To:

Ministry of Trade and Industry
100 High Street #09-01
The Treasury
Singapore 179434
Attn: Director, Market Analysis Division

Email: MTI_draftcompetitionbill@mti.gov.sg 29 May 2004

Dear Sir,

Public Consultation on draft Competition Bill

I am pleased to submit my comments on the first public consultation on the Competition Bill (the "Bill").

In general, this piece of legislation is eagerly awaited as it demonstrates very tangible Singapore's commitment to a free and open competitive business environment. After all, many other countries have enacted such legislation and as one of the freest economies in the world, Singapore's doing so is only putting substance into form.

I hereby tender my comments.

My personal particulars are as follows:
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Yours faithfully,

Bryan Tan

Summary of Major Points

As this submission is simple, I have not included a table of comments.

There are only four areas of comment:

(a) the precedent value of the Competition Commission's decisions;
(b) confidentiality of information provided to the Competition Commission
(c) the definition of dominant position
(d) extra-territoriality

Statement of Interest

My interest in this submission is as a member of the public.

Comments

Precedent Value of Commission's decisions

It is not clear whether the Commission will be bound its previous decisions. As a decision making body, certainty is appreciated. However, as a regulatory body, flexibility is also desired. Given that the categories are never closed', the publication of the decisions and guidance from the Competition Commission will be appreciated as they afford businesses guiding principles of what is acceptable conduct and what is not.

Confidentiality

Under the provision which allow for parties to seek guidance on their own agreements, conduct and mergers (sections 42, 29 and 56), there should be provisions to request for confidential treatment. The simple commercial reason is that these transactions by their nature would be of high value and share price-sensitive. From a policy perspective, the Commission should prefer for such parties to seek its guidance with openness before proceeding with the activity. Thus, treating such information as confidential is necessary. I note that this is provided for in section 78. In addition, where a person is compelled to give information, such information may be excluded from secrecy obligations under subsection 5. However, there are 2 situations which also need to be considered – (a) whistleblowers and (b) cooperative employees still under obligations of confidentiality. For whistle-blowers, their entire position may need to be protected from revelation as well as from liability. For employees who are compelled to offer information, under sections 63, 64 and 65, their personal protection under law is not provided for.

Dominant Position

Experience from the telecommunications industry indicates that the definition and classification of a party as being dominant is also one of contention. The definition provided in section 47(3) is inadequate. For instance, there is no guidance on what constitutes dominance – is it a 50% market share, which sounds clear but in commercial reality not acceptable? Is it 30%?

In most jurisdictions, abuse of dominant position works as such – because of the dominant position, there is a presumption that certain types of conduct would amount to an abuse of dominance. Therefore, it is clear that there are 2 issues here – is there dominance, and does the conduct amount to an abuse. In applying for notification for guidance, there does not seem to be a provision to rule on dominance. It would seem that a person making a section 50 application is admitting that it is dominant. I would suggest that this first phase be included, but separately. This is because the classification may be opened to public scrutiny and public debate whereas specific transactions should not be.

Extra-territoriality

Extra-territoriality – it is clear that the Bill has extra-territoriality effects even though its concern is with the effect in Singapore. However, anti-competitive agreements and abuse of dominant position are concerned, it is hard to see how paragraph 5 of the Third Schedule would apply to such actions outside Singapore. The clear intent of paragraph 5 are for Singapore regulatory authorities and this should be stated so. It cannot be referring to a regulatory authority in a foreign country (as used in the Insurance Act or the Financial Advisors Act). This may have been embodied within the definition of “written law ”but clarification would be helpful.

In addition, similar issues extend to paragraph 2 of the Fourth Schedule in relation to mergers. However, here the issue is more complex. Say, for example, a world-wide merger occurs between Shell and Exxon. Its effects would be felt in Singapore as well as in many other countries. Undoubtedly, the competition authorities in many countries would feel the effects and investigate the merger. The question is – does Singapore do the same? If Singapore does, it may possibly end up with different results (although cooperation with foreign competition bodies is provided for in section 76). If it does not, then Singapore may find itself saddled with a merger that lessens competition.

Conclusion

The Competition Bill represents a good start. It is a landmark in the Singapore legal landscape. Only time will tell whether this will work or not. We may not have a history of frowning upon monopolistic behaviour but I look eagerly to the time when Singapore can join the ranks of the world’s freest economies in name and in maturity.