Competition Law Consultation Paper – Feedback by SembCorp Industries Ltd

SembCorp Industries Ltd
30 Hill Street #05-04
Singapore 179360
Fax: 6822 3253

Contact Persons:

Linda Hoon (Ms)
Group General Counsel
DID: 6723 3068
E-mail: lindahoon@sembcorp.com.sg

Delphine Loo (Ms)
Legal Counsel
DID: 6723 3194
E-mail: delphine.loo@sembcorp.com.sg

SembCorp Industries

Contents

Competition Law Consultation Paper & Draft Bill

– Feedback by SembCorp Industries Ltd

1 INTRODUCTION

SembCorp Industries Ltd ('SCI', and where in reference to the group as a whole, 'SCI Group of Companies') welcomes this opportunity to provide feedback on the Consultation Paper and draft Competition Law Bill (the 'Bill'), which was released on 12 April 2004. SCI is pleased with the fair approach that has been taken in the Consultation Paper as well as the expression of the intent in the Bill. SCI nevertheless proposes to comment on some of the provisions to suggest a more effective way to promote competition.

SCI makes this submission on behalf of its entire SCI Group of Companies, namely:

- SembCorp Utilities Pte Ltd
- SembCorp Environmental Management Pte Ltd
- SembCorp Engineers and Constructors Pte Ltd
- SembCorp Marine Ltd
- SembCorp Logistics Ltd

The approach taken is to provide general comments and feedback that affect the SCI Group of Companies as a whole in Part 1, and then to deal with specific issues which could affect only a certain company within the SCI Group of Companies in Part 2. Part 2 of this representation comprises proprietary and confidential information which also has considerable commercial sensitivities. The information included in this Part is, however, of great relevance in assisting the SCI Group of Companies to put forth its views and proposals in this representation as a whole. SCI would therefore be grateful if MTI could preserve the confidentiality of the information submitted in Part 2 at all times.

SCI would be happy to discuss further any of the comments made below.

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1.1 Summary Of Major Points

- The extent of application of the Bill to sectors already regulated by other competition laws should be clarified. The provisions on appeal to the courts and the concept of dominance should be extended to the sectors already regulated by other competition laws (see discussions at section 2.2 below).

- The Single Economic Entity Rule should be expressly provided for in the Bill (see discussions at section 2.3 below).

- The Bill should expressly state that only anti-competitive acts that have an appreciable adverse effect on the Singapore markets will be caught (see discussions at section 3.1 below).

- Joint ventures which result in the improvement of production or distribution, or the promotion of technical or economic progress should be expressly exempted in the Bill (see discussions at section 3.7 below).

- The guidelines should also be binding on the Commission (see discussions at section 6.3 below).

- Timelines and limitation periods should be provided (see discussions at sections 7.1 and 7.2 below).

- There should be exemptions for projects relating to national interest, security, defence and emergency, overseas peacekeeping missions and aids, and public health and safety (see discussions at sections 9.1 and 11.1 below).

1.2 Statement Of Interest

Placed among the top 25 companies in Singapore by market capitalisation, SCI naturally has a strong interest in the impact Competition law will have on businesses in Singapore.

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PART 1 – GENERAL COMMENTS

2 SCOPE OF THE COMPETITION ACT – WHO ARE CAUGHT

2.1 Persons Carrying Out Or Performing Activities On Behalf Of Government

Clause 33(4)(c) of the Bill provides that the material provisions on anti-competition behaviour will not apply to:

> *any person carrying out or performing any activity undertaken by the Government or any statutory body on behalf of the Government or that statutory body, as the case may be, in relation to the carrying out or performance of that activity.*

It is not clear what categories of activities this section will exclude nor which category of persons will be excluded. The following issue arises:

- Is the intent to exclude any undertaking which enters into a contract with the Government or with a statutory body, regardless of the industry or sector it operates in? To illustrate, does it, for instance, exclude any private enterprise that has entered into a contract with the Government in relation to the supply of stationery?

If the response to these questions is in the affirmative, then it would seem that any contract with the Government, whether it was granted through an open tender or otherwise, and whether it was in relation to defence or security or otherwise, would be excluded from the operation of the competition laws. In the case of the SCI Group of Companies, this could mean exclusions for construction projects undertaken for and on behalf of the Government as well as logistics procurement undertaken for and on behalf of the Government.

