SINGAPORE INTERNATIONAL CHAMBER OF COMMERCE
FOUNDED 1837

29 May 2004

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

Attn: Director, Market Analysis Division

The Singapore International Chamber of Commerce (SICC) is pleased to submit the attached comments in response to the Ministry of Trade and Industry's Public Consultation on the Draft Competition Bill. These comments are submitted by the SICC on behalf of its members.

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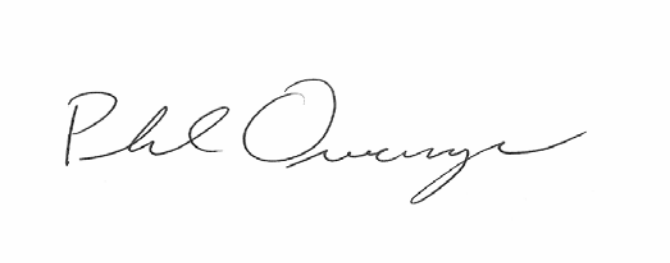
Best regards,



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   Companies otherwise subject to the Law should not be exempt from the Law simply because they are performing any activity on behalf of the Government. The Government and its statutory bodies are very large buyers in the Singapore market and any anti-competitive activity permitted in dealings with the Government is likely to spill over into the private sector.

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   The test for a prohibition of agreements is different than the test for prohibition of mergers and acquisitions. Also, the Competition Bill Consultation Paper describes another overall intent of the Bill and a different standard with respect to intellectual property rights. These different tests should be harmonized or clear guidelines need to be set as to their interpretation.

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   A literal reading of the Act could be interpreted to prohibit anti-competitive agreements between companies in the same corporate group that are not competing entities. We suggest specific amendments to clarify that the Act only applies to agreements between competing entities.

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   The Law could be interpreted to have an indefinite retrospective effect. We

recommend this be clarified to prohibit only agreements that continue after the commencement of the Act.

10. Abuse of dominant position and predatory behaviour

The definitions of these terms are not clear in the Act or are overly broad.

11. Guidelines on enforcement

Overall, the SICC feels the draft Bill lacks sufficient detail and in many areas does not offer adequate guidance to provide the clarity to companies necessary for their business decision making. We recommend that either the final version of the Act include a set of working guidelines or that the Commission be required to issue such guidelines shortly after it is formed.

12. Power to investigate

The draft Bill does not appear to clearly establish the right of any aggrieved party to file a complaint with the Competition Commission. It should be made clear that such parties have this right. However, it should also be made clear that parties who file unfounded or frivolous complaints may be held accountable for all costs of such actions.

13. Decision of Commission upon completion of investigation

To allow greater degree of transparency the commission should be required to reveal the details of its decisions to the affected party.

14. Transitional Provisions

Companies may need more than the 12 months suggested in the Consultation Paper to renegotiate existing agreements that are in potential violation of the new law. Also, adequate time must be provided for companies to make operational changes whenever the Competition Commission issues new guidelines or when new case law is established.

Statement of Interest

The Singapore International Chamber of Commerce (SICC) is the oldest Chamber of Commerce in Asia, being established in 1837 as the Singapore Chamber of Commerce. From its inception, the SICC has represented the interests of its member companies, all of whom are engaged in international and domestic commerce in Singapore.

Today the SICC membership totals over 800 companies all with major operations based and registered in Singapore. The largest group (over 35%) of the member companies, including many of the GLCs, are majority owned by Singaporeans. Companies from America, Germany, Japan, and Britain comprise the next largest nationality groups. In total, SICC member companies represent over 40 different nationalities. As such, all of the SICC member companies, and the SICC itself, will likely be subject to the new Competition Bill, should it become law.

The SICC is proud of its long history of working closely with the Singapore Government to provide information, comments and recommendations on issues that affect its members and the overall business climate in the country.

Comments

1. General Comments

The SICC strongly supports the development of the Competition Bill. As Singapore's economy becomes deeply integrated with the economies of developed nations throughout the world, it is critical that the laws of Singapore include a positive and progressive statement about the rule of law to be applied to competition. Similar laws in other countries provide guidance and direction to individual companies and to entire industry segments in both domestic and international business activities. This new law is an essential step to Singapore's full participation with these world economies.

