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Competition Bill Consultation

Singapore

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EXECUTIVE SUMMARY

NERA Economic Consulting welcomes this further step in the process of introducing national competition law in Singapore. We appreciate the endeavour to obtain stakeholders' views on the new rules and to provide transparency in the process of policy-making.

As an economic consulting firm, we generally limit ourselves to commenting on the economics aspects of the Competition Bill.

We have commented on the broad provisions of the Competition Bill during the first round of public consultation. The revisions to the Competition Bill do on the whole not affect the substantive economic elements, and our positive view on the high-level principles accordingly remains. We would however note that block exemptions alone may constitute an imperfect substitute for individual exemptions.

While the legal and institutional framework is a necessary pre-requisite for successful competition policy, its eventual effectiveness will inevitably also depend on the detailed implementation.

NERA Economic Consulting therefore welcomes the information on proposed guidelines. We believe that guidelines are of very high value, especially in an emerging competition policy regime.

In our view the proposed guidelines address some important aspects of competition policy. While it is difficult, on currently available information (i.e. broad section headings only), to comment on the guidelines, we are of the opinion that some key areas might need to be discussed to a greater extent. We also believe that the timetable for issuing the M&A guidelines should be accelerated.

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STATEMENT OF INTEREST

NERA Economic Consulting is an international firm of economists who understand how markets work. Our clients include corporations, governments, law firms, regulatory agencies, trade associations and international agencies. Our global team of 500 professionals operates in 16 offices across North and South America, Europe, Asia and Australia. NERA Economic Consulting focuses *inter alia* on competition policy and antitrust issues. We have advised on competition policy matters in Singapore, governed by the sectoral rules.

NERA economists devise practical solutions to highly complex business and legal issues arising from competition, regulation, public policy, strategy, finance and litigation. Our more than 40 years of practical experience creating strategies, studies, reports, expert testimony and policy recommendations reflects our specialization in industrial and financial economics. Because of our commitment to deliver unbiased findings, we are widely recognized for our independence. Our clients come to us expecting integrity; they understand this sometimes calls for their willingness to listen to unexpected or even unwelcome news.

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COMMENTS

We refer to the consultation document, “Second Public Consultation on the Draft Competition Bill”. This response has been prepared by NERA Economic Consulting. As we are an economic consulting firm, we primarily focus our observations on the economic aspects of the Competition Bill. Our response does not contain confidential information.

High-Level Principles

During the first round of public consultation on the draft Competition Bill NERA Economic Consulting expressed enthusiasm for the Ministry of Trade and Industry’s (“MTI”) plans to introduce national competition law in Singapore. We formed a positive view of the general provisions of the Competition Bill and the high-level principles underlying the emerging competition policy regime.

The Competition Bill has undergone some revisions since the first round of public consultation. Many of these changes affect procedural issues, on which we are not qualified to comment.

We would, however, observe that the provisions for individual exemptions have been deleted from the Competition Bill. The MTI argues that block exemptions should provide sufficient flexibility.

In our view, individual exemptions can play a key role, given that the competition effects of an agreement often depend on seemingly unimportant market features that are difficult to capture in a block exemption order.

We note that in other jurisdictions, e.g. the European Union, it is no longer possible to apply for an individual exemption. However, this change has been accompanied by the introduction of a “legal exception” regime, so that agreements outside the block

exemptions are automatically also exempted if they meet the respective criteria for exemption.

Proposed Guideline Documents

We believe that the Competition Bill represents a valuable framework for competition policy in Singapore. However, as the MTI notes, primary law should not go beyond high-level provisions, in order to maintain the flexibility required by the dynamics of markets and the economy. Accordingly, more detailed guidance is conveniently communicated through guidelines.

NERA Economic Consulting welcomes the emphasis placed on guidance documents. Such guidelines are especially helpful in an emerging competition policy regime such as Singapore.

We commented during the first round of public consultation that the Competition Bill addresses three broad classes of anti-competitive practices:

- (i) anti-competitive agreements;
- (ii) abuse of market power; and
- (iii) anti-competitive mergers.

Amongst other¹ – sometimes procedural/administrative – matters, the proposed guidelines deal explicitly with all of the three categories.

As regards the outline proposed for the guidelines on anti-competitive agreements, we recommend that the distinction between horizontal and vertical agreements is clearly set out. In economic terms, agreements between competitors raise very different competition policy concerns from agreements between firms at different levels in the value chain. In particular, in vertical agreements the parties typically produce complementary – i.e. not substitutable – products, so that there is no direct competition which could be eliminated.

With respect to the proposed bullet points from the guidelines on abuse of dominance, we think that further recognition should be paid to the various categories of abuse of dominance. The mechanism of a predation abuse is very different from an abuse through a refusal to supply. Accordingly, the section on examples of abuse of dominant position should in our view be very detailed, and reflect the differences between the major abuses, including predation, tying and bundling, refusal to supply, exclusive dealings and exploitative pricing.

¹ We note that in the proposed guidelines on market definition, which is generally investigated as a first step in most competition policy analyses, the three sub-bullets relate to “product market”, “geographic market” and “relevant market”. This is somewhat unusual, in that these terms are not of the same category: a relevant market is the general technical term for a market in a competition policy context, which in turn is defined with reference to the product and the geographic dimensions.

Thirdly, with reference to the guidelines on M&As, we cannot comment on the substance because no bullet points have been provided. However, we note that these guidelines are planned for 2006. In our view M&As form a central element in competition policy, and we would recommend to accelerate the timetable for the M&A guidelines.

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CONCLUSION

NERA Economic Consulting welcomes the progress that the MTI has made in the introduction of the proposed Competition Bill. The Competition Bill continues to command our support and enthusiasm.

In general we believe that the high-level legislative framework provides a solid basis for a successful competition policy regime in Singapore. We wish the MTI and the Competition Commission every success in further developing this foundation, as well as the guidelines to help stakeholders and advisers to devise business strategies that comply with competition rules and enhance consumer welfare.

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