FIRST ROUND OF PUBLIC CONSULTATION ON THE DRAFT COMPETITION BILL

29 MAY 2004

JOINT SUBMISSION OF TELECOMMUNICATION CARRIERS IN THE ASIA PACIFIC REGION

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SUMMARY OF MAJOR POINTS

There are several reasons why a robust competition regime is crucial to the development of a world class economy. First, an economy that does not regulate anti-competitive practices will invariably end up with dominant players in positions to abuse their dominance in its various industries, resulting in unnecessarily high prices, low innovation and poor quality of service to the detriment of consumers and business end-users/purchasers. The presence of dominant players, whose anti-competitive practices go unchecked, will hinder the creation of a pro-enterprise environment and damage the economy as a whole. Second, market research has shown that an economy with a robust competition regime attracts more investment than an economy which is known to be unregulated or which has weak or ineffective competition regulations. A robust competition regime in Singapore will therefore be more attractive to investors, and assist the expansion of the Singapore economy. Finally, members of the international community, including Singapore's trade partners, have shown an increasing willingness to enforce competition clauses in international trade agreements; this position will also carry through to competition clauses found in bilateral treaties entered into by Singapore. Singapore therefore must legislate effective competition laws to ensure that it is in compliance with its international treaty obligations. Accordingly, the proposed enactment of the Competition Act is indeed timely and commendable.

The draft Bill sets out a good general framework for competition law. However, it has several shortcomings which we submit for your consideration.

A fundamental concern lies with the proposed exclusion of the telecommunications industry from the ambit of the draft Competition Bill ("draft Bill"). As a key industry in Singapore and one which underpins the success of the country as a regional economic hub, the telecommunications sector would benefit from the application of the draft Bill once enacted, and its exclusion is a significant omission. Further, the intention to implement the draft Bill and the Code of Practice for Competition in the Provision of Telecommunication Services ("Competition Code") concurrently as completely independent tiers of the competition regime in Singapore, deviates from the policy as regards regulatory and competition regimes found in most other developed countries.

Aside from the deviation, there is also a 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 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 concurrently will therefore 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. Notable issues have been omitted in the draft Bill and certain key provisions need to be clarified[1]. In addition, there are numerous inconsistencies between the provisions of the draft Bill and the Competition Code. In light of the above, certain aspects of the draft Bill give rise to issues of interpretation, application and enforcement. These issues will lead to uncertainty in the implementation of the proposed Competition Act to the detriment of investment in the country.

We submit that there are two options to address our concerns: Our preferred option is to create a comprehensive generic competition law for all sectors, with specific guidelines and

[1] Refer to our Annex B and C for more details on this point

sector-specific regulation for the telecommunications industry. Such an approach is consistent with the practices in other jurisdictions which have proven to be feasible and effective. Alternatively, the second option is to amend and extend the Competition Code so that it is much more aligned with the draft Bill.

STATEMENT OF INTEREST

The MTI recently launched the first 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 proposed law.

The carriers involved in preparing the joint submissions ("Submissions") are AT&T Worldwide Telecommunications Services Singapore Pte Ltd, BT Singapore Pte Ltd, T-Systems Singapore Pte Ltd, Cable & Wireless Global Pte Ltd, MCI Worldcom Asia Pte Ltd and Reach International Telecom (Singapore) Pte Ltd.

As competitive providers of communications services to business and/or residential users in Singapore and as active players in the communications industry in Singapore, we hope to see the benefits of competition flow through to users of communication 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. Our interest and goal in this regard is consistent with that stated by the MTI in its Competition Bill Consultation Paper, that is to "enhance the efficient functioning of markets in Singapore and strengthen [its] microeconomic competitiveness".

COMMENTS

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

Part A: The Need for a Robust Competition Regime;
Part B: The Undesirability of a Two-Tier System; and
Part C: Comments on Specific Provisions of the Draft Bill.

Part A: The Need for a Robust Competition Regime:

(i) To Achieve a Pro-Enterprise Environment

The introduction to the Competition Bill Consultation Paper, states that the draft Bill was tendered in response to a recommendation of the Economic Review Committee that a national competition law be enacted as part of Singapore's effort to create a pro-enterprise environment.

We agree that an essential pre-condition to the creation of a pro-enterprise environment is the existence of a strong competition regime. It is a well recognised fact that in an unregulated industry, dominant market players can set the price in the market, and if they choose to engage in anti-competitive actions, they can eventually squeeze out smaller players from their markets. Likewise, in an unregulated industry, competitors have an opportunity to engage in anti-competitive conduct. This does not create a pro-enterprise environment. We therefore further submit that the efficiency of the proposed law should be measured by how successfully the draft Bill prohibits or regulates the occurrence of anti-competitive acts in the various industries. A more effective draft Bill will support the development of a robust competitive regime, thereby creating a more pro-enterprise environment.

