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By Courier & By Email
<MTI_draftcompetitionbill@mti.gov.sg>

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

Attn: Director, Market Analysis Division

Dear Sirs

Comments on 2nd Draft Competition Bill

We are pleased to submit our comments on the 2nd draft Competition Bill.

Yours sincerely

Susan de Silva

Enc.

Comments to

Ministry of Trade & Industry

on

2nd draft Competition Bill

from
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A. INTRODUCTION

This memorandum sets out our comments on the draft Competition Bill attached to MTI's Second Public Consultation document (**2nd Consultation Paper**).

B. SUMMARY OF MAJOR POINTS

1. Appointed Day for sections 34, 47 and 54 prohibitions

The appointed day on which the sections 34, 47 and 54 prohibitions come into effect should be at least 12 months after the Guidelines relevant to the interpretation of those prohibitions have been published.

2. Clause 34(5) should not apply to pre-12 April 2004 agreements

Agreements or decisions made before the launch of the 1st Public Consultation Paper of the draft Competition Bill should be "grandfathered" from application of section 34(5) of the proposed Competition Act.

3. Clause 68 Decision of Commission

The decision of the Commission under Clause 68 and the grounds of the Commission's decision should be made public, unless overriding considerations for non-disclosure apply (such as the considerations under Clause 76(8)).

4. Centralize all appeals from excluded sectors under the Competition Appeal Board (CAB)

The CAB should be the central tribunal for hearing all appeals on competition issues from all sectors including excluded sectors. However, the application of sector rules on competition may still be administered by the respective sector regulators.

5. CAB powers and procedures

More detailed provisions on the CAB should be included in legislation to ensure certainty, transparency, independence. Such provisions include the nature of the proceedings, CAB's powers and the procedures governing the appeal process. Since these provisions go to the issue of the jurisdiction of the CAB, they should be set out in legislation (the Competition Act or regulations) and not in the Guidelines.

6. Scope of exemption in Clause 33(4)

The scope of the exemption for private entities under this Clause should be clarified.

7. **Commission decisions should be made public**

The decisions of the Commission under Clause 68 should be made public, subject to the duty to preserve secrecy under the circumstances in Clause 78(6).

8. **Right of private action in Clause 75**

8.1 Clause 75(2) - The absolute prohibition against commencement of proceedings until after a decision on infringement of a prohibition should be reconsidered to allow for interim relief in certain cases.

8.2 Clause 75(6) - The two-year time bar should be extended to a longer period to allow parties more time to consider commencing an action for damages.

8.3 There should be a right of private action under clause 75 for loss or damage resulting from a breach of any competition rules under the excluded sectors.

8.4 The basis for calculation of damages for the infringement of the prohibitions should be spelt out. In particular, the considerations applicable to an award of ordinary damages and if applicable, exemplary damages should be specified.

C. STATEMENT OF INTEREST

ATMD is a Singapore law firm which provides legal services to both local and foreign clients.

ATMD's legal services include advising on commercial transactions, mergers & acquisitions, intellectual property and competition law under existing sectoral legislation.

The proposed Competition Act will be relevant to our clients generally, most of which will constitute commercial "undertakings" for the purposes of the proposed Act. To assist our clients to clearly understand their obligations under the new competition law, our interest is to see as much clarity and certainty as possible in the new Competition Act, particularly on the prohibitions and enforcement provisions.

D. COMMENTS

1. **Appointed day for sections 34 and 47 prohibitions**

At paragraph 31(b) of the 2nd Consultation Paper, MTI has stated that there will be a transition period of at least 12 months before the provisions on anti-competition agreements and abuse of dominance come into effect. Paragraph 28 of the 2nd Consultation Paper states that given the transition period of at least 12 months, undertakings should have sufficient time to review agreements to ensure that these comply with the competition law.

In order to give undertakings the full benefit of at least 12 months for this purpose, we request that the appointed day on which these provisions come into effect should be at least 12 months after the Guidelines relevant to these sections have been published. We note that although the Singapore-US FTA provides that a general competition law should be enacted by January 2005 (which MTI proposes to do in Phase 1 of its phased approach), the start date of these prohibitions is not specified in the FTA.

2. Clause 34(5) should not apply to pre-12 April 2004 agreements

Clause 34(5) provides the Section 34 prohibition will apply to any agreement implemented before the appointed day on which the Section 34 prohibition comes into effect.

The effect of Clause 34(5) is, from the appointed day, to interfere with the agreed terms in commercial contracts entered into before the appointed day by making void certain parts of the contract. This violates the principle of respect for the sanctity of contracts which were perfectly legal and enforceable when executed. It will not be productive for commercial undertakings to conduct a due diligence review of all their existing, hitherto legally enforceable contracts, including those executed outside Singapore, and those executed by group entities which may constitute a single economic entity with the undertaking. Furthermore, the effect of terms in existing contracts becoming void and the knock-on effect on the undertakings' other contractual obligations (for example, under cross-default clauses, or warranties given as to legal compliance) could be difficult to predict or to deal with.

