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Our Ref: LG-CL

28th May 2004

Ministry of Trade and Industry
100 High Street #09-01
The Treasury
Singapore 179434

Attn: Director, Market Analysis Division

Dear Sir/Madam

RE: Competition Law Consultation Paper
Feedback by Shells Eastern Petroleum Pte Ltd

We, Shell Eastern Petroleum Pte Ltd ("Shell") thank the Ministry of Trade and Industry ("MTI") for this opportunity to provide feedback on the Consultation Paper and draft Competition Law Bill ("Draft Bill"), which was released on 12 April 2004.

SUMMARY OF KEY POINTS

(i) Definition of undertakings: We suggest that this be revised to include all entities forming a single economic entity as has been interpreted by case law in some other jurisdictions.

(ii) Retroactive Application of Section 34.

(iii) Concept of Appreciable Effect to be introduced into the Draft Bill, section 34, 47 and 54.

(iv) Impact of non binding Guidelines – Section 61.

(v) Exemptions for mergers and Joint Ventures, where the commercial benefits outweigh anti competitive effects.

STATEMENT OF INTEREST

Given Shell's experience in other parts of the world, we are conscious and supportive of the importance of Competition laws. Compliance with Competition laws is also a matter of significance for our organization and forms part of our Group Business Principles. To enable us to meet our Business principles we would need comprehensive and clear provisions, along the lines of generally accepted legal principles in this area, within which we have to date been working. Hence our review of the proposed legislation.

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We set out below, our comments on the bill.

1. DEFINITION OF UNDERTAKING - SINGLE ECONOMIC ENTITY RULE

The definition of "undertaking" is cast in very wide language and will extend to any dealings between companies operating within the same group.

Case law in the European Union and in several other jurisdictions have interpreted the word "undertaking" to exclude group companies operating within the same economic entity. Given this developed state of international principles, Shell proposes that the Draft Bill should expressly provide that group companies operating within the same economic entity are excluded from the reach of the Draft Bill.

In the absence of such exemption, group companies would find it difficult if not impossible to function.

A number of businesses currently operate in this manner and a specific exemption would remove any uncertainty as regards the application of competition laws to group companies, as well as lingering doubts as to whether the Commission or the courts in Singapore will view European Union case law as persuasive authority. Alternatively, if the exemption is not expressly provided in the Bill, then it must be included into 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 when a group can be regarded as operating within a single economic entity must also be provided. On this, the test of control has been adopted in the European Union. For avoidance of doubt, any definition of 'control' introduced should be in accordance with that existing in the Companies Act and the Securities and Futures Act. It can and should, therefore, extend beyond mere shareholding ownership.

2. RETROSPECTIVE EFFECT OF BILL

Section 34(5) of the Draft Bill provides as follows:

> "subsection (1) applies to agreements, decisions and concerted practices implemented before, on or after the appointed day."

This section means that the competition laws will catch all existing agreements that businesses have entered into or are participating in when it comes into force. This would require organizations to review all their existing arrangements. Apart from being onerous, this places organizations in a vulnerable position for any potential allegations of a breach.

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Shell, therefore, proposes that the competition laws only apply to agreements that undertakings enter into from the date of the coming into force of the competition laws or from such prescribed date as may be set. If the latter option is adopted, then the MTI must give sufficient notice of the prescribed date so that undertakings can manage their affairs appropriately and ensure they are in compliance with the laws. Furthermore, in the case of agreements entered into prior to the appointed date, the provisions that may be offensive should be void, but not the entire agreement unless it is not possible for the agreement to stand alone without the provision (e.g. an agreement that has as its sole purpose anti-competition objectives). MTI must also provide that no action taken prior to the appointed date arising from or in connection with these agreements be actionable.

3. APPRECIABLE EFFECT

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

> "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."

Sections 34, 47 and 54 of the Draft Bill, however, provide that any agreement which could inter alia distort competition, or where there is an abuse of dominant position, or where there is a substantial lessening of competition as a consequence of a merger, is prohibited. This is wider than the stated intent in the Consultation Paper.

Case law in the European Union and the United Kingdom show that the courts have not been consistent in whether the stricter test of appreciable effect is to be used to ascertain whether an act is anti-competitive. As such, it may be prudent in the interest of promoting commercial activity and certainty, that the words "appreciable effect" be included into the Draft Bill, so that the stated intent in the Consultation Paper is given effect to.

At the very least, if the MTI desires to leave the legislation widely stated, then guidelines should be prescribed which use precise language to explain how sections 34, 47 and 54 of the Draft Bill will be interpreted.

4. DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS

Sections 34(2)(d) and 47(2)(c) of the Draft Bill provide as an instance of potentially anti-competitive behaviour, the following:

> "apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

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It is not uncommon for a party to negotiate varied terms with its customers depending on volume and term requirements. Also, it is not unusual to offer different credit terms to a customer on the basis that he is a better paymaster and has better credit rating than another customer who frequently defaults on payments or drags on payments. Imposing dissimilar conditions in such instances can in effect contribute towards greater economic efficiencies rather than have anti-competitive effect.

When dissimilar conditions are applied because of the type of trading party involved, the dissimilar conditions evidently do not have as their objective the prevention restriction or distortion of competition, but could unknowingly have the effect of preventing, restricting or distorting of competition. Additionally, under section 47, such conditions are deemed to indicate abuse.

The unintended impact of the specific wording in these sections could lead to an undesirable impact on businesses and Shell proposes that for the purposes of section 34 of the Draft Bill, the prohibition should be modified such that only agreements between undertakings which impose an obligation or agreement or consensus to apply dissimilar conditions with a view to distorting competition be prohibited. Similarly, for purposes of section 47, Shell proposes that the differing terms with the objective of abusing dominant position be deemed an abuse and not the mere existence of differing terms.