(ii) To Encourage Investment in the Market

Further to the development of a pro-enterprise environment, market research shows that there is a correlation between an effective telecommunications regulatory regime and investment per capita in telecommunications infrastructure. From results of market research, it is clear that effective regulation plays a key factor in aiding the development of less mature markets by encouraging investment in the market.

The European Competitive Telecommunications Association ("ECTA") published its latest Report on the effectiveness of regulatory framework for electronic communications in May 2004. The report noted that the greater the regulatory effectiveness, the greater the investment in the market. In a graph produced by ECTA in its Report, a direct relation between the effectiveness of the regulatory regime and the level of investment in telecommunications in a country can be discerned. On a per capita basis, the UK, with the most effective regulatory regime (including competition law), had the highest level of investment in telecommunications. Germany, with the least effective regulatory regime, had the lowest level of investment. We set out as Annex A to our Submissions the graph produced by ECTA in its Report.

(iii) The International Position on Competition Regimes

International bodies like the World Trade Organization ("WTO") have taken an active role in the enforcement of free-trade rules which apply to members of the international community, and there have been several recent international judgments which underscore the requirement of a strong competition regime on a national level. In April of 2004, the WTO ruled that Mexico's international telecommunications regime violated Mexico's WTO commitments. In particular, it was held that Mexico had breached its obligation to maintain appropriate measures to prevent its dominant carrier from engaging in anti-competitive practices. The decision of the WTO demonstrates the measures required to be taken by WTO signatories to ensure their compliance with WTO obligations.

It is submitted that this historic decision, the first of its kind involving the telecommunications industry, will have a significant impact on the telecommunication regimes of all signatories of the WTO, of which Singapore is one. It is submitted that unless Singapore complies with international competition law standards, including the enforcement of such standards, it could face increasing scrutiny and pressure from the international community at large.

(iv) United States – Singapore Free Trade Agreement

A specific example of Singapore's obligations in relation to competition law can be found in the United States – Singapore Free Trade Agreement ("FTA") which was recently signed between Singapore and the United States of America ("U.S."). Article 9.4 section 2(a) of the FTA sets out Singapore's obligations as follows:

> "ARTICLE 9.4: ADDITIONAL OBLIGATIONS RELATING TO MAJOR SUPPLIER OF PUBLIC TELECOMMUNICATIONS SERVICES
>
> 2. Competitive Safeguards
>
> (a) Each Party shall maintain appropriate measures for the purpose of preventing suppliers of public telecommunications services who, alone or together, are a major supplier in its territory from engaging in or continuing anti-competitive practices."

Article 9.4 section 2(a) clearly and unambiguously sets out Singapore's competition law obligations in respect of the telecommunications industry under the FTA. It is submitted that if the draft Bill were to apply to the telecommunications industry, it would serve to uphold Singapore's obligations under the FTA. By contrast, it is arguable whether the present Competition Code would fulfill Singapore's treaty obligations. We would refer you to Annex B of our Submissions which sets out a list of the inconsistencies between the draft Bill and the Competition Code, and which highlights the many 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 practices.

Another instance where the Competition Code may not uphold Singapore's commitments under the FTA can be found in Article 9.11 subsection 3, which sets out as follows:

> "ARTICLE 9.11: RESOLUTION OF DOMESTIC TELECOMMUNICATIONS DISPUTES
>
> 3. Judicial Review
>
> Each party shall ensure that any enterprise aggrieved by a determination or decision of the telecommunications regulatory body has the opportunity to obtain judicial review of such determination or decision by an independent judicial authority."

Article 9.11 subsection 3 provides for the right of judicial review of a regulatory decision. It clearly sets forth, that any aggrieved party in the telecommunications industry must have the opportunity to seek judicial review of the decision of the regulatory body. The Competition Code does not articulate the right of judicial review, whereas the draft Bill provides for this.

Given the WTO panel decision discussed above, wherein the WTO held Mexico in breach of its WTO obligations, it is evident that trade commitments are enforceable, and in fact, will be enforced. Singapore should carefully weigh the impact of its various bilateral and multilateral trade commitments when considering a competition law structure that does not fully comply with such commitments. Now is the time to eliminate any potential compliance gap.

Part B: The Undesirability of a Two-Tier System

Singapore is to be commended for producing a draft Bill which broadly adopts international competition law standards. However, we note the expressed intention in the draft Bill to exclude certain industries from the application of the draft Bill. These excluded industries are set out in the Third and Fourth Schedules of the draft Bill, and they include the telecommunications industry.

