

Our Ref: SL.tl/C&P/172/0504

28 May 2004

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

By mail & fax 6338 3782

Dear Sir,

PUBLIC CONSULTATION ON THE DRAFT COMPETITION BILL

Reference is made to your letters ref: MTI 074/01-2-003 dated 12 April 04 and 17 May 2004 on the draft Competition Bill.

We append our comments as enclosed in Appendix A for your kind attention.

We hope that you will take on board our comments in the proposed Competition Bill.

Thank you.

Yours faithfully,

SIMON LEE
Executive Director

Encl.

APPENDIX A

S/No.	Description	Comments
1.	Scope of Application	<ul style="list-style-type: none"> According to the Consultation Paper that accompanies the Bill, the proposed Act will apply to all economic activities by private sector entities, regardless of ownership, including non-profit organizations, foreign-owned entities and government-owned entities. However, this is not specifically spelt out in the Bill. We suggest that it be specifically pointed out. The proposed Act will not apply to the exercise of government functions, i.e. Government, statutory bodies, and any entity carrying out activities on behalf of the Government or statutory bodies (clause 33(4) of the Bill). In Singapore, the public sector happens to be the largest employer with extensive procurement needs. Exempting government functions completely may mean that the effectiveness of the legislation will be curtailed. For instance, possible abuses (that the legislation seeks to eliminate), for example, by dominant foreign or government-owned entities may be permissible for public sector works. We would like to request that the amendment to confine the exemption to non-commercial activities of the government only.
2.	Section 34	<p>Agreements etc., preventing, restricting or distorting competition.</p> <ul style="list-style-type: none"> Please clarify whether section 34 prohibition has retrospective effect on agreements entered into prior to the Act coming into force as it does not appear to be stated in the Act. Please clarify whether this provision will affect construction companies that have implicit agreements amongst themselves that relate to exchange of tender price information in order to corner a certain sector of the market remains to be seen. Also, our impression is that this provision may apply to certain parts of the construction industry, for example, the procurement of construction materials like steel and concrete. There are existing practices of market participants for these products, we would like to clarify how the upcoming Competition Bill govern or affect such practices.

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3.	Section 47	<p>Abuse of Dominant Position</p> <ul style="list-style-type: none"> Reference is made to section 47(2)(b) where it states "predatory behaviour towards competitors". The UK version of the Act is slightly different in that it does not use the words "<i>predatory behaviour towards competitors</i>". Instead it covers conduct which "<i>directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions</i>". Predatory behaviour is not defined anywhere in the Act. Hence clarification and guidance are required on the scope of such prohibited conduct. There are developers and landowners holding dominant positions in the Singapore property market that currently affect the building and construction industry. Will the proposed bill apply to this sector to level the playing field for other parties to enter these markets under more favourable terms?
4.	Section 54	<p>Mergers</p> <ul style="list-style-type: none"> The third prohibition relates to mergers that result in a substantial lessening of competition within any market in Singapore for goods or services. <p>It is not uncommon for construction companies to form joint ventures (JVs) for the purpose of carrying out major construction projects, even amongst competitors, whether it be due to sharing of risk, saving costs, pooling of industry knowledge and technological know-how.</p> <p>Given the wide definition of <i>mergers</i> in section 54 (2) read with section 2(1) of the proposed bill, JVs formed for such purpose may be technically anti-competitive in nature and in breach of the proposed bill as it may prevent other companies from competing with the JVs during a tender exercise.</p> <p>One approach in the UK suggests that consortium agreements between <i>non-competing</i> firms that jointly tender for a project that none of them could carry out individually would not be caught by their competition act.</p> <p>Kindly confirm that these type of JV agreements (those mentioned above) are unlikely to create competition problems.</p>

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		<ul style="list-style-type: none"> Our other questions include: <ul style="list-style-type: none"> (i) Will JVs agreements between construction companies be allowed and if so, the scope of the agreement? ; (ii) What type of mergers between construction companies will be affected? ; (iii) What type of procedural regulations would the Minister provide for companies wishing to apply for a merger to be excluded from the prohibition under section 54?
5.	Section 61 to 70	<p>Enforcement</p> <p>These sections cover investigative and enforcement powers granted to the Commission where instances of prohibited conduct and agreements are suspected to exist. The powers are wide and are potentially very intrusive. We would like to seek your views on the Commission's guidelines on when and how these powers are to be exercised.</p>
6.	Third Schedule	<p>Exclusions from Section 34 Prohibition and Section 47 prohibition</p> <ul style="list-style-type: none"> As there is no express exclusion, we would like to clarify whether construction related activities are excluded since the provision allows exclusion where services of general economic interest are provided; when the agreement or conduct is compelled by any written law or where public policy reasons dictate an exception. Many construction related services and agreements relate to projects of public economic interest, such as power plants, infrastructure projects, public buildings etc. It may be the case that such related construction activities may find themselves excluded by written law or by way of applications for individual or block exemptions.
7.	Fourth Schedule	<p>Exclusion from Section 54 prohibition</p> <p>Our comments here would be similar to those under Item 4 above.</p>