SCI proposes that the language of this sub-clause be clarified. Additionally, SCI proposes that separate carve outs be provided for the following types of contracts with the Government:

- contracts concerned with national security,
- contracts concerned with defence, and / or
- contracts involving the provision of goods and services which are of a vital nature.

See further the discussions at sections 9.1 and 11.1 below.

2.2 Industries / Sectors Subject To Other Competition Laws

The Consultation Paper suggests, as does the Third Schedule of the Bill, that industries / sectors regulated by industry / sector specific competition laws will not be regulated under the Bill.

However, there are specific provisions in the Bill which suggest that parts of the Bill continue to apply to industries / sectors regulated by existing competition laws. These include (not exhaustive) the following:

- Paragraph 5 of the Third Schedule of the Bill states that only clauses 34 and 47 of the Bill will not apply to industries / sectors regulated by industry / sector specific competition laws. This suggests that the rest of the Bill will apply.

- Clause 33(2) of the Bill, in dealing with the authority available to the Commission as opposed to the sector / industry specific regulator and vice-versa, suggests that portions of the Bill will apply to industries / sectors which nevertheless have specific competition laws regulating them.

- Clause 61(3) of the Bill suggests that the Commission can prescribe guidelines applicable to specific industries / sectors which are subject to the regulation and control of another regulatory authority.

It is also not clear if the appeal process to the courts available under the Bill will also now be made available to the electricity and gas markets, which are regulated under the provisions of the Electricity Act and the Gas Act respectively.

SCI proposes that the Bill be clarified to make it clear when it is to apply to industries / sectors regulated by existing industry / sector specific competition laws and when it will not. SCI also proposes that the appeal process to the courts be made available to the electricity and gas markets as well, for which there is presently no such provision.

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2.3 Single Economic Entity Rule

The Bill is silent as to whether clauses 34, 47 and 54 will apply to prohibit transactions between related companies which effectively operate as a single economic entity. There is merit to clearly provide in the Bill for a Single Economic Entity exemption. Such an exemption would be reflective of how a number of businesses currently operate in the existing economic climate.

Case law in the European Union has recognised the Single Economic Entity exemption, although the European Union Competition Legislation does not contain an express provision. This seems to be a fairly well established principle in the European Union, although there does seem to be some inconsistency in its application. If the intent is that related companies that operate within the same economic group are to be excluded, then this exemption should be articulated in the legislation for greater clarity.

Additionally, the provision of the exemption in the Bill will provide the assurance that the rule will be adopted in Singapore. It cannot be presumed that the Commission or the courts in Singapore will view European Union case law as persuasive authority, and adopt such a rule.

Alternatively, if the exemption is not expressly provided for in the Bill, then it must be contained in the Guidelines.

If an express provision to exempt single economic entities is to be included (whether in the Bill or in Guidelines), an appropriate definition of the term Single Economic Entity must also be provided. On this, the test of control has been given prominence in the European Union.

SCI proposes that the definition of 'control' be drawn from the provisions of the Companies Act and the Securities and Futures Act. Essentially, control for the purposes of ascertaining whether a Single Economic Entity exists must depend on shareholdings and control of the board.

Cases in the European Union also look at the extent to which the parent (used loosely) is able to influence the policy of or issue instructions to the subsidiary as key factors. Likewise, at informal feedback sessions, the Ministry of Trade and Industry ('MTI') has suggested that an 'economic independence' test be employed. However, both approaches, which are variants of each other, create a subjective element, which should be avoided.

SCI is not proposing that associated companies within the same group be automatically regarded as operating within the same economic entity. They should only be so regarded if control is established.

3 SCOPE OF THE COMPETITION ACT – WHAT ACTS TO BE CAUGHT

3.1 Appreciable Effect

The Consultation Paper at page 2, paragraph (b)(i) states:

> Instead of attempting to catch all forms of anti-competitive agreements or conduct in all markets, focus will be placed on anti-competitive agreements or conduct that will have an appreciable adverse effect on markets in Singapore.

