

29 May 2004

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

Dear Sir/Madam

RESPONSE TO MTI'S CONSULTATION ON THE COMPETITION BILL

I am writing to you in response to the Ministry of Trade and Industry's ("MTI") public consultation on the draft Competition Bill ("the Bill").

2 We thank MTI for the opportunity to provide comments on the draft Bill. As an active shareholder in a broad range of industries, we take a keen interest in the evolvement of a generic competition law in Singapore.

3 In coming up with our comments, we have given the proposed Bill due consideration and sought the views of companies in our group.

General Comments on Competition Law

4 Competition policy must exist to

- (i) protect and promote the **competitiveness** of the economy - for the benefit of the market and consumers as a whole – and not the interests of competitors; and
- (ii) ensure fair competition. The emphasis should be on ensuring competitiveness and not competition *per se*. Otherwise, there will be potential for economic friction and harm caused to the fair and free market operations.

5 The Competition Commission ("the Commission") should also bear this in mind when considering complaints from competitors of a firm under consideration. The Commission should ask itself why the competitors are expressing concerns. In the case of a merger appraisal, is it because the merger might substantially lessen competition, to the detriment of consumers?

6 In our view, the Bill as presently worded is general and leaves much discretion to the Commission in determining what is prohibited under the proposed Competition Act ("the Act"). This creates for businesses unlimited uncertainty as to whether their business dealings would be classified or prohibited under the Act.

7 This should not be the case. The Competition Bill should serve as a framework for a fair and free market. Apart from prohibiting anti-competitive agreements and the abuse of dominant position (eg. engaging in predatory pricing), the law should be drafted as clearly and as limited in scope as possible, so as not to introduce another layer of administrative and market costs.

8 For instance, consider the impact of the law on M&As. Unless the law is clear on what types of M&As the Commission will scrutinize and how it will exercise its powers (eg. are there stipulated timeframes?), parties involved in any M&A will have to incur costs in making applications to the Commission for guidance or decision. The M&A process may be delayed as a result of the above.

9 Another concern is that new entrants may exploit the Commission's discretion to their advantage and at the expense of existing players. If unfettered, this can potentially lead to an increase in business costs and be disruptive to business operations.

10 The Bill should therefore provide as much certainty and clarity as possible so that all players are clear about what is prohibited under the Act and not leave the government or government agencies to act as the final arbiter. It goes against market principles to leave this to the sole discretion of the Commission or any other government agency.

11 Governments should allow market forces to work; its role is not to take power from the market unto itself but to serve as a fair and efficient referee. In order for it to do so, all rules should be defined upfront and be subject to industry consultation prior to its promulgation, particularly in light of the fact that few administrators (as opposed to market players) have direct experience in the operation of the market or businesses.

12 With regard to the scope of the Competition Bill, it should focus only on certain critical sectors or classes of businesses where there are natural monopolies and where the businesses can have a large impact on the efficient or competitive functioning of the market. These sectors include the telecommunications, media and energy sectors. The government's focus should not be on completely open market industries or sectors like retail, manufacturing, property, personal services and other services like legal, accounting and transport.

13 The scope of the Bill can be subsequently expanded to include other sectors, on the basis of a tested and limited framework. We are of the view that this is a

better and more efficient approach. Companies should be allowed to grow and thrive on sound commercial principles, unfettered by bureaucratic impositions or non-commercial government directions.

Activities Prohibited

(a) *Anti-competitive agreements*

Void agreements

14 Clause 34(3) states that "Any agreement or decision which is prohibited by subsection (1) is void." There is no mention of the effect of obligations which have accrued and been performed under the same and the status of future obligations which now cannot be performed. This may prejudice the interests of the parties concerned and lead to business uncertainty. We would therefore like to seek clarification of the clause.

Blue-pencil test

15 In addition, clause 34(3) should be further clarified to refer to only the provisions in the agreement or decision which are prohibited so that the rest of the agreement or decision not affected by the prohibition is not made void.

Retrospective effect

16 With regard to the retrospective effect of clause 34, it appears inequitable for the clause to apply the Act to agreements entered into in good faith before the contemplation of the Competition Act. This can impose heavy and substantial legal and administrative costs to companies trying to review all contracts containing the characteristics prescribed in clause 34(2).

17 We understand that MTI's concern is that companies may deliberately enter into anti-competitive agreements before the Act comes into force. In the interest of not causing any prejudice to parties which may inadvertently be affected by the proposal, the better approach would be for the Act not to apply to agreements entered into prior to the publication of the Bill but to apply to agreements entered into after the Bill is published, before the Act comes into force.

(b) *Abuse of dominant position*

18 The next few paragraphs relate to clause 47 which covers the abuse of dominant position. Firstly, we note that "dominant position" is not defined in the Bill.

We would urge MTI to provide some indication on how “dominant position” is determined, vis-à-vis other players in a specific market or within a specified industry.

19 “Dominant position” is stated to be a dominant position within Singapore or *elsewhere*. It appears that the extra-territorial operation would only apply in a few circumstances. In these cases, the Commission could be given the additional power to invoke clause 47 with prior written notification to be given to the affected parties. Hence, the words “or elsewhere” should be deleted or it would be too onerous.

20 In determining if there has been a breach of the clause, it is necessary to analyse whether there has been an “abuse” of the dominant position. We would like MTI to provide clarity on what behaviour amounts to an abuse.