If MTI's concern is that "grandfathering existing anti-competitive contracts could encourage a wave of anti-competitive agreements to be concluded before the competition law is enacted", we suggest that a compromise position would be to grandfather all existing contracts entered into before the 1st Consultation Paper was issued on 12 April 2004, which was when commercial undertakings had the first chance to become aware of the terms of the proposed new competition law.

3. Clause 68 Decision of Commission

In the interests of transparency and predictability, we suggest that all decisions of the Commission be published, subject only to the Clause 78(6) considerations for non-disclosure of information.

4. Centralising Appeal Hearings from all sectors under the CAB

4.1 As drafted, the CAB will only deal with appeals from a decision of the Commission. In other sectors such as gas, electricity and telecommunications, appeals from the decisions of the relevant regulator must be directed to the Minister who will then set up an ad hoc appeal board to hear the appeal. In those cases, the decision of the appeal board is final (subject possibly to judicial review).

4.2 The effect of these provisions is that there will be numerous competition appeal boards hearing competition-related matters for different sectors, yet each may be deciding on issues which may have a bearing on other sectors. This may result in inconsistent decisions. The provisions for co-operation between the Commission and other regulatory authorities as provided for in Clause 76 of the draft Bill is not in itself a guaranteed safeguard against a multiplicity of approaches by the different sectoral appeal boards and the CAB.

4.3 We believe there is merit in centralising all appeals under a single appeals board. This centralised board can be the CAB. Any appeals from a decision of any regulator, whether the Commission or any other sector regulatory authority should be referred to the CAB. By doing so, the CAB can administer and adjudicate appeals in a consistent and fair manner for all sectors, leading to a consistent development of the law and practice on competition in Singapore.

4.4 If there is a concern that the individual sectors such as electricity, gas and telecommunications may need specialist industry, technical and economic expertise when dealing with appeals, this can be addressed by appointing members of the CAB from qualified persons within the relevant sectors. Further, the CAB can be empowered to co-opt specialists from the relevant sectors when dealing with appeals from a particular industry.

4.5 What does not change in this proposed centralised approach is that the initial decision as to whether or not there has been a breach of any anti-competitive provision is left in the hands of the sector regulator. The sector regulators with specialist knowledge will continue to administer their own competition rules, but their decisions will be subject to review on appeal by the CAB acting as an independent, central competition appeal tribunal.

4.6 This proposed approach for sectoral appeals to be dealt with by the CAB as the central appeal body for competition matters will be consistent with, and aid in, the eventual integration of the sectoral competition rules under a general and unified competition law.

5. CAB powers and procedures

5.1 There are a number of details concerning the powers of the CAB and the appeals procedures that should be addressed in the legislation so that this aspect of the competition law (dispute resolution) is as clear as the provisions on the prohibitions. These details relate to:

- the nature of the CAB hearings – whether as fresh hearings or as appeals only;
- powers of the CAB including to award costs, and whether hearings are public or private;
- the independence of the CAB; and
- the qualifications of the Chairman of the CAB.

As these are core provisions which go to the issue of the CAB's jurisdiction, these provisions should be set out in the legislation and not in the Guidelines.

5.2 The nature of the hearing before the CAB must be clarified. Is the hearing before the CAB a fresh hearing or an appellate hearing? In a fresh hearing, both parties will be free to address the CAB on all matters concerning the dispute, and may rely on fresh grounds or evidence to support their case at the CAB hearings. In an appellate hearing however, no new grounds or matters can be relied upon by the parties. Although Clause 72 (15) of the draft Bill provides for the Minister to make regulations providing for procedures governing the appeal and other matters, the nature of the CAB hearings is not a procedural matter. When the nature of the hearing by the CAB is made clear, then a comprehensive set of rules and procedure should be set out in the regulations to be made by the Minister in accordance with Clause 72 (15).

5.3 Sections 73(2) and 73(3) provide for the powers of the CAB. In particular, CAB is to have the powers, rights and privileges vested in a District Court. However, the following important matters are not clear from the current provisions in Section 73 of the draft Bill :

(a) Whether the CAB has the powers to order costs of the appeal against the appellant or the respondent to the appeal; and

(b) Whether the hearings before the CAB are public or private hearings and whether confidentiality attaches to the hearings.

5.4 The matters referred to 5.3(a) and (b) are important and need to be addressed expressly within the primary legislation. At the minimum, they should be expressly provided for within any regulations to be made under the proposed Act.