The Bill, in clauses 34 and 47, however, frames the prohibitions in much wider language. Instead of the phrase 'conduct which will have an appreciable adverse effect on markets in Singapore', the two sections prohibit any agreement which could *inter alia* distort competition or where there is an abuse of dominant position, regardless of the extent of distortion or abuse.

There appears to be a disconnect between the intent as encapsulated in the Consultation Paper and the Bill. At informal feedback sessions, the MTI has unambiguously indicated that only anti-competitive agreements or conduct that will have an appreciable adverse effect on markets in Singapore will be caught by the Bill.

If the intent is to narrow the scope of the competition laws so that it only catches conduct which has an appreciable adverse effect, then the words as used in the Consultation Paper should be adopted and the Bill modified to reflect that intent. This is to avoid any possibility of ambiguity.

At the very least, if the MTI desires to leave the legislation widely stated, then Guidelines should be prescribed using precise language to explain how clauses 34, 47 and 54 will be interpreted, including that the key criteria is whether the purported anti-competitive act or abuse of dominance has an appreciable adverse effect on competition.

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3.2 Clause 34(2) Transactions Are Mere Examples

Clause 34(1) of the Bill generally provides that agreements which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are expressly exempted. Clause 34(2) of the Bill provides that sub-clause (1) applies in particular to agreements, decisions or practices which satisfy any one of the five identified criteria.

The drafting of clause 34(2) suggests that all the agreements, decisions or practices mentioned in sub-clause (2) are per se anti-competitive. This could not have been the intent as the Consultation Paper clarifies that only agreements which have anti-competitive effects will be struck down. In other words, the stated intent in the Consultation Paper appears to be that it is nevertheless necessary where an agreement satisfies one of the five criteria in clause 34(2) to go further and prove that the agreement did in fact have as its object or effect the prevention, restriction or distortion of competition.

For clarity, SCI proposes that the first line of clause 34(2) of the Bill should be redrafted to make clear that the criteria there stated are merely illustrative of when there could be a prevention, restriction or distortion of competition, and do not in and of themselves make an agreement, decision or practice anti-competitive.

3.3 Dissimilar Conditions To Equivalent Transactions

Whilst the purport of this prohibition is clear, it is couched in too wide language, and may prove to be counter-productive. It must be stressed that it does not simply apply to price differentiation, but rather to any set of conditions that may be varied depending on the group of parties involved. The granting of preferential credit terms, favourable trading conditions, and / or better pricing to one trading party because of a basket of factors and unfavourable terms to another trading party because of past experience will be caught by this provision. This is because the provision targets the application of different conditions to similar type transactions, but does not have as a consideration the type of trading party the different conditions are being applied to.

The basket of factors that determines the nature of the trading party and eventually influences the dissimilar conditions being applied can include (not exhaustive):

- Commercial risk considerations of the particular project involved and the qualification of the trading party to aid in abetting the risk.

- The credit standing of the third party, including the promptness with which the trading party had settled all outstandings in the past.

- The skill set of the trading party.

These are legitimate grounds upon which to differentiate trading conditions. Additionally, applying variations depending on the type of trading party can in effect contribute towards greater economic efficiencies (such as increasing overall output) rather than have any anti-competitive effects. SCI therefore recommends that this provision be removed, at least, from clause 34 of the Bill. The fact that a similar provision exists under the competition laws of the United Kingdom, the European Union and Canada must not be a reason for adopting this provision in *toto*.

If the intent is nevertheless to retain such a provision, then there should be an additional criterion that looks to the nature of the trading party.

3.4 Dominant Player

It is welcomed that a dominant player is defined widely to include dominant players in other jurisdictions as well, and to prohibit abuse by such a dominant player in the Singapore market. This is a recognition of the economic size of Singapore.

3.5 Restrictive Covenants / Right Of First Refusal Etc

The Bill does not address the issue of whether restrictive covenants, rights of first refusal and non-compete clauses in contracts will be regarded as non-competitive or otherwise. Such clauses are introduced into contracts for a number of commercial reasons, including maintaining quality of services offered, ensuring brand management and protection of IP rights.

Case law from the European Union indicates that there is no consistent approach as to whether a restriction in an agreement which does not necessarily have as its object the prevention or distortion of competition is anti-competitive or not.

