



SINGAPORE INTERNATIONAL CHAMBER OF COMMERCE

FOUNDED 1837

20 August 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 Second Public Consultation on the Draft Competition Bill. These comments are submitted by the SICC on behalf of its members.

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Summary of Major Points

1. General Comments

The SICC continues to strongly support the development of the Competition Bill.

2. Formation of the Competition Commission

The SICC supports the changes incorporated in the Second Draft to strengthen and safeguard the independence of the Competition Commission.

3. The Competition Appeal Board

The Minister should appoint as Chairman of the Board a person who has served as a judge and who is experienced in conducting judicial proceedings.

4. Exclusion of Certain Regulated Sectors

The SICC continues to believe the Competition Law should be the overarching law across all sectors, and we are concerned that excluding certain regulated sectors may not reduce regulatory costs as anticipated.

Also, SICC recommends that the Competition Appeal Board be established as the single body to hear appeals of competition cases from all industry sectors, including the excluded industry sectors.

5. Retrospective Effect

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.

6. Guidelines on enforcement

The SICC supports plans for the Commission to develop extensive guidelines and to conduct public consultations before the guidelines are finalized. However, we believe this necessary and essential process may take more time than anticipated and urge the Ministry to plan for this.

7. Characterization of Guidelines as Non-Binding on Commission.

The Commission must be required to conduct public consultation before making amendments to its guidelines, and amendments must not have retroactive effect.

8. Transitional Provisions

The 12 month transition period should commence after the guidelines have been finalized. Also, the Commission should be given broader flexibility on granting extended transition periods.

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 continues to strongly support the development of the Competition Bill. We are pleased to note that many of the comments offered by SICC on the first Public Consultation have been incorporated or otherwise addressed in the second draft of the Competition Bill. We also appreciate the thoughtful explanations provided in the Second Public Consultation paper about the comments of parties that were not adopted in the Second Draft of the Bill.

Nevertheless, the SICC does have some concerns about the Second Draft Bill, and we discuss those concerns in the subsequent paragraphs of this document.

2. Formation of the Competition Commission

The SICC supports the changes incorporated in the Second Draft to strengthen and safeguard the independence of the Competition Commission. The new language will help assure a strong and professional Commission with the ability to make well reasoned and independent decisions.

3. The Competition Appeal Board

[Clauses 72 & 74]

As stated in our Comments on 29 May 2004, the SICC believes 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. We note that changes in the Second Draft of the Bill move to mitigate our concerns by requiring the Minister appoint to be Chairman of the Board a person who is qualified to be a Judge of the Supreme Court.

As we understand this addition, the qualifications to be a Judge of the Supreme Court are set forth in Article 96 (Qualification of Judges of Supreme Court) of the Constitution of the Republic of Singapore, and by reference, Chapter 161 of the Legal Profession Act. In layman's terms, the qualifications are essentially that the person has been qualified as an attorney to practice law in Singapore for at least ten years.

This is not sufficient to meet our concerns. If the Appeal Board is to be the highest level of appeal available on matters of fact, then the members of the

Board (or at a minimum the Board Chairman) must have extensive experience in eliciting and evaluating evidence of fact and law. Accordingly, we recommend that the Minister be directed to appoint a person who is not only qualified to serve as a Judge of the Supreme Court but who also is currently or has previously served as a Judge and who is experienced in conducting judicial proceedings and possesses relevant skills in such processes.

Further, the SICC recommends that the criteria for qualifications and terms of members of the Board be made similar to the requirements for the Commission members set forth in Schedule 1, so that the quality and independence of individual Board members is enhanced.

4. Exclusion of certain regulated industry sectors

[Clauses 33(2)&(3), Clause 35 and Clause 48]

As stated in our Comments of 29 May 2004, 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 competition law across all sectors.

In addition to the reasons we set forth in our May 2004 Comments, the SICC believes that the plan to exclude certain regulatory sectors may not minimize regulatory costs. For example, under the current draft, companies in excluded sectors will be subject to the Competition Law to the extent that they use their dominant market position in their regulated sector to engage in prohibited activities in other industry sectors. In such cases, however, the definition of dominance would likely need to be based on the Competition Law guidelines rather than whatever definition was in force under the regulations governing the excluded industry sector. Essentially, all companies operating in the excluded regulatory sectors will therefore be subject to at least two different standards for determining market dominance. This will increase these companies' compliance costs and add confusion and lack of business clarity to their planning and operations.

In its Second Consultation Paper the Ministry has stated that it will not extend the Competition Law to all sectors, but will maintain its plan to exclude certain regulated industry sectors. However, we note that the Ministry has also said that these exclusions are not intended to be permanent. In this regard, the SICC submits that the Ministry should establish a process of formal review with defined timeframes on the ending of these exclusions.

