask that the Ministry of Trade and Industry ("**MTI**") consider our input in relation to the 12 key points outlined below :

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2. STATEMENT OF INTEREST

Baker & McKenzie.Wong & Leow's lawyers form part of Baker & McKenzie's Global Antitrust Group, which is one of the largest antitrust practices in the world, with over 190 lawyers in 68 locations across the world specializing in all aspects of antitrust and competition law.

The practice encompasses the full range of antitrust and competition law advice. It covers merger control, regulatory investigations, and appeals including cartels, antitrust and competition litigation, criminal anti trust, general advisory work, and compliance planning and training, as well as lobbying on antitrust and competition-related issues.

We represent a wide range of clients including local conglomerates and MNC's with substantial activities in Singapore which will be affected by the new Competition Act. We are mindful of and support MTI's objectives, namely to reinforce Singapore's pro-competition business environment, but given our experience in other markets, the risk of over regulation and high regulatory compliance costs accreting over time should always be borne in mind and any uncertainties in the application of the Act should be reduced where possible. Many of our comments are directed towards reducing such uncertainties - Singapore has been lucky so far in having a relatively clear and transparent legal framework under which undertakings can operate easily and we would not like to see this affected by the introduction of the new Competition Act.

In preparing this response, Baker & McKenzie.Wong & Leow has been assisted by the competition team in our London office, to give a UK practitioner's perspective on the draft Bill, whose key provisions have been taken from the UK Competition Act.

3. COMMENTS

This part of the Submission provides more detailed comments on each of our key points below :

3.1. KEY POINT 1 : SECTION 33 - CLARIFICATION OF EXTRA-TERRITORIAL EFFECT THAT THE AGREEMENT, DECISION OR PRACTICE IS, OR IS INTENDED TO BE, IMPLEMENTED IN SINGAPORE

We note that S.33 of the draft Bill provides that as long as an "agreement, dominant position or merger has infringed, or is likely to infringe, any prohibition in Part [III]", it does not matter whether (a) the agreement has been entered into outside Singapore (b) any party to such agreement is outside Singapore (c) any undertaking abusing the dominant position is outside Singapore (d) a merger 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.

This means that agreements made entirely between foreign undertakings, decisions by associations of foreign undertakings or concerted practices will be caught by the Act as long as it can be shown that its effect (even if it was not intended) is (or is likely) to prevent, restrict or distort competition within Singapore.

The UK Competition Act in contrast provides that the Chapter I prohibition against agreements etc. preventing, restricting or distorting competition in S.2(1) applies "only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom."

Without this caveat, the draft Bill could arguably catch the situation where for example several Japanese manufacturers of compatible equipment agree between themselves to impose common quantitative restrictions on the export of Japanese made spare parts on their Japanese distributors to meet home market demand. Spare parts made in China and Thailand are freely available but Singaporean consumers generally prefer Japanese made spare parts even though the quality is the same. The agreement is intended to be implemented only in Japan but it has an effect within Singapore because only two or three of the larger distributors end up being able to bring in Japanese made spare parts. While the agreements between the individual manufacturers and their distributors would fall under the vertical agreements exclusion in the Third Schedule, the agreement between the manufacturers themselves could be inadvertently caught under S.34.

Conversely, S.33(f) could also arguably catch agreements between Singapore based traders which are intended to be implemented only abroad. Example - where a group of regional traders based in Singapore decide to offer common contracts for delivery of commodities in markets outside Singapore (eg Malaysia) and affect other regional traders based in Singapore operating in those markets. There is a recognised and large spot market for such commodities in Singapore and most of the regional buyers are based in Singapore but there negligible or no domestic consumption of the commodity. Even though the main effect is overseas, their actions could arguably be caught by S.33(f).

We would propose that S.34(5) be amended as follows :

"(5) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in Singapore on or after the appointed day."

3.2. KEY POINT 2 : SECTION 36 - INDIVIDUAL EXEMPTIONS SHOULD INCLUDE POSSIBILITY OF SELF ASSESSMENT

In both the EC and UK competition systems, the process of notifying the European Commission or the Office of Fair Trading ("**OFT**") in order to obtain an individual exemption is being abolished. The concept of an individual exemption will continue to exist, but it will be down to the parties to the agreement to self-assess whether the agreement meets the conditions for individual exemption (in our case as set out in S.41 of the draft Bill).