Given that a restriction of competition is an economic concept and is something that happens in relation to a market, a determination cannot be made simply from a provision in a contract that competition is restricted. What must be studied is the effect of the agreement in its particular market context.

For the avoidance of doubt, therefore, SCI proposes that a clear carve out be introduced, providing that restriction clauses in a contract are not per se anti-competitive. They should be allowed as long as their anti-competitive effects do not outweigh their pro-competitive benefits.

3.6 Horizontal Agreements

The language of clause 34 of the Bill as currently couched is very wide and can potentially prohibit all horizontal arrangements. It is appreciated that it is not possible to provide exemptions within the Bill to create carve outs or to explain the exact scope of how the provision is to apply to horizontal arrangements.

However, given that horizontal arrangements do contribute significantly to economic development as well as to more efficient services, the Commission should issue Guidelines containing illustrations as to how horizontal agreements would be treated. This is the approach taken in the European Union.

Where Guidelines are drawn up, it should expressly allow for undertakings to pool resources for the purposes of, amongst other reasons, negotiating better prices, so long as the pro-competitive effects brought about by such pooling outweighs any of its anti-competitive effects. Where pooling occurs, generally better prices can be obtained, which in turn can be passed on to the consumer. A similar approach should also be allowed for pooling arrangements entered into as a consequence of a request from the supplier.

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3.7 Joint Ventures

Clause 34 of the Bill is couched in such wide terms that it can have the effect of prohibiting all forms of partnerships, consortiums, business alliances and joint ventures (collectively 'joint ventures'). This should be narrowed.

Joint ventures are formed for a number of competitive reasons and can contribute significantly to consumer welfare through greater economies of scale. Such projects could be as a consequence of a one-off short term pooling of talents for a specific project or for mid term provision of services. Some examples include:

- Engaging in a one-off project in one designated location, without impeding competition in any way.
- Entering into a joint venture to complement differing skill sets to bid for and, if successful, to undertake the project. Exclusivity, if any, is limited in duration and project specific in that the partners are free to partner with any counter party for another project.
- Allowing for better allocation of risks and risk sharing for large projects.
- Creating greater economies of scale by offering a suite of services to target customers, but with no intention of bundling. In other words, the customer retains a choice of using the entire suite of services or to select some services out of the suite and obtain the remaining from a differing source.

As such, SCI proposes that a carve out be built into the Bill to exempt joint ventures which:

(a) improve production or distribution, or

(b) promote technical or economic progress,

but which do not —

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

These are the same criteria set out in clause 41 of the Bill itself for block and individual exemptions.

See further the discussions at sections 9.3 and 11.2 below.

3.8 Vertical Arrangements

The proposal to exclude all vertical arrangements from clause 34 of the Bill is welcomed. However, vertical arrangements which have the effect of an abuse of dominant position will still be caught by clause 47, as would such activities which the Minister specifies as being caught. The former qualification is fair, whilst the latter creates possible problems.

One such problem is as regards an activity which is seemingly valid when the law comes into force, but which subsequently becomes a specified activity, thus losing its competitive character. This could potentially involve the unwinding of various transactions for the undertaking in question as the consequences of being regarded as anti-competitive are wide ranging.

Given that it is recognised that vertical arrangements do contribute to economic efficiencies, SCI suggests that a better alternative is to include in the main body of the Bill (rather than in the Third Schedule of the Bill as an exemption) validating all vertical arrangements which satisfy the following criteria:

(a) improve production or distribution, or

(b) promote technical or economic progress,

but which do not —

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Again, these criteria are adopted from that in clause 41 of the Bill. This approach provides greater certainty for businesses to operate their activities.

4 BLOCK EXEMPTIONS

The intent to include the grant of block exemptions is welcomed. However, clauses 38 and 40 of the Bill as they are currently couched only allow the Commission to make recommendations for block exemptions to be granted.

For greater efficacy of business, SCI recommends that the clauses be modified to allow for companies and individuals, as the case may be, to also apply for block exemptions to be granted in the same way as for individual exemptions. At informal feedback sessions, the MTI indicated that the intent is that individuals and companies will be able to submit requests and / or suggestions for block exemptions to be granted. If so, then this should be made clear by an amendment to the proposed clauses.