(c) *Mergers & Acquisitions (M&As) that substantially lessen competition in Singapore*

Jurisdictional thresholds

21 The Bill does not include any jurisdictional thresholds and therefore in principle, all mergers and acquisitions are potentially subject to the jurisdiction of the Commission. In the interest of certainty for parties involved in the transactions, we propose that the Bill or regulations include some jurisdictional thresholds, thereby excluding certain categories of transactions from the scope of the Commission’s merger jurisdiction.

Issue of directions by the Commission

22 Clause 69 states that where the Commission has made a decision that the section 54 prohibition has been infringed, the Commission may issue directions requiring, *inter alia*, the merger to be dissolved in such manner as the Commission may direct; such assets or shares of the merger as may be specified by the Commission to be disposed of in such manner as the Commission may require; or requiring other modifications of the merger, including sale of a portion of its operations or assets.

23 We have two points to make with regard to the above. Firstly, for the sake of legal and business certainty, we would inquire as to the circumstances in which the Commission would be likely to exercise these directions. Secondly, as the directions have the effect of drastically affecting the rights and obligations of the parties concerned, the power should be exercised only in exceptional circumstances, and within stipulated timeframes.

Impact of competition law on M&As

24 What is the impact of competition law on M&As? Prior to undertaking an M&A transaction, parties would now need to ensure that the M&A undertaken does not substantially lessen competition or if it does substantially lessen competition, there is no appreciable adverse effect on markets in Singapore. This was not the case previously.

25 We note that the Commission will issue guidelines on what types of M&As it will consider to be of concern. These guidelines will be developed after the enactment of the competition law. We emphasise that these guidelines are important. Otherwise, the absence of certainty may increase costs, delay or even impede the M&A process.

Scope of application

Exclusions – Third and Fourth Schedules

26 Paragraph 5 of the Third Schedule and paragraph 2 of the Fourth Schedule only provide that sections 34, 47 and 54 shall not apply to areas which are already regulated under other written law or codes of practice. In our view, this causes confusion as to whether other sections of the Bill are therefore still applicable. Perhaps the Third and Fourth Schedules should be redrafted to provide clearly that the entire Bill will not apply to areas which are regulated elsewhere.

27 We would like to seek clarification as to whether the list of excluded goods and services set out in Annex B will be included in the regulations issued by the Commission.

Appreciable adverse effect on markets in Singapore

28 The Bill does not set out the concept of “appreciable adverse effect”. This is an important principle as it determines what agreements and conduct would be caught under the Act when it comes into force. The concept should be inserted or referred to in the text of the Bill. MTI has indicated that this will be set out in the guidelines. However, as clause 61(4) of the Bill states that guidelines published under that section shall not be binding on the Commission, there would be greater certainty if this was set out in the Bill.

29 In addition, MTI should set out what “appreciable adverse effect” means.

Enforcement

Enforcement of decision of Commission

30 Clause 69 states that “...the Commission may give to such person as it thinks appropriate such directions as it considers appropriate to bring the infringement to an end....”. These enforcement powers are extensive. In the interest of ensuring legal and business certainty, we would inquire the factors which the Commission would take into consideration in issuing the directions. In this regard, we note that in the United Kingdom, OFGEM (the electricity and gas regulator) has published guidelines in respect of the use of financial penalties including the factors which would tend towards the imposition of a financial penalty and the factors affecting the quantum of any financial penalty imposed.

Safeguards to prevent frivolous or vexatious claims

31 In addition, there should be provisions inserted to provide for compensation to be paid to the party against whom a complaint was lodged if it transpired that the complaint was frivolous or vexatious. Substantial costs could be incurred by a party against whom a complaint was lodged in order to defend the allegation, make submissions and provide information to the Commission during the investigation stage. The provisions would serve to deter any person wishing to make a frivolous or vexatious complaint.

32 In order to address MTI’s concern that the proposal may discourage complaints and therefore work against the purpose of the Act, the compensation could be made payable only upon a finding of a frivolous or vexatious claim and not merely because the complaint is dismissed.

Rights of private action

33 We note that the Bill provides for rights of private action. While we understand the intent, we are mindful that private actions may overload the system while deriving little positive benefits. The availability of such a cause of action may potentially lead to frivolous claims, an increase in business costs and be disruptive to businesses.

34 In our view, the enforcement actions and financial penalties imposed by the Commission should provide sufficient deterrence. The financial penalty imposed can be as much as 10% of the turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of 3 years.

Exemplary damages

35 In this regard, we also note that the court can award exemplary damages. Exemplary damages should only be awarded in exceptional circumstances (e.g. reprehensible conduct, flagrant infringement). In deciding the quantum of damages to be awarded, the court should consider whether the party has taken steps to correct the infringing act and the amount of the financial penalty imposed.

Powers of investigation

36 Clauses 63 to 65 confer very wide powers on investigating officers. These powers, which allow premises to be searched and documents to be seized, are very intrusive. Their exercise could have an adverse effect on a business or even make it impossible for it to operate, at least for a while.

37 In the circumstances, the powers to gather information by unannounced visits should only be exercised after careful consideration of the justification for their use and, where the power to search is needed, only once the Commission has successfully made the case for the grant of a warrant by the court.

38 We hope that MTI will consider our comments in light of creating a pro-enterprise and competitive environment.

Best regards

Yours sincerely



LIM HWEE HUA (MRS)
MANAGING DIRECTOR
STRATEGIC RELATIONS