We support the guiding principles noted in the Consultation Paper as they describe the objectives of incorporating international best practices and simultaneously keeping regulatory costs low both for business compliance and for government enforcement.

Nevertheless, the SICC does have several concerns about how some of these principles are to be implemented, and we discuss those concerns in the subsequent paragraphs of this document.

2. Formation of the Competition Commission

The SICC recommends that consideration be given to placing the Commission under a Ministry that does not also have significant holdings or operational involvement with companies that are subject to the Competition Bill.

The Ministry of Trade and Industry, especially through its many Statutory Bodies, is an active player in the Singapore business community through majority and minority ownership in companies and through grants and loan guarantee programs. We are concerned that this important role of MTI may give the perception, however unfounded, of conflict of interest between the Commission and the business activity of companies supported or owned by the Ministry. The fact that many MTI executives serve on the Boards of Directors or as advisors to some these companies could further contribute to such a perception.

We note that many of our members have expressed concern over the years about the "fairness" of competition in Singapore between the Government Linked Companies (GLCs) and the private sector. The SICC recognizes that the Temasek Charter issued by Temasek Holdings in July 2002 provides some safeguards against the GLCs crowding private companies; however this Charter is inherently a self-governing code. Adoption of the Competition Law will go a long way to alleviate these concerns, and placing the Commission under a Ministry without any potential for even the appearance of a conflict

of interest will make a clear statement about the Government's commitment to assuring an environment for robust and fair competition.

A possibility we would like to suggest is that the Commission be established in the Prime Minister's Office or in the Ministry of Law, since neither of these Ministries appear to have significant direct involvement managing commercial business activities.

Further adding to concerns about the potential appearance of a conflict is the requirement that all moneys recovered under Act shall be paid into the moneys of the Commission [Clause 13]. The Commission will have the authority to impose significant financial penalties of up to 10% of a company's annual turnover for up to 3 years [Clause 69(3)], which could run into hundreds of millions or even billions of dollars. We recommend these moneys be paid to the general treasury and that the Commission be funded through an independent budgeting process.

3. Appeals to the High Court and the Competition Appeal Board
[Clause 74(1)]

For similar reasons to those stated above in connection with the Commission, we suggest the Appeal Board also be established in a Ministry that does not have significant direct involvement managing commercial business activities.

Also, we believe that any appeals from the Competition Commission or from the Appeal Board are likely to involve complex issues of market definition and matters of fact relating to both definition and actions. Therefore, we are concerned that limiting Appeals to the High Court to matters of law or to the amount of any financial penalty is overly restrictive. It has been noted by the MTI consultation team during the SBF sponsored discussion sessions that much of the application of the Competition law will be developed over time through case law and specific applications. Therefore, it is essential that the High Court not be limited in its ability to fully review the decisions of the Commission and of the Appeal Board.

4. General Exclusions from Section 34 and Section 47 prohibition
[Third Schedule]

The exclusions set out appear to be broad. However, some of them are difficult to understand (e.g., the clearing house exclusions). Guidelines should be published to clarify how these exclusions can be interpreted and the tests to be applied for them. For example, in the EU, the EU Commission had issued specific guidelines on vertical restraints. Vertical agreements of minor importance and small and medium sized enterprises (i.e,. undertakings of which market share is not substantial), as well as genuine agency agreements (i.e., obligations of agents as to contracts negotiated on behalf of their principals) fall outside the scope of Article 81 of the EU Treaty (which is similar to the prohibition in Section 34 of the Bill). There should be similar guidelines issued in Singapore for the Bill to give a clear understanding of the interpretation of the exclusions.