The reason for excluding the telecommunications industry from the application of the draft Bill is stated to be that competition law regulating the industry is already in place, namely the Competition Code.[2] Notwithstanding this, we will highlight various reasons why the telecommunications industry should not be excluded from the application of the draft Bill.

(i) Experiences and Practices of other Countries with National Competition Laws

We have observed that 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

[2] 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.

and the secondary regulatory systems act as a counter-balance or support to one another.

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 the dominant player need to be capped. Indeed, in most European countries as well as the U.S., competition rules and telecommunications regulations both exist and are applied without conflict. All these jurisdictions have recognised the need for both sets of rules to apply in order to protect competition in the market. In fact, should Singapore choose to specifically exclude the application of its competition law to the telecommunications sector, it would stand virtually alone in the developed world in this regard. This unusual exclusion could give rise to the perception or reality that the telecommunications section is disadvantaged compared with other industries, which in turn could draw the criticism of Singapore's trading partners.

In contrast to other jurisdictions, it is submitted that the draft Bill and the Competition Code are not complementary; they do not follow the standard approach of a generic competition law floor, supported by sector-specific regulation. In fact the draft Bill, as it now stands provides for two tiers, with each of the two tiers designed to operate completely independently of each other. Consequently, the proposed two tiers do not support or counter-balance each other. This option would seem duplicative; and it gives rise to the possibility of divergent rules applying to telecommunications and other business sectors.

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

With a highly skilled generic competition agency, regulation can gradually be withdrawn. In Singapore, there is currently very limited regulation of the market. It is therefore critical to have a highly skilled telecommunications agency with resources and sanctions, as well as a credible competition regime, to oversee any wielder of market power.

(ii) Lack of Symmetry Between the Draft Bill and the Competition Code

Where there is a lack of symmetry between the two proposed tiers in the Singapore competition regime, this will lead to an imbalance in the competition regime. It is clear that the draft Bill is a much more powerful piece of legislation than the Competition Code, which among other things, lacks adequate enforcement measures and remedies.[3] Consequently, the telecommunications industry will be severely disadvantaged when compared with other industries. This will likely have a resultant effect on investor confidence in the telecommunications sector.

[3] See Annex B and C for more details on this point.

We submit that there are two options to address our concern. Our preferred option is to create a comprehensive generic competition law for all sectors, with specific guidelines and sector-specific regulation for the telecommunications industry. Such an approach is consistent with the practices in other jurisdictions which have proven to be feasible and effective. The second option is to amend and extend the Competition Code so that it is more consistent with the draft Bill.

(iii) Current Inconsistencies Between the Draft Bill and the Competition Code

The need for consistency in the laws of Singapore is recognized as a public policy concern, and this is reflected in paragraph 6(b)(ii) of the Competition Bill Consultation Paper, where it states that "there should be an alignment between these sectoral frameworks and the draft Bill, where possible and appropriate." However, as discussed earlier, the proposed two tiers in Singapore consists of tiers which are completely independent of each other, with each being applied by a different body: the generic competition law found in the draft Bill will be enforced by the Competition Commission, while the telecommunication industry-specific Competition Code is enforced by the IDA. Moreover, each tier contains different provisions for dealing with anti-competitive issues. Our concern is that these two tiers will give rise to inconsistent applications of competition law; where the provisions dealing with anti-competitive issues are different, the Competition Commission and the IDA may reach different conclusions on the same anti-competitive issue, and even where provisions dealing with anti-competitive issues are the same, the Competition Commission and the IDA may still reach different decisions. This will lead to business uncertainty. In the long run, this uncertainty will hamper the growth of business in the telecommunications industry.

To substantiate our view that there are inconsistencies between the draft Bill and the Competition Code, we set out in Annex B hereto, a table which sets out some of the inconsistencies. The more significant inconsistencies have been addressed below.

Mergers: Section 9 of the Competition Code and Section 54 of the draft Bill

(a) Section 9 of the Competition Code deals with consolidations that are likely to "unreasonably restrict competition." The draft Bill, on the other hand, states that a merger which results or may be expected to result in a "substantial lessening of competition" is prohibited. The concept of "substantial lessening of competition" in the draft Bill follows the established practice of regimes such as Australia, the U.S., the U.K. and the new provisions of the Telecommunications (Amendment) Ordinance 2003, adopted by the Hong Kong government last year.

(b) We are of the view that it will be inconsistent, impractical and cumbersome if Singapore adopts two different systems of merger control with 2 different threshold tests, namely "unreasonably restricts competition" versus "substantial lessening of competition". Once again, Singapore would be to our knowledge alone in the world in

applying a different test to telecommunications sector cases than that applied in other sectors.

