Submission to the Ministry of Trade and Industry on the Second Public Consultation Of the Draft Competition Bill

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A. Summary of major points

1. It is proposed that the Competition Commission, to be established under the Competition Bill, introduces guidelines on the market threshold of the relevant markets concerned in relation to the proscribed activities and agreements which would otherwise be deemed to be a violation of the prohibitions of the Competition Bill.

2. The author advises against the use of "rule of reason" phraseology as it may lead to the wholesale import and adoption of US-style antitrust jurisprudence into the local competition law jurisprudence.

B. Statement of interest

The author is currently an in-house counsel in Michelin Asia-Pacific Pte Ltd.

The author has a professional interest as well as academic interest in the subject of the proposed Competition Act 2004, having studied the subject of competition laws.

The views in this submission are expressed by the author in his personal capacity and do not represent the official position of the Company.

C. Comments

The author welcomes the opportunity to respond to the Ministry of Trade and Industry ("MTI") Second Round of the Public Consultation (the "Second Consultation") seeking feedback from the public on the proposed Competition Act 2004 (the "draft Bill").

1. Appreciable Adverse Effect

1.1 It is clear from the outset in both MTI's Consultation Papers issued under First Round of the Public Consultation (the "First Consultation") and the Second Consultation that the MTI does not intend that the Competition Commission inquire into each and every form of agreement and conduct that seemingly impairs competition in Singapore, however miniscule the effect it may have. Otherwise it would be a very time- and resource-consuming exercise for the Competition Commission.

1.2 In response to requests for clarity of the terms used in the prohibition provisions in the Competition Bill, MTI has responded that pursuant to section 61 of the draft Bill the Commission is empowered to introduce

guidelines on the terms. Likewise, the MTI has listed in Annex A of the Second Consultation on the proposed set of guidelines indicating the manner in which the Competition Commission will interpret and give effect to the provisions of the draft Bill.

1.3 In addition to the issuance of guidelines under section 61 of the draft Bill, it is proposed that the Competition Commission be authorized to apply a *"de minimis"* approach by publishing guidelines on the market share or threshold of relevant markets concerned in relation to the proscribed activities and agreements which would otherwise be deemed to be a violation of the prohibition of the Competition law.

1.4 The "de minimis" approach on competition law is currently being practised in the European Union. In the European Union, there exists a *Notice of Minor Agreements (2001/C 368/07)* (the "Notice") which guides companies and businesses on concerted conduct and agreements between competitors which would otherwise be deemed to be a violation of the relevant provisions of the European competition law. Such conduct and agreements are not struck down provided that they do not appreciably restrict competition.

1.5 For instance, in para 7 of the Notice it is stated that :-

"agreements… do not appreciably restrict competition within the meaning of Article 81(1) of the EC Treaty [equivalent to section 34(1) of the draft Bill]:

(a) if the aggregate market share held by the parties to the agreement *does not exceed 10% on any of the relevant markets* affected by the agreement, where the undertakings … are actual or potential competitors; or

(b) if the market share held by each of the parties to the agreement *does not exceed 15% on any of the relevant markets* affected by the agreement, where the undertakings are not actual or potential competitors." (emphasis added)

1.6 By defining a "de minimis" level of risk arising from an agreement which is not significant enough for the Competition Commission to be concerned with, it will certainly ease the workload of the Competition Commission and keep regulatory compliance costs to a minimum.

1.7 More importantly, this is a practical means of guiding companies and businesses as to whether they are potentially violating the competition law and subject to sanction by the Competition Commission.

2. Caution against adoption of phraseology of US antitrust.

2.1 In the First Consultation, the MTI had expressed in Annex C of the consultation materials that in relation to the relationship between Competition Law and Intellectual Property Rights ("IPR"), a "rule of reason" approach shall be adopted in ascertaining whether a business activity involving the exercise of IPR has any competition concerns.

2.2 It is encouraging that MTI takes cognition of the perennial tension between IPR and competition law. Nevertheless, by expressly using the phrase "rule of reason" which is associated with US style antitrust law, this may unwittingly signify to the public and therefore lead to the blanket adoption of US style antitrust law and jurisprudence into the local competition law landscape.

2.3 In the US, the "rule of reason" analysis is an established practice to ascertain if cumulatively the restraints in an agreement concerned is likely to produce pro-competitive efficiencies that outweigh its anticompetitive potential. This is a necessary exercise as the primary legislation Sherman Act does not provide for statutory exemptions to agreements which contain *restraints*., in which case the restraint are regarded as *naked restraints* and the agreements held *per se illegal*.

2.4 This is unlike the draft Bill, where agreements which are held to restrict competition can still be exempted under section 41 of the draft Bill. In fact, the draft Bill facilitates the Competition Commission to publish category of agreements which fall within the scope of Block Exemptions. The Competition Commission must periodically monitor the types of agreements which should be exempted and publish this for the benefit of companies and businesses.

2.5 In the circumstances, the author proposes that it is not advisable for MTI to use the phrase "rule of reason", usually used in conjunction to the concepts of naked restraints and per se illegality in the US, which may complicate the competition law landscape and unwittingly invite misleading comparison with and unfair unreliance of US antitrust precedents in Singapore's context.

2.6 It is therefore preferable that MTI and the Competition Commission adopts the words "economics-based cost-benefit analysis" which are more broad-based and do not imbue US slant into the proposed competition law.

D. Conclusion

It is encouraging that the focus of the Competition Commission will be placed on anti-competitive agreements or conduct that will have an appreciable

adverse effect on markets in Singapore, instead of attempting to catch all forms of anti-competitive agreements or conduct in all markets in Singapore.

With the Competition Bill, the Competition Commission is there to make sure that a more level playing field is developed between the small players and the big boys in a competing or related industry. Small businesses can also take comfort that bigger companies cannot engage in anticompetitive conduct in the name of marketing strategies to shore up their business or unfavourably capture market share from the smaller businesses.

Singapore is to be lauded for taking the bold step of introducing the Competition law into the business landscape.