5. MERGERS SECTION 54

It is felt that the regulations governing this section need to be clear and comprehensive as it is a very important area for businesses. Exemptions in particular from these rules need to be clearly defined and Shell proposes that there be greater clarity as to what forms of partnerships and alliances between undertakings are intended to be caught, in particular as noted by the MTI in the Consultation Paper an additional element is that there are no other offsetting efficiencies. Leaving it to interpretation by the Commission or by the courts could create substantial uncertainty for the businesses.

As the MTI is aware, joint ventures are formed for a number of varying reasons with varying commercial benefits which often clearly outweigh any anti-competitive effects, including the following:

- Greater economies of scale with the end result of better consumer welfare.
- More effective management of group companies.
- Does not restrict, distort or prevent competition.

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Given this, Shell proposes that an appropriate provision be included in the Draft Bill to allow joint ventures where the commercial benefit brought about by the joint venture substantially outweighs any anti-competitive effects that may peripherally arise. In particular, the exemption must extend to any agreement between undertakings which are intended to obtain cost synergies and improve efficiencies, e.g. production joint ventures or co operation agreements for logistics.

Confirmation is also sought that the Merger provisions will not be put into effect until all regulations have been comprehensively completed.

6. HORIZONTAL AGREEMENTS

Section 34 of the Draft Bill is widely worded and can potentially prohibit all horizontal arrangements. 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 should be treated. This is the approach taken in the European Union.

7. RESTRICTIVE COVENANTS / RIGHT OF FIRST REFUSAL ETC

The Draft is silent as to whether restrictive covenants, rights of first refusal and non-compete clauses (collectively "restriction clauses") in contracts will be caught as being non-competitive. Such clauses are introduced into contracts for a number of commercial reasons, including maintaining the quality of services offered.

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

Shell proposes that for the avoidance of doubt, there should be an express exemption providing that restriction clauses in a contract are not anti-competitive where the commercial benefits of such clauses outweigh the anti-competitive effects.

8. BLOCK EXEMPTIONS FOR ANTI-COMPETITIVE AGREEMENTS ETC

Shell notes that the Commission can make recommendations for block exemptions to be granted under section 38 of the Draft Bill. The section does not allow for applications to be made by undertakings for block exemptions to be granted.

Query? Is it the intention that block exemptions be granted by the Commission to relevant agreements across the board? Should the section be modified to allow for all undertakings to be able to apply for block exemptions to be granted in the same way as it can for individual exemptions?

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9. FRIVOLOUS COMPLAINTS

The Draft Bill does not deal with the issue of frivolous complaints. Frivolous complaints could unnecessarily result in increased costs for the business 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.

Shell is conscious that this has to be balanced against the need to monitor competition compliance and not deter whistleblowers or other legitimate complainants, and would agree with that. Shell, nevertheless, considers some protection may be necessary so as not to leave undertakings exposed to possible unjustified costs.

10. SELF REPORTING

Shell proposes that provision be made in the Draft Bill (both at the Commission and court levels) to take cognisance of by imposition of reduced penalties and fines or by way of a warning only where an alleged anti-competitive company 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.

11. COMPLIANCE

11.1 Guidelines To Ensure Compliance

Section 61(1) of the Bill provides that Guidelines will be issued to undertakings to order their affairs to ensure compliance with the competition laws.

Section 61(4) provides that the Guidelines are not binding on the Commission. This questions the effectiveness of the Guidelines if it cannot be used as a shield against the Commission.

11.2 Difference Between Obtaining Guidance Or decision

The Bill includes provisions allowing undertakings to apply for guidance or issue a notification for a decision from the Commission. There does not appear to be any material difference between the effect of obtaining guidance and or a decision. Clarification is sought on the purpose that is intended to be achieved.

11.3 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 documents that have the following effect:

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- 'a bearing on the investigation' or
- that is 'relevant to the investigation' or
- that is 'of the relevant kind'.

Whilst such broad powers ensure a more efficient investigation process, it can be disruptive for the business. As a counter balance, Shell proposes that the request for documents be limited to those directly connected with the incidents and further that the business can make copies or retain such equipments under prescribed conditions to enable the business to carry on its business.

In the case of a section 54 of the Draft Bill violation, Shell proposes that rather than a raid, a request for document be made to the undertaking. This request can be fulfilled in the presence of the investigating officers of the Commission. This is because in Merger projects, the documentation involved is voluminous. But more importantly, in an alleged Merger violation, unlike in sections 34 or 47 violation, there is less likely to be an immediate impact.

11.4 Powers Of Investigation – Searching A Person

Section 64(5)(c) of the Draft Bill empowers the investigating officer of the Commission to enter premises and search any person on those premises "if there are reasonable grounds for believing that that person has in his possession any document or article which has a bearing on the investigation". Shell is of the view that this power is too wide. Shell proposes that, if indeed a power to search a person is necessary, then adequate safety procedures for the respect of the individual must be put in place.

12. COMPLAINTS / APPLICATIONS TO COMMISSION AND COURT

The Draft 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 when key target dates for filings, submissions and final decision are. This will enable businesses to better plan their activities without the concern of pending complaints hanging over them.

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13. CONCLUSION

As a general comment, Shell emphasises that clarity and certainty in the proposed competition laws to be introduced is essential. This requires the language used in the Draft Bill to be clear, and any exemptions or carve outs introduced concise and to the point. Any vagueness in language could result in uncertainty for the business and a tendency to adopt a "play safe" attitude which is likely to cause an influx of administrative work for the Commission, resulting in delays in achieving business targets and an inefficient application of the competition laws.

Yours sincerely,
for and on behalf of
SHELL EASTERN PETROLEUM (PTE) LTD

Mrs Lalita Bajwa
Head, Legal Department