5. Exclusion of certain regulated industry sectors
[Clauses 33(2)&(3), Clause 35 and Clause 48]

The SICC supports the government's objective to minimize regulatory costs for both the regulatory agencies and for companies in Singapore. Therefore, we agree with the proposal to exercise regulatory powers through agencies focused on particular industry sectors. However, we believe the Competition Act should effectively be the overarching law across all sectors. We recommend that the sectorial regulatory agencies be required to adopt the Competition regulations in the Act, unless they make specific findings that specific aspects of the Act are not relevant to a particular industry sector. This will assure a more uniform and transparent application of the Act across all industries. In particular, where provisions in existing competition legislation in the proposed excluded regulated industry sectors is weaker than the draft bill, these provisions should be amended and extended to ensure consistency with the bill provisions, e.g., the telecommunications sector.

6. Application to persons performing activities on behalf of the Government
[Clause 33(4)(c)]

This section would effectively exempt from the Competition Act any person performing any activity on behalf of the Government of any statutory body. The SICC believes this exemption is far too broad and could have appreciable adverse effect on several market segments in Singapore. This exemption would permit any company performing any work for the Government to enter into agreements that would restrict or distort competition in the market for similar products or services or to abuse any dominant market position such firms may have obtained through work they are performing for the Government. The Government and its Statutory bodies are very large buyers in the Singapore market and any anti-competitive activity permitted in dealings with the Government is likely to spill over into the private sector as well.

Additionally, the SICC notes that the Government has been transferring business related and commercial activities from within Statutory bodies to "corporatized" subsidiaries. We endorse this practice. However, many of our members believe that some of these government held companies enjoy special relationships with the Statutory bodies of which they were once a part. Many such companies provide products and services (e.g., training, conference planning, travel arrangements, and data/internet services) that are also available commercially from private suppliers. It is essential that these Government owned companies not have even the appearance of special treatment in their dealings with the government.

We recommend that that Clause 33(4)(c) be deleted and that any specific situations where such exemptions are necessary be handled under the Commission's powers to grant Individual exemptions [Clause 36] and Block exemptions [Clause 38]

7. General test for prohibitions
[Clauses 34(1) and 54(1)]

The general test for a prohibition under Clause 34 seems to be based on "prevention, restriction or distortion of competition" [Clause 34(1)]. Compare this with the test for mergers and acquisitions, which relies on the "substantial lessening of competition" [Clause 54(1)]. In addition, the MTI Competition Bill Consultation Paper indicates that the overall intent of the Bill is on conduct that will have "an appreciable adverse effect on markets [Paragraph 6(b)(i)]; and with respect to intellectual property rights a "rule of reason" approach will be adopted [Paragraph 16 in general and Annex C Paragraph 9] . With these various types of tests, clear guidelines need to be set as to the interpretation of the Clause.

8. Agreements among companies in the same group
[Clause 34(1)]

Based on the talk organised by the Singapore Business Federation and presented by MTI on 6 May 2004, the intention of Clause 34 is to prevent anti-competitive agreements between competing entities. This, however, is not clear in Clause 34. A literal reading of Clause 34 may cover agreements or decisions between same group entities (instead of competing entities) which is not aligned with such intention.

Suggested amendments to address this issue:

Clause 34(1) – to insert the word "competing"

"Subject to section 35, agreements between <u>competing</u> undertakings, decisions by <u>competing</u> associations of undertakings or concerted practices…"

• Definition of "undertaking"

- to include references to same group and associated entities.

9. Retrospective Effect
[Clause 34(1) & (5)]

We note that the section 34(1) applies to agreements, decisions and concerted practices implemented <u>before</u> on or after the appointed day. This means the Act would have an indefinite retrospective effect. If the intention for the clause is to apply to prohibit anti-competitive agreements entered into before the commencement of the Act and such agreements <u>continue</u> after the commencement of the Act, it should be made clear.

10. Abuse of dominant position and predatory behaviour
[Clause 47]

The provisions of Section 47 on the prohibition against "abuse of dominant

position" is similar to those of Article 82 of the EU Treaty. It is clear from Section 47 that where 2 or more parties act collectively and exercise a dominant position, the prohibition is applicable. However, it is not uncommon for companies to enter into joint or collective business activities, perhaps to achieve economies of scale or benefit from each party's expertise. This activity may however be "caught" by Section 47.

Also, with particular reference to Clause 47(3), the definition of dominant position to mean "within Singapore or elsewhere" is excessively broad and would appear to capture a company which only has a dominant position in a foreign market and does not have any significant market position in the Singapore market.

