SECOND ROUND OF PUBLIC CONSULTATION ON THE DRAFT COMPETITION BILL

20 AUGUST 2004

JOINT SUBMISSION OF TELECOMMUNICATION CARRIERS IN THE ASIA PACIFIC REGION

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SUMMARY OF MAJOR POINTS

We are pleased to comment on what is a good framework for a strong, generic competition law in Singapore. The changes proposed in the second draft Competition Bill (the "draft Bill") generally strengthen the existing provisions of the draft Bill.

Although the revisions to the draft Bill are generally positive, a fundamental concern which we wish to submit for your consideration lies with the continued exclusion of the telecommunications industry from the ambit of the draft Bill. The intention to implement the draft Bill and the Code of Practice for Competition in the Provision of Telecommunication Services (the "Competition Code")[1] concurrently as independent tiers of the competition regime in Singapore, deviates from the policy as regards regulatory and competition regimes found in most other developed countries and will be detrimental to the telecommunications industry in Singapore.

Aside from the deviation, there is considerable discrepancy between the efficacy of the draft Bill and the Competition Code. From a comparison of the terms of the draft Bill and the competition provisions of the Competition Code, it is clear that the former is a much stronger piece of legislation. The implementation of both the draft Bill and the Competition Code, as currently drafted, will give rise to an imbalance within the competition regime and lead to material uncertainty and the lack of availability of useful precedent across different sectors. In addition, there are numerous inconsistencies between the provisions of the draft Bill and the Competition Code.[2] Moreover, the Ministry of Trade and Industry ("MTI") has proposed to issue a number of explanatory guidelines with respect to the draft Bill whereas the Infocomm Development Authority ("IDA") has not committed to issue any guidelines with respect to the Competition Code. Unless addressed, the discrepancies between the draft Bill and the Competition Code will lead to an imbalance in Singapore's competition regime to the detriment of investment in the country.

We submit that it is critical for MTI to set a definitive timeline for ending the divergence of policy within Singapore's competition legislation and to commence a transparent process of formal review. An alignment of the draft Bill and the Competition Code would require amendments to the Competition Code and an expansion of the guidelines to be issued under the Competition Code to equal, both in number and substance, those to be issued under the draft Bill. We would therefore urge MTI to co-ordinate with MITA and IDA before the draft Bill and new Competition Code are finalized to ensure that the provisions are as closely aligned as possible. We submit that MTI can further assist in closing the gaps between the two pieces of legislation by working closely with IDA to ensure that the guidelines MTI plans to issue are as closely aligned as possible with those to be issued by IDA. We also recommend the establishment of a working group consisting of representatives of both the telecommunications industry and the governmental authorities responsible for competition and telecommunications regulation for purposes of progressing the alignment of the draft Bill and the Competition Code, with a firm timeframe for completing this alignment.

We note that the Second Public Consultation on the draft Bill states that the sector exclusions provided under the draft Bill "…are not intended to be permanent." In this regard, we seek

[1] For the purposes of this submission, references to provisions of the Competition Code are to the Code of Practice for Competition in the Provision of Telecommunication Services as at 2000.

[2] Refer to Annex A of this submission for more details on this point.

MTI's and IDA's commitment to expeditiously ensure the alignment of the Competition Bill and the Competition Code.

STATEMENT OF INTEREST

MTI recently launched the second round of public consultations on the draft Bill to solicit feedback from members of the public, companies as well as consumer and business associations, on the changes to the proposed competition law.

The carriers involved in preparing this joint submission ("Submission") are AT&T Worldwide Telecommunications Services Singapore Pte Ltd, BT Singapore Pte Ltd, T-Systems Singapore Pte Ltd and MCI Worldcom Asia Pte Ltd.

As competitive providers of telecommunications services to business and/or residential users in Singapore and as active players in the telecommunications industry in Singapore, we hope to see the benefits of competition flow through to users of telecommunication services by way of increased choice, innovation, lower prices and better products and services. In addition, as a key trading country, it is important for Singapore to have a pro-enterprise environment with a robust regulatory framework that promotes competition in all industries.