(c) We recommend that Singapore adopt the concept of a "substantial lessening of competition" as proposed in the draft Bill and consistent with the established practice of regimes such as the U.S., U.K., Australia and Hong Kong. We further urge the MTI to create uniformity and avoid business uncertainty by including the telecommunications industry within the application of the draft Bill.

(d) Finally, we note that the Australian Competition and Consumer Commission ("ACCC") has laid down a very comprehensive set of merger guidelines on how the merger provisions will be applied in practice. Hong Kong's office of Telecommunications Authority ("OFTA") is doing likewise. We urge the MTI/IDA to consider following the same path and publishing a consistent set of guidelines detailing how mergers will be analysed and assessed.

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

(a) Sections 62-65 of the draft Bill highlight the extensive powers of the Competition Commission in conducting an investigation. These include power to require document production, power to enter premises with or without notice, power to search premises or persons, power to take copies and remove etc. Moreover, the draft Bill introduces criminal liability and penalties for breach of the provisions of the Act. These powers reflect international best practice – indeed the UK and EU have recently extended enforcement powers so that authorities have greater ability to investigate alleged breaches of competition law. The existing powers under the Competition Code (and those proposed by the proposed Competition Code[4]) do not meet this standard. We would consequently urge the MTI/IDA to ensure that any authority investigating an alleged breach of competition law has adequate powers of investigation. Again, ideally, these wider ranging rules which comply with international best practices should be applied uniformly to all sectors of the economy.

(b) The enforcement provisions highlighted in the proposed Competition Code give the IDA a certain amount of discretion (e.g. in deciding whether to provide conciliation and in the manner in which it conducts enforcement action). We have concerns as to how this discretion will be exercised because of the ensuing effect on business and legal certainty. The draft Bill affords the Competition Commission less discretion in its enforcement decisions, providing a greater range of enforcement options. Section 69 of the draft Bill sets out a wide range of orders the Competition Commission may make where a breach of

[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 Submissions

the proposed Act is established. These go further than those in the existing or proposed Competition Code, which are relatively weak. For example, under the draft Bill, 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 under competition law.) Whereas the IDA may only impose financial penalties of up to $1 million per contravention under the proposed Competition Code. The penalties under the Code are less effective; they do not go as far to encourage compliance and do not conform to world standards. Again, compliance in the telecommunications sector will be hindered by the weaker powers of enforcement and new entrants and smaller players will be disadvantaged as a result. We would urge MTI/IDA to introduce standard penalties in line with those of the draft Bill.

(c) The draft Bill does not contain timescales for enforcement action by the Competition Commission, which will, no doubt, be covered in the enforcement guidelines. However, we would like to point out that the timescales proposed in the new Competition Code are unduly lengthy (see Section 11. 4.1.2). We would urge MTI to take into account the timescales recently proposed by OFTA in its Guidelines on Anti-Competitive Conduct in Hong Kong Telecommunications Markets. Together with a robust complaints and enforcement regime, OFTA states that it will strive to complete 80% of investigations within 4 months. These timescales are highly commendable. They will provide certainty for licensees and speed up enforcement so that disruption to competition and damage to competitors resulting from anti-competitive conduct can be minimized. Moreover, OFTA has also made provision for "fast track" review of urgent and serious cases – again a commendable inclusion. In contrast, the timescales proposed by the IDA for review of complaints lag behind this standard.

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

(a) The draft Bill contains a very comprehensive appeals procedure. It 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 provision for further appeal to the High Court and Court of Appeal on a point of law or on the amount of financial penalty.

(b) In contrast to this regime, the appeals procedure outlined in the proposed Competition Code is very limited and ineffectual for the following reasons:

- a party requesting review may not make new arguments or present new facts;

- the review procedure is two-pronged – reconsideration by IDA (i.e. it reviews its own decision) and/or appeal to the Minister -which prolongs the appeal process.

Justice delayed is Justice denied

Our reservations regarding the effectiveness of the appeals procedure in the Competition Code have been confirmed by our experiences; for example, the IDA released its decision on the "Designation of SingTel's Local Leased Circuits as Mandated Service" on December 16, 2003; SingTel appealed IDA's decision almost immediately, on 31 December 2003. As at the date of these Submissions, no information has been provided by the IDA or any other party regarding the process of the appeal. Also, no information has been provided on the status of such appeal, and since there is currently no mechanism in place for enquiries to be made regarding the status of appeals, the suggestion is that parties have no option except to await an official announcement. However, as the Competition Code does not set out any deadlines for when a decision on an appeal must be announced, there is no indication of when a final decision will be made, if at all. It is submitted that such uncertainty is unacceptable. Clear guidelines regarding appeals, relating *inter alia* to, the process for appeals, enquires as to the progress of appeals and the applicable timelines for decisions on appeals, should be made publicly available.