With this in mind and with our recommendations on the membership of the Appeal Board set forth in Paragraph 3 above, the SICC makes the following recommendation: The Appeal Board established under the Competition Bill should be established as the single body to hear appeals of competition

cases from all industry sectors, including cases first taken up by the regulatory agencies responsible for the excluded regulated industry sectors set forth in Annex B. The Appeal Board will be formed with individuals who have broad legal experience and the skills to understand the complex issues of law and facts across a wide range of industries. The Competition Commission and the individual sector Regulatory agencies will provide detailed technical, factual, and legal analysis in their initial finding on individual competition cases that will be available to the Appeal Board for its consideration. Also, we note that in some excluded sectors the appeal process for similar cases is much less developed than under the proposed Competition Law. Finally, we believe that this proposal will provide a single organization to monitor and to develop recommendations over time on the relative necessity of maintaining the exclusions of certain regulated sectors from the Competition Bill.

5. Retrospective Effect

[Clause 34(1) & (5)]

As we stated in our Comments of 29 May 2004, Clause 34(5) states that Clause 34(1) applies to agreements, decisions and concerted practices implemented before on or after the appointed day. This means the Act could technically have an indefinite retrospective effect and apply to practices before the appointed day, even if they have been rectified by the appointed day. We note MTI's position that the transitional provisions of the Competition Bill should not grandfather existing anti-competitive agreements and there should be sufficient time for undertakings to review the same to ensure compliance. As such, the SICC must re-iterate its position that the law should make clear that clause 34 only applies to those agreements, decisions, and concerted practices which continue or remain unrectified after the appointed day. This will allay the fear of the businesses that they may still be penalised for such past anti-competitive agreements or practices which have been rectified, given the wide wording of the clause.

6. Guidelines on enforcement

[Clause 61]

It is noted that a number of comments to the first Consultation Paper have been responded to by MTI on the basis that they will be provided for in the Guidelines. This makes the Guidelines even more critical than originally anticipated. Accordingly, the SICC is pleased to note that the Commission will be directed to develop extensive guidelines during 2005 as described in Annex A to the Second Consultation Paper and that the Commission will conduct public consultations before finalizing the guidelines.

The Competition Bill as currently drafted leaves many items unclear and open to a wide range of interpretations. This is very disruptive to business planning and operational practices. In order to maintain high business confidence in Singapore, it is essential to provide clear and stable guidelines for the application of the new Competition Law. We believe, however, that

the process of developing extensive and useful guidelines will require considerable time and effort by industry and the Commission. We urge the Ministry to recognize and plan for this, especially as it will impact the Transitional Provisions (Clause 94). (See our further comments in Paragraph 8 below.)

7. Characterization of Guidelines as Non-Binding on Commission
[Clause 61(4)]

As noted in Paragraph 6 above, it is essential that the Business Community be able to plan their affairs with reasonable certainty and to be able to rely with confidence on the Guidelines developed by the Commission. However, Clause 61(4) states that such guidelines shall not be binding on the Commission. This is not acceptable as the industries and public should be able to rely on such guidelines to conduct their affairs and should not be penalised if the Commission should decide to revise or change its guidelines.

The SICC recommends that this section be amended to make clear that any changes or additions to the guidelines will not have retrospective effect, that due process will be allowed for compliance with changes or additions, and that the Commission is required to conduct public consultations before making changes to the Guidelines.

Also, 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.

8. Transitional Provisions
[Clause 94]

The Second Public 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. As noted in Paragraph 6 above, the SICC is concerned the development of effective and meaningful guidelines by the Commission could take several months, given the substantive nature of the guidelines and the consultation process, which may be lengthy. In such case companies will not have sufficient time to prepare for the competition law. In this regard, SICC recommends that the minimum 12 month transition period only commences from the time the proposed guidelines have been finalised. This will provide businesses greater certainty and confidence on the expected implementation time frame.

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 in such cases. The SICC appreciates the Ministry's concern about grandfathering existing agreements and notes the plans to allow companies with long-standing agreements to apply to the Commission for a longer transition period. However, given the complex and unknown nature of the many agreements

that will be impacted by the new law, and the fact that the specific implications of the Bill will not be fully understood until after the Guidelines are finalized, we recommend that the Commission be given broad flexibility in granting extended transition periods. The proposed limitation of the Commission's authority to grant such extensions only for contracts entered into five years prior to the implementation of the competition law is too restrictive

Conclusion

The SICC would like to express its appreciation to the Ministry for continuing to seek Public Comments on this important draft Bill. We also note that the Ministry has stated that a public consultation on Guidelines associated with the final Bill are likely to be requested after the Bill is enacted. The SICC strongly endorses this continued level of public consultation. We believe that the resulting Law and associated Guidelines will benefit directly from this process.