COMMENTS

Our comments on the draft Bill are set out in the following sequence:

Key Point 1:	The Proposed Changes Strengthen the Efficacy of the Draft Bill
Key Point 2:	The Exclusion of the Telecommunications Sector from the Application of the Draft Bill will Marginalize the Telecommunications Sector and is Inconsistent with International Best Practice
Key Point 3:	The Draft Bill and Competition Code Lack Symmetry
Key Point 4:	The Draft Bill and Competition Code Contain Inconsistent Provisions
Key Point 5:	Alignment of the Draft Bill and Competition Code is Critical

Key Point 1: The Proposed Changes Strengthen the Efficacy of the Draft Bill

The changes to the draft Bill proposed by MTI are commendable and mainly strengthen the existing provisions of the draft Bill. In this regard, the following changes are of significance:

> ***Competition Commission***. The independence of the Competition Commission will be strengthened and safeguarded by the proposed changes on appointments and financial matters, as well as by the changes which limit the ability of the Minister of Trade and Industry to intervene.
>
> ***Proposed Guidelines***. Annex A to the Second Public Consultation of the draft Bill sets forth a list of proposed guidelines which MTI will publish to ensure that there is clarity of the terms used, as well as with respect to the implementation and enforcement processes. These guidelines will be extremely helpful for businesses, especially as the draft guidelines will be subject to public consultation.

We believe the most significant of these changes is the proposed guidelines. It is crucial that these guidelines are issued and implemented as soon as possible as they add explanation and working practice to the legal framework of the draft Bill. The draft Bill only covers the general framework of the competition legislation. In many ways, the guidelines will be of greater importance to businesses seeking to comply with this new law. The guidelines will also give clear direction to the Competition Commission in enforcing them.[3]

Key Point 2: The Exclusion of the Telecommunications Sector from the Application of the Draft Bill will Marginalize the Telecommunications Sector and is Inconsistent with International Best Practice

As discussed above, the changes to the draft Bill are generally beneficial and commendable. However, we are concerned that the telecommunications sector remains excluded from the application of the new competition law. The reason given in the Second Competition Bill Consultation Paper for excluding the telecommunications sector is as follows:

[3] We submit that MTI should refer to the guidelines of established competition authorities, for example the OFT guidelines under the Competition Act of 1998 and the new European Commission Reg. 1/2003, as good examples of effective enforcement mechanisms.

> *"Given the stage of market development of these sectors and the technical complexities that accompany competition issues in these sectors, the competition rules in these sectors have been specifically designed to cater to the unique characteristics of the particular sectors. Therefore, it would be more appropriate for the relevant sectoral regulators, with their industry knowledge and expertise, to administer their own competition rules in these sectors, than to subject these sectors to the competition law."*

MTI's reason for excluding telecommunications from the draft Bill is based on the premise that sectoral competition rules are better suited to address the specific needs of the industries in question. However, as regards the telecommunications industry and in particular, the competition provisions of the Competition Code, this is not the case. The competition provisions of the draft Bill are stronger than those in the Competition Code and the telecommunications industry would be better served by being included in the draft Bill. Undoubtedly, "the stage of market development" referred to in the Consultation Paper (i.e., fledgling competition in the telecommunications industry) would be better protected under the draft Bill with its effective enforcement and penalty measures, and stronger competition rules.

The draft Bill, as it now stands, provides for two tiers of competition regulation which will operate independently of each other. The experiences encountered in other jurisdictions demonstrate that there are more effective ways of addressing the unique needs of the telecommunications sector without the downsides associated with a two-tier system. Most other jurisdictions have elected to enact generic, cross-sectoral competition laws and where the need arises, secondary regulatory systems have been put in place to address industry specific issues, for example, interconnection for the telecommunications sector. Thus, generic competition law and the secondary regulatory systems act as a counter-balance or support to one another.

For example, in the United Kingdom, the Competition Act of 1998 applies to all industries without distinction and, at the same time, a telecommunications regulatory regime also exists to deal with those situations in which the ability to impose additional controls is needed in order to foster competition and protect the consumer, such as where the prices of a dominant player need to be capped. The situation is similar in most European countries as well as the United States. In this regard, Singapore's decision to specifically exclude the application of its generic competition law to the telecommunications sector separates it from the developed world.

Furthermore, if the competition laws in Singapore are consistent with those in other jurisdictions, the ability to consult existing precedents will speed the resolution of disputes, and will lead to the formation of a highly skilled competition agency, which would help to ensure that best practice is applied across all industries.

We express grave concern that the creation of divergent competition regimes, with a weaker regime for the telecommunications sector, places the sector at a disadvantage compared with other industries. As investment in the telecommunications sector requires a commitment of significant capital and other resources, a secure regulatory framework is essential. Reducing the legal protections afforded to the telecommunications sector in Singapore will diminish investment interest in Singapore's telecommunications sector. In making investment

decisions, companies take great heed of the relevant legal protections in place and will direct investment accordingly.

Key Point 3: The Draft Bill and Competition Code Lack Symmetry

As discussed above, the exclusion of the telecommunications sector from the draft Bill will result in a two-tier competition regime. One risk of a two-tier regime is that different legislation and different regulators will result in different application and results for different industries. For example, the provisions dealing with anti-competitive agreements and abuse of dominant position in each of the draft Bill and the Competition Code are different and are therefore likely to be interpreted differently. Whereas the provisions in the Bill are in line with established international jurisprudence, the provisions in the Competition Code depart from such standards which will make it much more difficult for telecommunications licensees to interpret and apply them.