(c) Again, the inconsistent provisions in the draft Bill and the Competition Code show up the imbalance between the two regimes in Singapore. The aforesaid restrictions of the review process will disadvantage the telecommunications industry and lead to a two tiers system. The defects of the review procedure under the proposed Competition Code demonstrate the downsides of sectoral regulation via a Code compared to the supporting legal framework of a legislative Act.

Part C: Comments on Specific Provisions of the Draft Bill

In the final section of our Submissions, we will discuss the specific provisions of the draft Bill.

As is the case for any generic competition law, the draft Bill provides an overall legislative framework. However, as a general comment, certain provisions of the draft Bill are too widely drafted, require clarification or lack procedural guidelines for their implementation and/or application. We submit that clear guidelines should be issued or regulations enacted in respect of the following areas:

- anti-competitive conduct under both Section 34 and Section 47;
- market definition and assessment of dominance under Section 47;
- merger control and assessment of significant market power ("SMP") under Section 54;

- administrative procedures/enforcement by Competition Commission;
- complaints procedure.

The guidelines and regulations will assist businesses in applying the proposed law. It will also give clear direction to the Competition Commission in enforcing the same.

In particular, we note the following:

(i) Section 33: Ambit for the application of the draft Bill

The draft Bill has wide-reaching extra-territorial application. Clarification is requested on how the Competition Commission proposes to police this provision in practice, and how the Competition Commission will enforce decisions applying to firms outside the jurisdiction of the Singapore Courts.

(ii) Section 34: Agreements, etc., preventing, restricting or distorting competition

We submit that this section is drafted too widely. It does not state that an "appreciable" or "significant" effect on trade is required before the section is triggered, so that as the section now stands, even minor effects on competition will be caught. The consequence of the above is that the Competition Commission may become inundated with requests for guidance/individual decisions on trivial matters.

(iii) Section 37: Cancellation, etc., of individual exceptions

The Competition Commission can cancel an exemption if it has "reasonable grounds" for believing there has been a material change of circumstances. The terms used in this section are unclear, and the section affords no business certainty. Consequently, businesses may be reluctant to make an investment that could later be held to be illegal. It would be useful if a definition for "reasonable" is provided in the draft Bill and further guidelines are provided on how the Competition Commission intends to interpret this section.

(iv) Section 43 and 44: Notification for guidance and Notification for decision

The draft Bill merely sets up a framework; guidelines are required to clarify what would amount to an infringement of Section 34. For example, the guidelines should address whether the criteria listed in section 41 will be taken into consideration when deciding whether an agreement is in breach of Section 34.

(v) Sections 42 – 46: Applications to the Competition Commission for Guidance or Decisions on Agreements, and the Guidance or Decision given by the Competition Commission

Similarly, Sections 42 to 46 of the draft Bill merely set up a framework. Clear guidelines for the procedure to be followed by the Competition Commission when they give guidance or make determinations, are required. These guidelines should address issues like whether the Commission must produce a written decision, and

whether the Commission must seek comments from third parties before making decisions.

(vi) Section 47: Abuse of dominant position

Section 47 lays down the framework for dealing with anti-competitive conduct by dominant firms. It is key to the enforcement of this provision that guidelines are published detailing how the Competition Commission will approach market definition, how dominance will be established and how the Competition Commission will identify and establish abusive conduct. The guidelines should specify the test for dominance, which may be for example "significant market power" or "the ability to operate independently in a market", and the level of market share which will give rise to a presumption of dominance. Further, the list of conduct which may constitute an abuse should be non-exhaustive; it should be able to incorporate other non-listed forms of abuse.
Guidelines should also specify the threshold to apply when assessing a merger, whether it "unreasonably restricts competition" or if it results in a "substantial lessening of competition" (see above).

Section 47(3) states that "dominant position" means "a dominant position within Singapore or elsewhere". Please define "elsewhere": does this include a market within Singapore or is it strictly extra-territorial? If "elsewhere" is meant to refer to an extraterritorial "dominant position", please clarify why a particular business's dominance outside Singapore should be a relevant consideration for deciding if the said business has a dominant position in the Singapore market?

Perhaps the draft Bill in this regard intends to catch situations in which there is no dominance inside Singapore but a company that is dominant elsewhere is perceived as leveraging that dominance into a market within Singapore in which it is not dominant, e.g. by cross-subsidizing from the dominant to the non-dominant market. If Singapore is considering this application for its competition law, we note that it would be unusual - all jurisdictions of which we are aware seek to regulate only abuses of a dominant position held within their own territory. It is our view, therefore, that this may be an unacceptably broad application and an extra-territoriality principle that could lead to diplomatic controversy if applied.