5.5 The issue of costs is important particularly when considering the possibility that orders may be made against the Commission for costs to be paid in the event the decisions of the Commission are found to be wrong. Competition appeals may be complex and may involve parties having to expend substantial costs and expense. Therefore, as a policy matter, it is important to know if the CAB is empowered to order costs, because if the Commission is potentially liable to pay costs of the other party if the Commission loses an appeal, the Commission must be sufficiently funded to meet such expenses.

5.6 There should be an express provision in the legislation to provide for the independence of the CAB. This can be along the lines of Section 84(4) of the Gas Act Cap. 116A, which provides for the appeal panel to "be independent in the performance of its functions".

5.7 Clause 72(5) of the draft Bill which relates to the qualification of the Chairman of the CAB should be made clear. The current draft provides that "a person who is qualified to be a Judge of the Supreme Court" shall be appointed to be Chairman of the CAB. The meaning of the phrase "qualified to be a Judge" is not clear. If the Chairman could be selected from amongst any existing Judge, retired Judge or Judicial Commissioner, the provision should simply say so.

6. **Exemption for private companies carrying on activities on behalf of the Government in Clause 33(4)**

The draft Bill provides in Clause 33(4) that the prohibitions do not apply to any activity carried on by, or any agreement entered into or any conduct on the part of, any person acting on behalf of the Government or that statutory body in relation to that activity, agreement or conduct.

This would appear to provide a complete exemption to any private party who carries out any "activity on behalf of the Government or statutory body". As drafted, this exemption may be unnecessarily broad. It will be difficult in practice to determine which private companies are to benefit from the exemption since the term "activities on behalf of the Government" may be broadly or narrowly construed. Private companies involved in anti-competitive conduct may attempt to rely on this exclusion for any activity which relates to or involves the Government or a statutory board.

If the intention is to make this exemption applicable to only specified activities which are usually performed by the Government or a statutory board but which may be outsourced to private companies, a better approach may be to specify the nature of the activities which are intended to be covered by this exemption.

7. **Right of private action under Clause 75**

7.1 Interim reliefs should be allowed before decision on infringement of a prohibition

The draft Bill provides that a private action can only be commenced after a decision on infringement of a prohibition has been made. This is supported by the fact that the Court in hearing a private action will be bound by the decision of the Commission or the CAB that the prohibition has been infringed.

While this approach reduces the likelihood of speculative litigation, it may be necessary for a party to seek relief from a Court by means of injunctive relief, for example where the conduct of another party has such an adverse effect as to put the first party out of business. In that case, the right to commence a private action after the decision may be moot. In such cases, the law should allow a party to obtain the leave of court to apply for immediate injunctive relief until the decision on infringement is made. An alternative approach may be apply to the Commission for leave to apply to Court for such relief.

7.2 Extend 2 year time bar on commencing actions for civil damages

The draft Bill provides in Clause 75(6) for a 2-year time bar for commencement of a civil action for damages. This time runs from the relevant date of the decision of the Competition Commission, Appeal Board or Court of Appeal in Clause 75(4).

Given that the introduction of competition law is a completely new concept to businesses here, we would recommend that private parties be given more time to consider whether to commence a private action at least 3 years.

7.3 Private action for sectoral exclusions

One of the difficulties that arises from the sectoral exclusions is that there is no right of private action available to parties under the relevant sectoral regulations. This creates an inequality for persons in those sectors.

We therefore suggest that the proposed Competition Act include a right of private action for any party who suffers loss or damage as a result of the action of another party that is in breach of the sectoral competition regulations. This will ensure that all private parties will be entitled to relief for loss suffered, whether the anti-competitive activity occurs under an excluded sector or under the Competition Act.

7.4 Quantification of damages

The draft Bill does not set out any minimum or maximum damages payable. In the context of a completely new competition law, the quantification of damages will be a very important consideration. The draft Bill does not stipulate what damages are payable and on what basis they should be calculated.

We suggest providing for the basis of damages in the proposed Competition Act by specifying for example whether damages should be compensatory or punitive in nature, as this will provide some certainty to the business community. Further, the principles to be considered in determining the award of damages should be spelt out.

In particular, MTI should consider and seek public feedback on whether ordinary damages only are to be payable or whether aggravated or exemplary damages are intended. If exemplary damages are intended to be available to private parties, limits should be placed on when such damages should be awarded.

E. CONCLUSION

ATMD welcomes the proposed Competition Act as a progressive instrument that will enhance efficiencies in the Singapore market. The new competition law may better achieve its objectives by being, from the beginning, as clear, detailed, comprehensive and accessible as possible, so that undertakings both within and outside of Singapore may readily understand and thus comply with the new competition law.

Alban Tay Mahtani & de Silva
20 August 2004