The lack of symmetry between the two-tiers will also lead to an imbalance in the competition regime. The telecommunications industry will be severely disadvantaged because, as discussed, the draft Bill is a much more powerful piece of legislation than the Competition Code, which lacks, among other things, adequate enforcement measures and remedies. For example, a dominant licensee suspected of abusing its position in a telecommunications market is more likely to escape effective investigation and, even if found to have infringed the Competition Code, is likely to receive a much lighter financial penalty than it would face if it came under the jurisdiction of the Bill. This sort of differential will undoubtedly affect investor confidence in the telecommunications sector in Singapore.

Key Point 4: The Draft Bill and Competition Code Contain Inconsistent Provisions

The table in Annex A of this Submission sets out a list comparing selected provisions between the draft Bill and the Competition Code and highlights the key areas in which the Competition Code's approach towards preventing anti-competitive practices are ineffectual or non-existent and substantially less effective than international best practice. The more significant inconsistencies have been addressed below.

Enforcement: Section 10 of the Competition Code (Section 11 of the proposed Competition Code) and Section 61-70 of the draft Bill

Sections 62-65 of the draft Bill highlight the extensive powers of the Competition Commission in conducting an investigation. The powers granted to the Competition Commission include the power to require document production, enter premises, search premises or persons, and take and remove copies of documents. These powers reflect international best practice. The existing enforcement powers under the Competition Code (and those proposed by the proposed Competition Code[4]) are limited, at best, and do not meet this standard.

Penalties: Section 10.3.2.4 of the Competition Code and Section 69 of the draft Bill

[4] The proposed Competition Code pursuant to the first triennial review of the Code of Practice for Competition in the Provision of Telecommunication Services in 2003, which is still undergoing discussion at the time of this Submission.

Section 69 of the draft Bill sets out a wide range of penalties that the Competition Commission may impose. The penalties under the Competition Code are less effective; they do not go as far to encourage compliance and do not conform to international standards. For example, under the draft Bill, the Competition Commission can impose financial penalties of up to 10% of turnover for each year of infringement up to a maximum of 3 years. In contrast, under the proposed Competition Code the IDA may only impose financial penalties of up to $1 million per contravention.

Appeals: Section 10.2.2 of the Competition Code and Section 71-74 of the draft Bill

The draft Bill contains a very comprehensive appeals procedure. It provides for, among other things, appeals to an independent Competition Appeal Board and further appeal to the High Court and Court of Appeal on points of law. This procedure is in line with standard international practice and complies with Singapore's commitments under the United States - Singapore Free Trade Agreement (the "FTA"). The appeals procedure outlined in the Competition Code is ineffectual and does not comply with the FTA's judicial review requirement. In particular, we wish to highlight the following deficiencies in the appeals process provided under the Competition Code:

- The Competition Code does not provide for appeals to an independent third party. Even under the proposed revisions to the Competition Code, reconsideration of decisions is to be made to the IDA, the same governmental authority that made the decision under appeal, and/or to the Minister of Information, Communications and the Arts.

- Judicial review of the IDA's decisions is not available. Under the Competition Code, final appeals must be made to the Minister of Information, Communications and the Arts, as opposed to the courts. This omission forecloses the ability of an aggrieved party to obtain a decision by an independent judicial authority and is inconsistent with Singapore's obligations under the FTA.

<u>Key Point 5</u>: Alignment of the Draft Bill and Competition Code is Critical

We are gravely concerned over the two-tier competition system which will result from the exclusion of the telecommunications sector from the draft Bill. The asymmetry and discrepancies between the draft Bill and the Competition Code will lead to an imbalance in Singapore's competition regime to the detriment of the telecommunications industry.

To address the issues raised in this Submission, we believe that it is critical for the existing Competition Code and the draft Bill to be aligned. In order to align the draft Bill and the Competition Code, the Competition Code would need to be amended and the number of guidelines to be issued thereunder would need to be expanded to equal, both in number and substance, those to be issued under the draft Bill. We would therefore urge MTI to co-ordinate with MITA and IDA before the draft Bill and new Competition Code are finalized to ensure that the provisions are as closely aligned as possible. Moreover, to achieve

consistency in the application of competition laws in Singapore, it is crucial that MTI co-ordinate with MITA and IDA when issuing guidelines to ensure alignment between the guidelines and to minimize any differences in application which could disadvantage the telecommunications industry. To this end, we would recommend the establishment of a working group consisting of representatives of both the telecommunications industry and the governmental authorities responsible for competition and telecommunications regulation for purposes of progressing the alignment of the draft Bill and the Competition Code, with a firm timeframe for completing this alignment. We would also welcome the MTI's publication of the proposed guidelines on "Cross Sectoral Competition Case Management" as soon as possible.