(vii) Section 54: Mergers

The draft Bill, states that a merger which results or may be expected to result in a "substantial lessening of competition" is prohibited. The concept of "substantial lessening of competition" in the draft Bill follows the established practice of regimes such as Australia and the new provisions of the Telecommunications (Amendment) Ordinance 2003, adopted by the Hong Kong government last year. The ACCC has laid down a very comprehensive set of merger guidelines on how the merger provisions will be applied in practice. Hong Kong's office of Telecommunications Authority ("OFTA") is doing likewise. In view of the fact that Singapore seems to be adopting the definition of merger used in Australia and Hong Kong, it would be helpful for MTI to refer to the merger guidelines published by the aforesaid countries when MTI is drafting the Singapore merger guidelines.

In a related point, it is submitted that MTI also needs to provide guidance in relation to the definition of safe harbours thresholds, so that businesses have some idea of the degree of concentration that will attract scrutiny. Reference should be made to the Office of the Telecommunications Authority, Hong Kong's ("OFTA") new guidelines on mergers (very comprehensive) and also to Australian guidelines on what constitutes "substantial lessening of competition".

As stated above, we are of the view that it will be inconsistent, impractical and cumbersome if Singapore adopts two different systems of merger control with two different standards and two different thresholds tests with respect to telecommunications and non-telecommunications mergers. We would urge the MTI/IDA to create uniformity to avoid confusion and business uncertainty. We would also urge the MTI/IDA to issue a set of guidelines detailing how mergers will be analyzed and assessed and highlighting any special provisions for the telecommunications industry.

(viii) Section 61: Guidelines for enforcement

Enforcement provisions are absolutely key to the effective implementation of competition and regulatory rules, to the maintenance of fair competition and to attaining the ensuing benefits to consumers. Without efficient and effective processes, any competition provisions will be rendered redundant in practice. Moreover, in order to assist investment decision and market growth, the enforcing authority must be independent, proactive and powerful.

The draft provides for the Competition Commission to publish guidelines on how it will interpret and give effect to the enforcement provisions. Obviously these guidelines are absolutely crucial and need to be issued as soon as possible. We note from section 27 of the Competition Bill Consultation Paper that the Competition Commission will develop these guidelines during the time between when the proposed Act is enacted and before the Act comes into force. We strongly encourage that Public Consultations on these guidelines be held during this time. Further to the above, 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 Committee Reg 1/2003, as good examples of effective enforcement mechanisms.

We cannot stress enough that enforcement is key to the effectiveness of the draft Bill. The provisions of the draft Bill provide a good framework for enforcement; however, this commendable framework is worthless without a robust and effective enforcement mechanism.

It is also important for MTI to note that good framework and guidelines will need to be diligently applied, as evident in the practices of established competition regimes. Annex C to our Submissions provides a short summary of several recent actual application of competition law to the telecoms industry. Should MTI have questions on the facts or application of these cases or others, we would be pleased to provide further information and analysis.

(ix) Complaints Procedure

The draft Bill omits a complaint procedure. Section 75 of the draft Bill allows the right of private action for any person suffering loss as a result of infringement of Sections 34, 47 or 54. However, this right of private action is by way of civil proceedings, and it only arises after a decision is taken. It is fundamental that any competition law contains a right for anyone suffering loss or harm as a result of anti-competitive conduct to make a complaint to a competition authority and that the competition authority has a duty to investigate that complaint. Without such a procedure, a competition law will be rendered ineffective. A mere right of private action after a decision has been made is ineffectual in practice. As it now stands, the position in the draft Bill in relation to the right for private action goes against standard competition law practice**.** We submit that the Competition Commission should be under a duty to investigate any complaint made by anyone at any time. We would urge MTI to clarify that individual complaints by injured third parties will be accepted by the Competition Commission and to specify that the draft Bill will place a duty on the Competition Commission to investigate any such complaint and do so within a specific timeframe.