It is not entirely clear from the draft Bill whether an undertaking, in order to claim the benefit of an individual exemption, must seek guidance under s.43 or notify the agreement under s.44. In addition to these two procedures, we think it would be useful to give undertakings the ability to self-assess in order to claim the benefit of an individual exemption. This could be useful especially if the Singapore Competition Commission (the "**Commission**") will take its time to grant such exemptions. This could also be of benefit to the Commission too since it reduces the risk of the Commission being caught in a deluge of notifications.

3.3. KEY POINT 3 : SECTION 47 - ABUSE OF A DOMINANT POSITION SHOULD BE LIMITED TO ABUSE OF A DOMINANT POSITION IN SINGAPORE ONLY

As drafted, the Bill potentially catches any conduct on the part of one or more undertakings (even if the undertaking is not dominant in Singapore but dominant elsewhere) which amounts to an abuse of a dominant position (i.e. it falls within one of the examples such as applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage) in any market in Singapore.

We understand that it is MTI's intention to catch foreign undertakings who are dominant abroad because of their ability to affect Singapore's small market, nevertheless we would point out the following difficulties:

- Firstly, paragraph 3 appears to contradict paragraph 1. We note that S.47(1) refers to conduct that amounts to the abuse of a dominant position in any market in Singapore. S.47(3) then explains that a dominant position means a dominant position within Singapore or elsewhere.
- Secondly, the ability to define the foreign market in which the undertaking is dominant would give the Commission too much scope to intervene and would introduce too much uncertainty in the market. If the effect is that the Bill prohibits a company with a dominant position in another small market (for example, the Peruvian market for dishwashers) from selling at a predatory or discriminatory price to break into the market in Singapore (where it holds an insignificant market share and much larger and more established competitors are already established), then it would perversely entrench the dominant position of its competitors. This result does not appear to be based on sound competition or economic policy as a company with a small 10% market share in Singapore, cannot harm competition in Singapore by selling at a predatory price in Singapore. In fact it is arguably pro-competitive (and in the interests of consumers) if such a company is in fact allowed to sell at a price below cost;
- Thirdly, if any person can apply to the Commission for guidance or a decision by finding some market in which its competitor is dominant, then the procedure could be easily abused.

We would request accordingly that S.47(3) be deleted or, if appropriate, reworded to clarify that a "dominant position" means a dominant position on a market (a) in Singapore or (b) including Singapore. Otherwise, effectively any company with a dominant position anywhere in the world will be subject to very restrictive rules in Singapore that should normally only be reserved to companies with dominance in Singapore.

Whilst we appreciate that the Commission intends only to deal with situations which have an **appreciable adverse effect** on markets in Singapore and could thus deal with such situations by saying that despite the undertaking having a dominant position in Peru, its 'introductory' pricing would not infringe S.47 because it does not have an appreciable and/or adverse effect given its small market share in Singapore, this would lead to too much uncertainty and the Commission being deluged by requests for guidance.

3.4. KEY POINT 4 : SECTION 54 - JURISDICTIONAL THRESHOLD FOR MERGERS SHOULD BE BASED ON SINGAPORE TURNOVER AND/OR ASSETS

S.54 indicates when mergers are prohibited (i.e., a merger is prohibited if it will result in a substantial lessening of competition - "**SLC**"). We note that SLC is also the test employed in the UK, the US and Australia and like the UK and Australia (though not the US), notification of the merger is voluntary.

Under the draft Bill, it is clearly envisaged that the Commission would have jurisdiction to prohibit a merger that does result in SLC. The slightly different approach in the UK, the EC, Australia and the US (and indeed most other jurisdictions) is that there is an initial test to determine whether the regulator has jurisdiction to review the merger. It is only if the regulator has jurisdiction that a merger can be reviewed by the regulator under the relevant substantive test (e.g., the SLC test in the UK). So for example, in the UK, the OFT will have jurisdiction if:

- the merger creates or enhances a combined 25% share of supply in the UK; or
- the target undertaking has UK turnover exceeding GBP 70 million.

The benefit of having such an initial jurisdictional threshold is that parties to mergers below the threshold do not have to assess whether their merger may result in SLC. This is useful for businesses since assessment of SLC is a complicated time-consuming economics-based process. The approach under the draft Bill would require parties to any merger to undertake an SLC analysis. However, in other jurisdictions, parties would not need carry out such an analysis if the merger is below the jurisdictional threshold thus reducing their regulatory compliance costs.