We note that the Second Public Consultation on the draft Bill states that the sector exclusions provided under the draft Bill "…are not intended to be permanent." In this regard, we seek MTI's and IDA's commitment to expeditiously ensure the alignment of the Competition Bill and the Competition Code.

CONCLUSION

MTI's proposed revisions to the draft Bill are generally commendable. However, the continued exclusion of the telecommunications industry from the ambit of the draft Bill is of great concern. Presently, competition law in the telecommunications industry is governed by the Competition Code. The proposed enactment of the Competition Act, which excludes telecommunications from its ambit, will invariably create problems in enforcement of the competition regime in Singapore if the Competition Code is not aligned. Specifically, the relative weakness of the Competition Code when compared to the draft Bill places the telecommunications sector at a disadvantage compared to other sectors.

To address the problems brought about by implementing a competition regime consisting of two independent and non-aligned tiers, the Competition Code would need to be amended and the guidelines to be issued under the Code would need to be expanded. We would therefore urge MTI to co-ordinate with MITA and IDA before the draft Bill and new Competition Code are finalized to ensure that the provisions are as closely aligned as possible. We submit that MTI can further assist in closing the gaps between the two pieces of legislation by working closely with IDA to ensure that the guidelines MTI plans to issue with respect to the draft Bill are as closely aligned as possible with those to be issued by the IDA.

We further submit that it is critical for MTI to set a definitive timeline for mending the discrepancies between the two tiers of competition regulation and commence a transparent process of formal review of these discrepancies. To this end, we would recommend the establishment of a working group comprising representatives of both the telecommunications industry and the governmental authorities responsible for competition and telecommunications regulation for purposes of progressing the alignment of the draft Bill and the Competition Code, with a firm timeframe for completing this alignment.

ANNEX A

Description	Competition Code ("Code")	Draft Competition Bill ("draft Bill")
Sanction and penalties for breach **(Section 62-65 of the draft Bill)**	• powers for investigation of alleged breaches and the sanctions provided in the Code are not as strong as those in the draft Bill • Powers for investigation and sanction are in fact below the international best practice standards	• Competition Commission has extensive powers in conducting an investigation • criminal liability and penalties for breach of provisions • powers reflect international best practice standards
Discretion in enforcement	• enforcement provisions in the proposed Code give the IDA some discretion in the enforcement of the Code • for example, in deciding whether to provide conciliation and in the manner in which it conducts enforcement action. • There are no guidelines as to when or how the IDA should exercise its discretion • unfettered discretion leads to uncertainty in implementation	• the Competition Commission has less discretion in its enforcement decisions • this leads to more certainty in enforcement and therefore more business confidence
Enforcement options **(Section 69 of the draft Bill)**	• does not provide a wide range of enforcement options • enforcement options provided are relatively weak; they are in fact inadequate, they do not encourage compliance and they do not conform to world standards • for example, the IDA may only impose financial penalties of up to $1 million per contravention under the proposed Code	• clear and wide range of enforcement options, as set out in section 69 • enforcement options are similar to the international position on financial penalties • for example, the Competition Commission can impose financial penalties up to 10% of turnover for each year of infringement up to a maximum of 3 years. This is similar to the EU position on financial penalties
Timescale for enforcement **(Section 11 4.1.2 of the new Code)**	• The timescale in the new Code are unduly lengthy • lags behind standards put forward by the OFTA in Hong Kong	• does not presently contain timescales for enforcement action by the Competition Commission (this will probably be covered in the enforcement

Description	Competition Code ("Code")	Draft Competition Bill ("draft Bill")
		guidelines) • we would like to draw your attention to the timescales recently proposed by OFTA in its Guidelines on Anti-Competitive Conduct in Hong Kong Telecommunications Markets, wherein the OFTA states that it will strive to complete 80% of investigations within 4 months • the OFTA has further made provision for "fast track" review of urgent and serious cases
Appeals procedure	• appeals procedure outlined in the proposed Code does not provide for appeal to an independent tribunal or for judicial review	• contains a very comprehensive appeals procedure which allows for appeals to an independent Competition Appeal Board which has wide powers of review of the original decision (including all the powers of the Competition Commission) • there is also a provision for further appeal on a point to point of law or on the amount of financial penalty imposed by the High Court and Court of Appeal
Guidelines	• limited number of interpretive guidelines provided for and no commitment has been made to issue them	• provides for ten sets of interpretive guidelines to be issued and submitted for public consultation prior to adoption