REACH LTD.

SUBMISSION IN RESPONSE TO MTI PUBLIC CONSULTATION

COMPETITION BILL CONSULTATION PAPER

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SUMMARY OF COMMENTS

Reach Ltd. ("**REACH**") applauds and strongly supports the Ministry of Trade and Industry ("**MTI**") for the initiative it is taking to introduce a general competition law in Singapore, and believes that the draft Competition Bill ("**draft Bill**") provides a good foundation for competition law. While REACH is in broad agreement with the proposals in the draft Bill, REACH has also contributed to comments on the draft Bill in the "Joint Submission of Telecommunication Carriers in the Asia Pacific Region" which sets out the common concerns of that industry group. REACH, in this submission, provides additional comments to emphasize two aspects of the draft Bill about which it is particularly concerned:

- The exclusion of the telecommunications industry.
- The exclusion of vertical agreements.

STATEMENT OF INTEREST

REACH provides this submission in response to the MTI's Public Consultation *Competition Bill Consultation Paper* ("**Consultation Paper**").

Our comments are made on behalf of our subsidiary, Reach International Telecom (Singapore) Pte Ltd. This entity is the holder of a Facilities Based Operator Licence in Singapore under which it supplies a broad range of products to other telecommunications operators. As REACH has an overarching interest in Singapore being a competitive telecommunications hub, REACH therefore has a particular interest in the Consultation Paper as the MTI's current proposals exclude the telecommunications sector from the scope of the Competition Bill.

EXCLUSION OF THE TELECOMMUNICATIONS INDUSTRY

Section 33(2) of the draft Bill sets out that if an industry or a sector of industry is subject to the regulation and control of another regulatory authority, then the draft Bill will not apply to that industry or sector. As the telecommunications industry is already regulated by the Info-comm Development Authority of Singapore ("**IDA**"), the telecommunications sector falls outside the scope of the draft Bill.

The rationale for exclusion of industries subject to separate sectoral regulation appears to be a concern that, with both a general competition authority and a sectoral regulatory authority, a business could be subject to the regulations of both authorities. The MTI, in paragraph 6(b)(ii) of the Consultation Paper, highlights that there should be alignment between any sector-specific regulatory frameworks and the draft Bill to ensure that businesses do not end up being regulated on the same competition matter by more than one regulator.

REACH, however, considers that better alignment of general competition and sector-specific regulation would be achieved if the relevant industries were within the scope of the draft Bill as well as their own sectoral regulation.

It seems to REACH that the risk of competitive harm that could arise from instances of anti-competitive behaviour (particularly by an operator with significant market power within the telecommunications industry) slipping through gaps between the two regulatory regimes – or the sectoral authority having insufficient powers to adequately address certain behaviour – far outweighs any potential cost from the risk of a business being reviewed by two regulatory authorities separately. The safeguard of general competition law for industries which have sector-specific regulation would also provide some protection against abuses or circumstances not previously contemplated by sectoral regulation. Further, if the activities of a business are such that they have come to the attention of both the industry-specific and general competition authorities, then there is likely to be good cause for investigation of that business. If concerns about the activities of a business have reached a level where both authorities are alarmed, REACH considers that the most appropriate alignment of general competition and sectoral regulation would be that the two authorities liaise about how best to proceed with an investigation and their respective roles. This would seem to be a better alignment of the two bodies than the scopes of their respective regulatory regimes being made mutually exclusive simply to avoid potential conflicts concerning theatres of influence and operation.

REACH is also concerned that as current safeguards are rolled back in industries which have sector-specific regulatory regimes – for example, the further lifting of Dominant Licensee obligations in the telecommunications industry – the regulations which remain in place afford operators in these industries less protection against anti-competitive behaviour than is provided by the draft Bill to "normal" companies in industries without sector-specific regulators. This would be inequitable to companies in industries subject to sectoral regulation – far more so than any possible inequity arising from dual regulatory jurisdiction over some aspects of those industries. REACH does not believe that it is the intent of the MTI to deny selected companies the same basic protections that the draft Bill proposes as a general right for most other companies and, consequently, believes that the provisions of the draft Bill should apply to industries which have their own sector-specific regulation as well.

REACH considers that the proposed approach to exempt the telecommunications sector, amongst others, from the new general competition regime:

- Ignores the fact that general competition and sector-specific regulation have common economic and legal foundations.
- Restricts flexibility to pursue anti-competitive behaviour by an operator with the requisite degree of market power under the most appropriate regime.
- Misses the opportunity which the draft Bill offers to set out a migration or evolutionary pathway for future regulation in Singapore.
- Leads to the potential for general competition law and sector-specific law developing differently in dealing with similar situations.