CONCLUSION

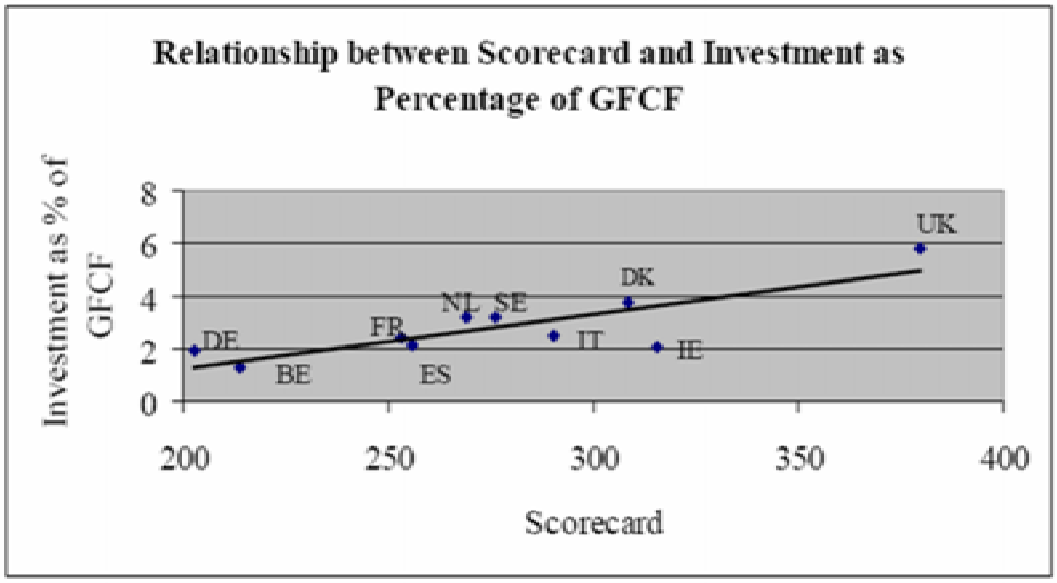
Singapore's effort in producing a world class Competition Act is indeed commendable. It is a significant move to address anti-competitive practices in the Singapore economy.

However, the exclusion of the telecommunications industry from the ambit of the draft Bill is a very serious omission. Presently, competition law in the telecommunications industry is governed by the Competition Code. The proposed enactment of the Competition Act, which is not aligned to the Competition Code, will invariably lead to problems in the competition regime in Singapore. Specifically, the relative weakness of the Competition Code when compared to the draft Bill is likely to lead to an imbalance in the regime. Furthermore, the inconsistencies between the provisions of the draft Bill and the Competition Code will lend uncertainty to the competition regime established in Singapore.

To deal with the problems brought about by implementing a competition regime comprising of two independent and non-aligned tiers, we would propose to the MTI to apply the draft Bill as a comprehensive generic competition law for all sectors, including the telecommunications industry. Specific guidelines and sector-specific regulation can then be further enacted, to fine-tune the application of the competition law. Alternatively, it is submitted that, with the draft Bill soon to be enacted as law, MTI/IDA should take urgent steps to amend and extend the existing Competition Code so that it is more consistent with the draft Bill.

Ignoring for the moment the problems caused by the implementation of a competition regime which has two non-aligned tiers, the draft Bill sets out a strong legal framework to support a robust competition regime. However, clear and comprehensive guidelines must be published to assist in its interpretation, application and enforcement. In this respect, the MTI may wish to consider the comprehensive guidelines issued by the competition regimes in other countries, namely Australia and Hong Kong.

ANNEX A



Key:

GRCR: Grossed fixed capital formation

DE: Germany

BE: Belgium

FR: France

ES: Spain

NL: Netherlands

SE: Sweden

IT: Italy

DK: Denmark

IE: Ireland

UK: United Kingdom

ANNEX B

Description	Competition Code ("Code")	Draft Competition Bill ("draft Bill")
Framework for control and enforcement	• lacks a legal framework which adequately addresses and rectifies anti-competitive behaviour and the abuse of dominant position	• generally provides a clear and concise framework for regulatory control and enforcement
Power of Modification	• lack of certainty because IDA has the sole discretion to modify the Code "at any time"	• as legislation, the draft Bill cannot be modified unilaterally. • provides a framework for independent review and appeals procedures
Goals	• goals as stated are relatively weaker than goals of the draft Bill: "(b) ensure that telecommunication services are reasonably accessible to all people in Singapore, and are supplied as efficiently and economically as practicable and at performance standards that reasonably meet the social, industrial and commercial needs of Singapore; (c) promote and maintain fair and efficient market conduct and effective competition……"	• goals of the draft Bill as set out in Section 6 are boldly stated: "(b) to eliminate or control practices having adverse effects on competition in Singapore; (c) to promote and sustain competition in markets in Singapore; (d) to promote a strong competitive culture and environment throughout the economy in Singapore."
Accountability	• the public reporting system relating to the IDA's administration of the Code is uncertain**,** which in itself gives the IDA less accountability than the Competition Commission	• Competition Commission is a fully accountable public body which must present an annual report to Parliament detailing its activities during the preceding year and must present annual audited accounts
Ambit of Application	• applies solely to specific categories of licensees, consequently, it has an intra-Singapore focus • with the increasing globalization of services and systems in the	• has far reaching extra-territorial application. By section 33, the draft Bill applies to agreements, undertakings or mergers outside Singapore