Similarly, there is no clear definition of "predatory behaviour". Article 82 of the EU Treaty uses the phrase "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".

For the purpose of interpreting the extent of these prohibitions, clear definitions should be set, and clear guidelines (or perhaps even some examples – like those provided in the Penal Code) should be issued to clarify the application of these prohibitions.

11. Guidelines on enforcement

[Clause 61]

Overall, the SICC feels the draft Bill lacks sufficient detail and in many areas does not offer adequate guidance to provide the clarity to companies necessary for their business decisions. (We have noted some of these specific areas in the preceding sections of these comments.)

During the discussions with the MTI Drafting Team at the recent SBF sponsored review sessions, questions were raised about the appropriate Body of Precedence to be used in support of arguments before the Competition Commission, especially for early cases after the law is enacted. However, the MTI Team clarified that the market situations in Singapore are significantly different than in other countries with established competition laws, and therefore the Bodies of Precedence from such jurisdictions may not be applicable in Singapore. Without other guidelines, there will be a significant lack of clarity, which will likely stifle business activity until a clear set of case law is established.

We recommend that either the final version of the Act include a set of working guidelines that companies and their legal advisors may rely upon for decision making, or that the Commission be required to issue such guidelines shortly after it is formed.

For example, in situations of cooperation among members of associations such as the Singapore International Chamber of Commerce, it is not unusual that horizontal agreements will arise. Clear tests and guidelines must therefore be set down (with distinct examples) so that genuine co-operation, say between members of associations, will not be prohibited.

Furthermore, Clause 61 provides that guidelines may be issued by the Commission but such guidelines are stated not to be binding [Clause 61(4)]. This is not acceptable as the industries and public will be relying on such guidelines to conduct their affairs and should not be penalised if the Commission should decide to revise or change its guidelines. We submit that this clause should be deleted or it should be made clear that any guidelines should not have retrospective effect in the event of any amendments so that parties will not be unfairly penalized.

12. Power to investigate
[Clause 62]

The MTI Competition Bill Consultation Paper states that the Commission may conduct an investigation if, among other reasons, it receives a complaint about an alleged prohibited activity [Paragraph 19]. However, the Bill itself does not appear to provide individuals with the right to lodge such complaints with the Commission. (While Clause 49 does permit a person who thinks some conduct may infringe on Section 47 prohibitions against abuse of dominant position to seek guidance from the Commission, Clause 42 only permits persons who are parties to agreements that may infringe on Section 34 prohibitions to seek guidance.) The Bill should clarify the right of any aggrieved party to file a complaint with the Commission.

However, it should further be made clear that where such complaints are found to be unfounded and frivolous or vexatious, the complainant should bear the costs of all submissions to the Commission (including those incurred by the party against whom the complaint was made) and such affected party should be entitled to take a private action for loss or damage against the complainant. This will deter against frivolous complaints which hamper business activity.

13. Decision of Commission upon completion of investigation
[Clause 68]

To allow greater degree of transparency, apart from notifying of its decision, the Commission should also reveal details of or reasons for its decision to the affected party.

14. Transitional Provisions
[Clause 94]

The MTI Competition Bill Consultation Paper notes that a transition period of at least 12 months will be provided before the prohibition provisions of the competition law come into force [Paragraph 25]. Many companies may need longer periods of time in order to renegotiate existing agreements that are in potential violation of the new law, especially those agreements that do not expire naturally within the 12 month period. Consideration should be given for longer transition periods is such cases.

Similarly, when the Competition Commission issues new guidelines or when

new case law is established, companies subject to the law must be given adequate periods of time to come into compliance with the new standards.

Conclusion

The SICC would like to express its appreciation to the Ministry for seeking Public Comments on this important draft Bill. We also note that the Ministry has stated that a public consultation is likely to be requested on a revised draft of the Bill in the July/August 2004 time period, and that public consultation may also be requested on guidelines proposed by the Competition Commission after the enactment of the Law. The SICC strongly endorses this continued level of public consultation. We believe that the resulting Law will benefit directly from this process.