

The Singapore Manufacturers' Federation's (SMA) Comments on the 2nd Draft of the MTI Draft Competition Bill

1. General

- 1.1 After receiving comments and submissions (during the period from 12 April to 29 May 2004) on the 1st draft Competition Bill (the "1st draft Bill"), the Ministry of Trade and Industry ("MTI") has since made changes and released a 2nd consultation paper together with a 2nd draft Competition Bill (the "2nd draft Bill") seeking further public feedback.
- 1.2 We welcome MTI's efforts in acknowledging and taking in feedback on the 1st draft Bill, especially with regards to the need for the provision of clear guidelines for the interpretation and implementation of the new Competition Act. It is heartening to note that provisions relating to the receipt of donations and retention of monies by the Competition Commission (the "Commission") will be deleted -- as this will definitely improve the public's perception of the independence and impartiality of the Commission.
- 1.3 We would however urge the MTI to grant a longer transitional period of no less than 18 to 24 months, after the Act comes into effect, to enable parties (especially those companies with many contracts) to grasp and understand the provisions and scope of the Act, to educate and train their staff, to conduct the necessary due diligence exercise to identify any problem contracts, and to thereafter have sufficient time to approach the other parties to such contracts to renegotiate and/or appropriately deal with them.
- 1.4 Our observations on the 2nd draft Bill are set out below.

2. Anti-competitive Agreements - Individual Exemptions

The 1st draft Bill had provided for the Commission to grant individual exemptions for anti-competitive agreements if they satisfy certain set criteria (Sections 36, 37 and 41 of the 1st draft Bill). In the 2nd draft Bill, such provisions have been removed for 2 reasons: (a) significant resource costs to the Commission; and (b) the rationale that the provision of block exemptions will be sufficient to exempt "deserving" individual anti-competitive agreements.

Comments: Whilst it is appreciated that costs to the Commission should not be incurred unnecessarily, there may be instances where the provided block exemptions may not extend to exempt certain “deserving” individual anti-competitive agreements, which have beneficial economic effects. We therefore urge the MTI to retain the provisions for individual exemptions (as in the 1st draft Bill or in a modified form) to afford an avenue for exemption to parties of “deserving” individual agreements, where the provided block exemptions do not apply. However to avoid the issue of the Commission having to incur substantial costs, perhaps all applicants for individual exemptions should be made to bear the costs of such applications (including the Commission’s costs to evaluate the same). But in the event that the Commission should recommend that a “deserving” individual agreement be exempted (either individually or perhaps as a newly created category of block exemption) because of its beneficial economic effect, then the costs which the applicant would have borne for the process should then be waived and borne by the State.

3. Frivolous Complaints

MTI in its consultation paper on the 2nd draft Bill had observed that it does not intend to discourage real complaints by imposing fines or fees on complainants. The safeguard is that the Commission will assess validity of complaints and reject those which are frivolous.

Comments: Companies which are the subject matter of a complaint may be compelled, because of the lodgement of a complaint to the Commission, to seek the Commission’s clearance and thus have to reveal to it details of their transaction or operations. Therefore, notwithstanding that the Commission may choose, either without any or after its own investigations, not to pursue frivolous complaints, it is submitted that there is a real possibility that certain parties may use the complaint system to “fish” for information on their competitors’ plans or to “sabotage” their competitors’ plans, especially where sensitivity of time or the element of surprise may be crucial to the transaction. To assuage MTI’s concerns that imposing fines or penalties on complainants may deter genuine complaints, perhaps fines or penalties should only be imposed on those complainants where the Commission in its discretion deems that the complaints are frivolous and/or were intended to hamper genuine/bona fide business activity. It is submitted that such safeguards should be in place to guard against such abuse, as it

will only be a matter of time before the Commission will gain sufficient experience as to how to handle and deal with such situations.