Description	Competition Code ("Code")	Draft Competition Bill ("draft Bill")
	telecommunications markets, the Code may not be able to reach or address some activities which would be caught by the draft Bill, to the detriment of Singapore consumers	
Agreements which prevent, restrict or distort competition **(Section 8 of the Code and Sections 34-36 of the draft Bill)**	• more complicated rules for anti-competitive agreements which are more difficult to apply. Departs from established principles and therefore lacks jurisprudential assistance for their application • it is submitted that the segregation created by the rules do not produce particularly relevant results • for example Section 9 of the proposed new Code makes a distinction between agreements between competing licensees (horizontal agreements) and agreements between licensees and entities that are not direct competitors (non-horizontal agreements) and the Code applies different rules for each	• Section 34 of the draft Bill is broadly in accordance with established practice, particularly Article 81 of the European Treaty. There is a wide body of international jurisprudence that the Competition Commission will be able to look to in making its decisions.
Definition of "dominant" **(Section 47 of the draft Bill)**	• a "dominant licensee" is a licensee that: (a) the IDA has classified as dominant; (b) has the ability to exercise SMP (proposed Code); or (c) is licensed to operate facilities that are sufficiently costly or difficult to replicate creating a significant barrier to entry for new entrants (proposed Code) • no guidance is provided for the "threshold" for dominance	• is generally in line with international competition law standards, however, the term "dominant position" is not defined • no guidance is provided for the "threshold" for dominance – need to address this in guidelines
Collective or Joint-Dominance **(section 47 of the draft**	• both the Code and the proposed new Code only apply to a "Dominant Licensee"	• applies to "one or more undertakings…..", which means the issue of collective or joint dominance is addressed

Description	Competition Code ("Code")	Draft Competition Bill ("draft Bill")
Bill)	• collective or joint dominance is not addressed	dominance is addressed
Compliance	• does not provide a mechanism for businesses to check for compliance	• allows for an application to the Competition Commission for guidance or a formal decision regarding compliance to Section 47 • this will aid business certainty and encourage investment decisions
Consolidations and Mergers **(Section 9 of the Code) [Which section in the draft Bill?]**	• only provides the power to deal with "consolidations by facilities-based licensees that are likely to unreasonably restrict competition" • does not have the power to deal with any other sort of licensee	• a merger which results or may be expected to result in a "substantial lessening of competition" is prohibited • wider than the prohibitions under the Code
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	• clear and wide range of enforcement options, as set out in section 69 • enforcement options are similar to the international position on

Description	Competition Code ("Code")	Draft Competition Bill ("draft Bill")
	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	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 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 is very limited and ineffectual for the following reasons: (a) a party requesting review may not make new arguments or present new facts; (b) the review procedure is two-pronged – reconsideration by IDA (i.e. it reviews its own decision) and/or appeal to the Minister - which prolongs the appeal process.	• 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

ANNEX C

European Commission Decisions under Article 82 EC:

Wanadoo (France Telecom subsidiary) ADSL (France, July 16 2003)

A subsidiary of France Telecom, Wanadoo, was found guilty of predatory pricing for its ADSL services and a fine of 10.35 million Euros was imposed on Wanadoo. Wanadoo was found to have set its prices significantly below total costs and at one point below even average variable costs. Wanadoos' pricing, in this regard, was found to be deliberately designed to monopolize the market for high speed Internet access. The Commission found, inter alia, that:

- Wanadoo's dominance was established by its own market share figure coupled with its position as part of the France Telecom group and a comparison of the market share of its next largest competitor;
- practices designed to capture strategic markets such as the high-speed internet access market call for particular vigilance (the Commission made this statement in its press release); and
- a dominant firm has a "special responsibility" not to hinder effective competition, and therefore cannot incur financial loses in the downstream market even when competitors may be doing so there.

TeliaSonera High Speed Internet Access (December 19, 2003).

This was an inquiry by the European Commission into whether TeliaSonera abused its dominant position in the market for provision of high-speed Internet access by tendering for a contract for the construction and operation of a broadband network for a housing complex at a price offered intentionally below cost.

Commissioner Monti noted that "[This is] a sign of the Commission's continued determination to penalize incumbent telecommunications operators that abuse their market power in order to stifle competition in the broadband field. It is in the interest of European consumers to prevent this from happening."

Competition Commission Reports

The Competition Commission examined the call termination charges which O2, Vodafone, Orange and T-mobile levy each other for terminating calls on their respective networks and concluded that they operate against the public interest. The Competition Commission decided that termination charges should be cost-reflective and that the most appropriate measure of costs for these purposes was long-run incremental costs. The existing call termination charges were found to be well in excess of a "fair charge" - i.e., the long run incremental cost of call termination, including fixed and common network costs and a mark-up for certain non-network costs. The Commission's report was unsuccessfully challenged upon judicial review. *EWHC 1555 (Admin), 27 June 2003.*