The approach proposed by the MTI appears to put institutional concerns about keeping the general competition regulator and the sector-specific regulator out of each other's domain above the establishment of a unified, coherent economic regulatory framework for Singapore. Measures to avoid institutional overlap are important, but they can be achieved without the creating an unsustainable separation between competition law and sector-specific law when addressing similar issues.

The focus of general competition law and sector-specific law is the same – the incumbent's market power which enables it to distort competition in downstream retail and wholesale markets. The same economic principles and tools are applied by the regulators in both regimes - such as principles of market definition, how to assess market power and whether markets are likely to correct themselves or require regulatory intervention.

Industry-specific regulation generally takes a preventative approach to risks of anti-competitive behaviour, and can be appropriate to change behaviours which have been established over long periods of monopoly – imposing *ex ante* controls. Competition regulation applies corrective measures where a market failure has occurred – an *ex post* approach. As competition evolves, industry-specific regulation should reduce, and more reliance should be placed on competition law.

Whether general competition law or industry-specific law is appropriate depends on how far the relevant market sector has evolved towards a workable competitive market. As the European Commission has stated:

> [I]n a market such as the communications sector, it is vital that the new regulatory framework is capable of adopting flexibly to market developments, if it is to remain effective in meeting its objectives. … [T]he future regulatory framework should therefore allow for the progressive relaxation of ex ante obligations in specific markets, once it could be shown that competition was sufficiently strong to guarantee equivalent outcomes.

General competition law and sector-specific law, therefore, need to be linked in a common legal framework so that:

- Both approaches are open to the relevant regulator and it can choose whichever is most appropriate.
- A common approach is taken on common issues, such as market definition and assessment of market power.
- Over time, the regulatory balance can shift to general competition law.

This is not possible if these two branches of economic and competition law are completely separated as proposed in the draft Bill.

Most countries have introduced competition law and sector-specific law in the reverse order to Singapore – they had a tradition of competition law and then they introduced sector-specific law in telecommunications and other utilities because the degree and extent of the incumbent's market power justified *ex ante* measures rather than reliance solely on *ex post* competition remedies. However, sector-specific regulation was introduced to be complimentary and not to

substitute for competition law, for the reasons outlined above. While Singapore is introducing general competition law after sector-specific law, the same issues arise.

It is important to separate two issues:

- Should sectors covered by sector-specific law be exempted from the application of general competition law.
- How should regulatory responsibilities be distributed between the sector-specific regulator and the general competition regulator.

It seems to REACH that the MTI may have confused the second issue with the first.

There are three basic models for the relationship between telecommunications regulation and competition law adopted in other countries:

- *The German model*: the industry-specific regulator has exclusive jurisdiction for all competition related matters between operators, including access and interconnection disputes. These responsibilities are carved out from the general competition jurisdiction of the competition agency. This seems to be similar to the proposed approach in the draft Bill.
- *The UK model:* the industry-specific regulator has comprehensive jurisdiction for the telecommunications industry, including access and interconnection, controlling anti-competitive retail behaviour and technical issues. General competition law continues to apply to the telecommunications sector and the competition agency and the sector-specific regulator have concurrent (shared) jurisdiction under general competition law.
- *The Australian and New Zealand model:* the general competition regulator has responsibility for both general competition law and industry-specific regulation of competition in telecommunications, including interconnection and access.

The Australian and New Zealand model, while it seems the most sensible, looks to be impracticable in Singapore at this stage, given the current institutional arrangements and established position of the IDA.

REACH believes that the UK model provides a better solution than the German model. The OECD is concerned about the loss of synergies in the German model:[1]

> Assigning competition protection to competition agencies and economic regulation to sector-specific regulators, as theoretic comparative advantage consideration might suggest, means important synergies might be lost. Synergies exist between competition protection and economic regulation and also between both of those functions and access regulation.

The relationship between the German competition regulator and the German telecommunications regulator has been strained at times. Although their jurisdictions are

[1] OECD, Relationship between Regulators and Competition Authorities at 9. <http://www.oecd.org/dataoecd/35/37/1920556.pdf>

formally separated, they have been in dispute over the consistency of economic and competition principles applied between them.

It is also not possible to completely separate the jurisdictions of the competition and sectoral regulators because:

- Anti-competitive conduct in telecommunications markets can adversely impact other markets falling within the general competition regulator's jurisdiction.
- Anti-competitive conduct in markets neighbouring the telecommunications market, such as content, can have an impact on telecommunications markets within the jurisdiction of the telecommunications regulator.
- Mergers often involve companies with interests in telecommunications and non-telecommunications sectors.
- Conditions on approval of mergers can have an impact on access regulation and other aspects of ongoing regulation.

REACH's position is not that competition law should be superadded to sector-specific law. Doubling the number of anti-competitive conduct provisions an operator with significant market power faces is not necessarily going to help address the real issues in the telecommunications market. More regulators and more regulation is not necessarily better regulation.