Additionally, it is helpful to include a provision along the lines of clause 40(1)(b) that prior to introducing a block exemption, an opportunity to be heard should be accorded to all interested parties who are likely to be affected by the block exemption proposed by an undertaking.

5 AVENUE FOR COMPLAINTS AND PROTECTION

5.1 Whistleblowing

There are no whistleblowing, in particular, provisions which accord protection to whistleblowers, save perhaps for clause 78(1)(c) of the Bill. Clause 78(1)(c) is, however, of limited protection as it only requires the Commission and its officers to preserve the secrecy of the person furnishing information to the Commission. It does not accord protection where the whistleblower is known to the defaulting party.

SCI submits that there is merit in including a whistleblowing provision as regulating anti-competitive behaviour is a difficult and tedious process. Active policing by the regulators would mean increased costs. As such, in keeping with the general regulatory climate in Singapore, which is moving towards a more disclosure-based environment, there should be such a provision.

The provision should make clear that such whistleblowing could come from directors, officers and other employees of the company purportedly engaging in anti-competitive behaviour rather then from just disgruntled competitors or members of the public. Whatever the source of whistleblowing, there ought to be protection accorded to the whistleblower against claims, whether civil or criminal, and other forms of persecution.

Under the provisions of the United Kingdom Enterprise Act, the Office of Fair Trading is granted the power to issue whistleblowers with written notice to confirm that the person will not be prosecuted for a matter under investigation where certain conditions are satisfied. Even if a notification in similar form is not provided, protection should indeed be accorded.

Under the Bill in its present form, the only protection that is accorded (and rightly so) is to the Commission and its officers under clause 84 of the Bill. This protection should be extended to whistleblowers.

5.2 Leniency

As a corollary to whistleblowing, leniency provisions should also be introduced where an alleged anti-competitive company and / or officer thereof alerts the Commission of the activity. This will act to encourage greater self-regulation and make the task of the Commission less onerous.

Leniency must be premised on various factors. Typically, these factors would include the following:

- that the person makes an admission of guilt,
- that the person is not the lead cartel member (in the event of cartels or abuse of dominant position),
- that the person makes full disclosure, and
- that the person ceases involvement with the cartel and cooperates fully with the investigation.

5.3 Dealing With Frivolous Complaints

There is no provision as regards how frivolous complaints will be dealt with nor whether sanctions will be imposed for frivolous complaints made.

Frivolous complaints could result in unnecessary increased costs for the undertaking subject to investigation as a consequence of having to comply with investigation requests by the Commission. It can also result in disruption to work in the event that documents and equipment are removed from the premises.

SCI suggests that provisions on how frivolous complaints should be handled be included into Guidelines.

Additionally, it is proposed that to counter the effects of frivolous complaints, a remedy against the complainant should be allowed where the complaint has been found to be frivolous by the Commission. This is particularly useful given that clause 86 of the Bill expressly prevents any action from being brought against the Commission or its officers.

6 REGULATOR

6.1 Constitution And Role Of Regulator

The constitution of the Commission as contemplated under the Bill is not for a single global regulator who can also hear appeals from the sector / industry specific competition regulators to be formed. Rather, under the Bill, the Commission is established by statutory power that is independent and distinct from all other government bodies, and functions separately from all other competition regulators.

SCI submits that the Commission should be a single global regulator that has overall jurisdiction and oversight of all competition matters in Singapore with investigative and enforcement powers carved out to individual sub-agencies in respect of certain industries. This would ensure more effective regulation. Thus, for example, the Energy Market Authority will be a sub-agency under the authority of the single global regulator. As a statutory board, the regulator would have the legal power to establish and regulate the policies. The single global regulator would have powers to issue administrative orders with the right of appeal to the courts.

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6.2 Relationship Between Sector / Industry Specific Regulator And Commission

Given that no single global regulator has been constituted under the Bill, it is not very clear how the proposed Commission will work in conjunction with the sector / industry specific regulators. Clarification is required.

SCI proposes, as stated in the preceding section 6.1, that the Commission should indeed be a single global regulator which has overall jurisdiction and oversight of competitive matters in Singapore with investigative and enforcement powers carved out to individual sub-agencies in respect of certain industries.