As to what type of jurisdictional threshold could be usefully introduced, we note that :

- the UK jurisdictional test is based on a mixture of UK shares of supply (slightly narrower concept than, and different from, market shares). Australia's threshold test is based solely on Australian market shares.
- the EC test is based on a mixture of global, EU and national turnover; and
- the US test is based on a mixture of global assets and turnover.

In order to provide a clearer benchmark to business, we would suggest that a test based on Singapore turnover and/or assets would be most useful. Such a test is easier to apply than say a share of supply or market share test (as in the UK or Australia) which involves the parties

having to undertake a potentially complicated market definition process. Also, it is preferable to base the threshold test on Singapore (as opposed to global) assets and/or turnover since global criteria can result in national merger rules applying to a merger that has little connection with that jurisdiction (for example, this used to be the case with the UK's former test of the target holding GBP70 million global assets and today, in relation to Slovakia, whose merger rules can apply to transactions with little effect or relationship with Slovakia).

3.5. KEY POINT 5 : SECTIONS 54-60 MERGERS - TIME LIMIT FOR REVIEW SHOULD BE SHORT AND CASES SHOULD NOT BE REOPENED

As noted above, like the UK and Australia, the notification process is voluntary (it is mandatory in the EC and the US). Our slight concern under the draft Bill is that there is no long-stop date to the Commission's ability to review the merger. This leaves a constant threat hanging over the merger that it could be prohibited in a year's time for example (or even longer !). In the UK by comparison, the OFT only has jurisdiction to review a merger within 4 months of the merger being completed or the merger being made public.

In contrast, in the Bill, it is envisaged that the Commission could hand down a decision under s.58 that there is no SLC and then could under s.60(2) at any later time reopen an investigation if there is a material change in circumstances since the initial decision. The possibility that the Commission could reopen an investigation of a merger numerous years after its completion and then perhaps order a divestiture would be unacceptable to all parties from a commercial certainty viewpoint.

We would suggest that certainty needs to be provided to completed mergers through:

- a long-stop date for the Commission to review cases (e.g., 4 months after the merger has been closed or made public); and
- the inability to reopen a case once a decision has been handed down.

3.6. KEY POINT 6 : SECTION 61 - GUIDELINES SHOULD BE DEPARTED FROM ONLY IN CASES OF PUBLIC INTEREST AND CHANGES SHOULD BE SUBJECT TO PUBLIC CONSULTATION

We note that outside the excluded sectors, MTI has indicated that it intends to focus on anti-competitive agreements or conduct that will have an **appreciable adverse effect** on markets in Singapore, i.e. there will be some de minimis threshold below which it will not be concerned.

We understand that the Competition Commission is expected to issue Guidelines on this during 1Q 2005 after public consultation but that these Guidelines will be non-binding on the Commission (as provided in S.62(4)).

To provide flexibility to the Commission, the Commission certainly should have the right to amend or modify the Code (or to depart from the Guidelines where such action is necessary in the public interest) but there should preferably be a similar public consultation exercise for major changes and a transition period to enable undertakings to modify their agreements if required. This general approach has been taken by the IDA in relation to its Telco Competition Code.

3.7. KEY POINT 7 : SECTION 71 - PARTIES THAT MAY APPEAL SHOULD BE EXPANDED TO INCLUDE AFFECTED THIRD PARTIES SUBJECT TO CERTAIN CONDITIONS/CRITERIA

Currently, the right of appeal to the Competition Appeal Board lies with a party to an agreement reviewed by the Commission, a dominant company whose conduct has been investigated by the Commission or a party to a merger that has been reviewed by the Commission. In the UK and the EC, the right of appeal also lies with third parties that may have an interest in the case. For example, a competitor or an affected customer may want to appeal a decision approving a merger or an agreement between two parties or a decision that does not prohibit an alleged abuse of dominance.

This is to be contrasted with the right of appeal from the Competition Appeal Board to the High Court under S.74 where the right of appeal lies with any person aggrieved by the Board's decision (though only on limited grounds). This means that if a party to the agreement or the merger or the dominant company does not appeal, then other aggrieved parties are potentially shut out.