4. **Scope of Application - Exclusions** (Third Schedule, paragraph 8)

The exclusion of vertical agreements remains in the 2nd draft Bill, but all horizontal agreements are “caught”. It therefore appears that our previous request for consideration that certain types of horizontal agreements, in particular in situations of co-operation between members of associations such as the Singapore Manufacturers Association, be granted exemption, has either been overlooked or turned down.

Comments: As previously suggested, the MTI should look into the issue of excluding certain types of horizontal agreements, such as those arising from co-operation of association members from the Competition Act, where such agreements have positive economic effects. In this respect, perhaps guidelines can be set to exclude such agreements.

5. **Enforcement**

MTI had outlined in the consultation paper to the 2nd draft Bill the need to empower the Commission with wide powers to investigate. Upon completion of investigation, the Commission will make a decision as to whether the prohibitions under the Competition Act have been infringed and to notify the affected party accordingly. Sanctions for infringement of the Act include a financial penalty of up to 10% of the turnover of the business of the infringing party for up to a maximum period of 3 years. However, there is no mention of the Commission having to reveal any reasons for its decision.

Comments: Whilst we can appreciate the need for the Commission to have wide reaching enforcement powers, however as the 2nd draft Bill only requires the Commission to notify the affected party of its decision but not its reasons, we urge the MTI to reconsider our previous submission to make provisions to require the Commission to give reasons for its decision to the affected parties. This will definitely afford greater transparency to the workings of the Commission, as well as allow “aggrieved” parties to make appropriate and valid appeals if they so desire.

6. **Transition Provisions** (Section 94)

In the consultation paper to the 2nd draft Bill, MTI stated that all agreements will be expected to comply with the competition law when it comes into effect. However, the transition period provided in the draft Bill is of "at least 12 months". Furthermore, MTI is allowing parties to contracts that were entered into 5 years prior to the implementation of the competition law, to apply to the Commission for a longer transition period and an exemption from the provisions of the competition law during the transition period.

Comments:

As previously submitted, the transition period should be no less than 18 months (and preferably up to 24 months) to allow sufficient time for parties to grasp and understand the scope of the Act, to educate and train their staff, to conduct the necessary due diligence exercise to identify any problem contracts, and to thereafter have sufficient time to approach the other parties to any affected contracts to renegotiate and/or appropriately deal with them. Therefore, like the provisions made for contracts entered into more than 5 years before the implementation of the Act, it is submitted that all contracts entered into less than 5 years before the implementation of the Act (and which would otherwise be immediately "caught" by at the date of commencement of the Act) should similarly be exempted from immediate compliance during the proposed initial transitions period of 18 to 24 months.

This is so that no company will be immediately prejudiced by the commencement of the proposed Act because of its retrospective nature and its "crushing" penalties, and especially when its provisions are currently still not finalised. The MTI should also bear in mind that all parties must be given sufficient time to understand the scope and intricacies of such a drastic piece of legislation, in order that it can and will be successfully implemented. In addition, it is suggested that the MTI may also wish to conduct public education seminars and workshops once the provisions of the Act are finalised, much like during the phased in implementation of the Goods and Services Tax.

Finally, whilst it is appreciated that the implementation of such an Act will enhance Singapore's image and place as an open and competitive economy, especially by its major trading partners such as the United States and the European Community, the Government must bear in mind that companies will have to incur substantial resources, costs and will also need

time to review and in certain circumstances, renegotiate, amend and/or terminate and make alternative arrangements for affected agreements. This necessary diversion of resources because of and for the successful implementation of the Act will definitely hinder both current and future business activity, as the time and resources could have been better channeled towards creating new business. Therefore the Government is urged to “lessen the pain” to business by making provisions for a longer phased in period for the implementation of the Act, as suggested.

The above comments were submitted on behalf of the Singapore Manufacturers' Federation. It was prepared by Chua Eng Chiang, Senior Legal Counsel of Siemens Pte Ltd.

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