Drawing from the United Kingdom experience, the two bodies can function in parallel. In the United Kingdom, the Office of Fair Trading and the Office of Gas and Energy Markets have concurrent jurisdiction under the United Kingdom Competition Act to investigate and enforce the United Kingdom Competition Act. The Office of Gas and Energy Markets operates under the direction and governance of the Gas and Electricity Markets Authority which makes all major decisions and sets policy priorities for the Office of Gas and Energy Markets. The rationale for parallel application is that Office of Gas and Energy Markets has the expertise and in-depth knowledge of the gas and electricity markets in the United Kingdom and hence issues relating to such markets are more competently dealt with. There should be similar set-up in Singapore.

6.3 Effects of Guidelines

Clause 61(1) of the Bill is welcomed as it indicates that Guidelines will be provided to undertakings to order their affairs to ensure compliance with the competition laws. The fact that such Guidelines will be published by way of Gazette Notification means that the Commission will have flexibility to modify and update the Guidelines as the circumstances arise.

The issue though is that it is expressly stated that the Guidelines are not binding on the Commission, suggesting that it would only be binding on undertakings. If this is intended, it could lead to the anomalous scenario where an undertaking has complied in *toto* with the Guidelines, but the Commission can nevertheless prosecute it as the Guidelines are not binding on the Commission.

SCI proposes that it be made clear that the Guidelines are binding on all parties, including the Commission. A proviso can be included to state that the Guidelines are binding on the Commission except where there has been a material change of circumstances which affects the industry at large. This will provide the Commission with the necessary flexibility.

6.4 Powers Of Investigation - Extent Of Confiscation

The Commission's power to take away documents with or without a warrant is couched in very wide terms. Specifically, the Commission can take away any document that has 'a bearing on the investigation', is 'relevant to the investigation' or is 'of the relevant kind'. Whilst such broad powers ensure a more efficient investigation process, they can be disruptive or even crippling for the undertaking. As a counter balance, it should be made clear that the undertaking can make copies or retain such equipment under prescribed conditions to enable the undertaking to carry on its business.

This suggestion is particularly important given that clause 86 does not allow any claim for damages to be brought against the Commission or its officers.

7 COMPLAINTS / APPLICATIONS TO COMMISSION AND COURT

7.1 Timelines And Procedures

The Bill does not prescribe timelines within which the Commission and the Board of Appeal must hear submissions and hand down its decision. Presumably this will be set out in regulations or in Guidelines.

Providing guidance on the timelines is an important requirement that aids certainty as to the target dates for filings, submissions and final decision. This will enable undertakings to better plan their activities without the concern of pending complaints hanging over them.

7.2 Limitation Period

The wording of clause 75(2) does not make it clear whether it is an accrual of action clause. It is necessary to redraft clause 75(2) to clarify that the cause of action for any private action will only accrue at the point the Commission's decision is handed down.

Moreover, the right of private action for anti-competitive conduct is not a recognized category under the Limitation Act. The Bill would have to state the limitation period for such private actions.

7.3 Appeal To Court

The Bill provides for an appeal to the court on points of law. This is welcomed.

However, this is in contrast to the process under the Gas Act and the Electricity Act, where the final arbiter is the Minister. Even if separate regimes are to be maintained, there should be consistency in the appeal process to the court, which can and must be the final arbiter on points of law.

See further the discussions at section 10 below.

8 APPLICABILITY OF THE COMPETITION LAWS

Clause 34(5) of the Bill provides that 'subsection (1) applies to agreements, decisions and concerted practices implemented before, on or after the appointed day'. This suggests that even existing agreements, decisions and practices that undertakings are now involved in would be caught by the competition laws when it comes into force.

SCI is of the view that this is too onerous and recommends that a clear date be provided as to when the competition laws are applicable to agreements. SCI, therefore, proposes that clause 34(5) be deleted, and it be provided clearly in transitional provisions as to when the laws are applicable to the agreements, decisions and practices.

CONCLUSION

SCI hopes that the feedback provided has been helpful. Please do not hesitate to contact Ms Linda Hoon or Ms Delphine Loo if there are any queries.

Submitted for and on behalf of
SembCorp Industries Limited
Ms Linda Hoon
Group General Counsel