REACH believes a better approach would be to ensure that competition regulation and sector-specific regulation are dovetailed with each other into a single framework as follows:

- Sectoral law focuses on *ex ante* regulation, such as access and tariffing regulation.
- The *ex post* anti-competitive conduct provisions of the sector-specific regulation should be replaced with the general competition law provisions (subject to our comments about regulation of vertical agreements).
- The IDA should have concurrent jurisdiction under the competition legislation.
- To ensure consistency in approach to common issues, such as market definition, the new competition regulator should be able to issue binding guidelines on how these issues are to be addressed by the sectoral regulators.

VERTICAL AGREEMENTS

The MTI proposes to exempt vertical agreements from the provisions of Section 34 of the draft Bill as they are deemed to provide pro-competition benefits that outweigh the potential anti-competitive harms. REACH, however, considers that significant competitive harm can arise from vertical agreements, particularly in the telecommunications industry where one operator is present at all market levels and has dominant or significant market power in all those markets – as well as operations in associated markets which are not subject to any heightened regulatory scrutiny.

OFTA, the telecommunications regulator in Hong Kong, like the MTI recognises that vertical agreements are less likely to be anti-competitive than horizontal agreements, but is also aware of the special circumstances of the telecommunications industry arising from legacy structures which span the full range of telecommunications markets:[2]

> However, particularly in telecommunications, competitors at a downstream functional level (e.g. telecommunications service providers retailing to the public) may have to rely on the supply of an input at an upstream level (e.g. reliance on a vertically integrated network provider to carry their services) while at the same time compete with that upstream supplier's downstream arm.
>
> Where there is market power at one functional level, there are obvious incentives where there is vertical integration (or a vertical merger) to leverage that market power into the vertically-related market for anti-competitive purposes.

Accordingly, OFTA has said that it will assess vertical mergers for any likely anti-competitive effects before approving a merger. Obviously, as the incumbent telecommunications operator in Singapore is already a fully integrated business covering all Singapore telecommunications markets, regulatory pre-approval of its structure is not feasible (although regulators in the past have mandated structural separation of the incumbent operator). However, assessment of arrangements between the upstream and downstream elements of the incumbent's structure can, and should, be undertaken for likely anti-competitive effects, and appropriate competition safeguards put in place where necessary - such as those in the draft Bill.

Although pro-competition benefits can flow from vertical agreements, such agreements can also result in abuse of market position. Therefore, REACH believes that a blanket exemption for all vertical agreements is inappropriate and the draft Bill fails to provide a safeguard against such abuses. Rather, as the draft Bill provides for individual and block exemptions, an individual or industry group could apply for exemption for vertical agreements. The general competition regulator could then determine whether there was a high degree of vertical integration within a specific industry and assess the potential for competitive harm from vertical agreements. If the regulator deemed the potential for competitive harm to be low, a block exemption could be granted for that industry, instead of a there being a presumption of no competitive harm by exempting all vertical agreements in all industries as a matter of course.

CONCLUSION

REACH maintains that there is no justification for companies in industries with sector-specific regulatory regimes to be denied the same basic level of protection from anti-competitive conduct within their industries as is proposed in the draft Bill for companies in industries without specialist regulators.

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[2] OFTA, Telecommunications Authority Guidelines, Mergers and Acquisitions in Hong Kong Telecommunications Markets. paragraphs 4.63 and 4.64. < http://www.ofta.gov.hk/report-paper-guide/guidance-notes/gn_20040503.pdf>

The possibility that a company may fall foul of both general competition law and sector-specific regulation seems to be the MTI's major concern and rationale for exclusion of the telecommunications industry from the scope of the draft Bill. REACH submits that if the activities of a company are so suspect as to come to the attention of both the general competition authority and the industry regulator, then the potential for any harm arising from possible dual attention by these bodies is far outweighed by the competitive harm that could be caused if neither regulator has effective jurisdiction over such behaviour. Further, the UK regulatory model demonstrates that a general competition authority and an industry-specific regulator can, and do, work harmoniously and without duplication.

REACH, therefore, considers that the telecommunications industry should not be excluded from the scope of general competition law as proposed in the draft Bill.

Further, REACH believes that there are certain infrastructure intensive industries, telecommunications being one, where the incumbent operator has dominant or significant market power in all related markets. In such circumstances, the incumbent is in a position to leverage its market power in one market into upstream and downstream markets through vertical agreements or arrangements, and may abuse its market power in doing so. Accordingly, REACH considers that a general exemption for vertical agreements is inappropriate and unnecessary, particularly as there is also provision for the exemption of certain agreements or groups of agreements in the draft Bill.