Nevertheless, to reduce the possibility of opening the floodgates too wide, some criteria or thresholds could be established to limit 'busybodies' from bringing appeals. In the UK, the Competition Appeal Tribunal permits third party appeals under the UK Competition Act 1998 if the Tribunal is satisfied that the third party has "a sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest".

3.8. KEY POINT 8 : SECTION 75 - RIGHTS OF PRIVATE ACTION SHOULD BE GIVEN ALSO TO SPECIFIED CONSUMER BODIES

In the UK, such rights also lie with consumer bodies on behalf of consumers impacted by anti-competitive conduct. We would suggest that the approach taken in the Consumer Protection (Fair Trading) Act 2003 be followed allowing the Minister by notification in the Gazette, to appoint any person or body as a "specified body" for the purposes of taking private action under the Act.

3.9. KEY POINT 9 : SECTION 88 - OFFENCES BY OFFICERS SHOULD BE LIMITED

We understand that there is no intention currently to criminalise anti-competitive activities and subject directors of a cartel for example to jail terms, although they can be fined and/or imprisoned up to one year for refusing to provide information, destroying or falsifying documents, providing false or misleading information, or obstructing an officer of the Commission.

In the UK, a corporate officer can only be subject to criminal prosecution if he has dishonestly participated in a horizontal cartel (i.e., criminal sanctions are reserved for the worst types of infringement). A director can also be disqualified where broadly speaking the company has committed a breach, the director is unfit to be involved in management and the director's conduct contributed to the breach.

To our knowledge, in the US and Canada, criminal sanctions have similarly been reserved for horizontal cartels and in Australia, whilst we understand that criminal sanctions have not yet been introduced, they have once again only been proposed by the regulator for hard-core cartels.

We would suggest that Singapore not introduce criminal or other sanctions for officers of undertakings involved in horizontal cartels or indeed any other offence (other than for wilful obstruction etc) for the time being whilst the country is still getting to grips with a new competition regime in its infancy.

3.10. KEY POINT 10 : WHISTLE-BLOWING PROVISIONS SHOULD BE INTRODUCED

We understand that MTI is considering introducing "whistle-blower" provisions to encourage parties to come forward first with evidence of such activities. The leniency/whistle-blowing scheme has worked relatively well in the EC and the UK as it allows the regulator to uncover anti-competitive conduct. It also works well for business in that they can cooperate with the regulator and come clean about offences and thereby get complete immunity or a reduction in any penalty. We would support the introduction of such provisions.

3.11. KEY POINT 11 : INTELLECTUAL PROPERTY ISSUES SHOULD BE PROMPTLY ADDRESSED

Given the recent Microsoft decision by the EU Commission and the heated debate over the replacement technology transfer block exemption in Europe, we wait to see how the Competition Commission intends to address this important area in particular in relation to technology transfer agreements.

We note that Singaporean entities are still on balance more likely to be licensees than licensors and that clauses requiring licensees to exclusively grant back to the licensor their new IPR in any improvements and not to challenge their licensor's IPR are commonplace, as well as some of the hardcore restrictions covered by the EU block exemption.

3.12. KEY POINT 12 : SECTION 8 OF THIRD SCHEDULE - CONTINUING EXCLUSION OF VERTICAL AGREEMENTS SHOULD BE MONITORED

We note that this section excludes vertical agreements from the scope of the Bill. It is generally accepted that restrictions in vertical agreements give less cause for concern than horizontal agreements. However, the EC (Article 81 EC), UK (s. 2 Competition Act), US (s.1 Shearman Act) and Australian (s.45 Trade Practices Act) systems apply to vertical agreements as well. In particular one area of concern in these jurisdictions is resale price maintenance ("**RPM**") - that is, the manufacturer and distributor agreeing on the price at which the distributor sells goods/services to the end consumer. This can attract heavy fines in the UK and the EC. Whilst there was an exclusion for vertical agreements in the UK, this is now being removed. However, this exclusion did not apply where there was RPM in any case.

We note that MTI is not in favour of covering RPM under this draft Bill at this stage but we would encourage it to monitor the situation further.

4. CONCLUSION

We applaud MTI on producing a clear and generally well-drafted piece of legislation and for providing the public with numerous opportunities to provide feedback to MTI. We hope that our comments will prove of use to the MTI in helping to clarify portions of the draft Bill.

Baker & McKenzie.Wong & Leow

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