Competition Law Consultation Paper II
– Feedback by SembCorp Industries Ltd –

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1 INTRODUCTION

SembCorp Industries Ltd (SCI, and where in reference to the group as a whole, SCI Group of Companies), as in the case of the First Round Consultation, welcomes this opportunity to provide feedback on the Consultation Paper (2nd Consultation) and draft Competition Law Bill (2nd Bill), which was released on 27 July 2004. SCI is pleased to note that many of its suggestions have been adopted. SCI nevertheless proposes to make comments on a few of the provisions to suggest and or reiterate some points made in its submission in the First Round Consultation (Initial Submission). The short forms used in the Initial Submission applies *in toto* to this submission

As with the Initial Submission, SCI makes this submission on behalf of its entire SCI Group of Companies, namely:

- SembCorp Utilities Pte Ltd
- SembCorp Environmental Management Pte Ltd
- SembCorp Engineers and Constructors Pte Ltd
- SembCorp Marine Ltd
- SembCorp Logistics Ltd

The approach taken is to provide general comments and feedback that affect the SCI Group of Companies as a whole in Part 1, and to deal with specific issues which could affect only a certain company within the SCI Group of Companies in Parts 2 and 3.

SCI would be happy to discuss any of the comments made here further.

PART 1 – GENERAL COMMENTS

2 INDIVIDUAL AND BLOCK EXEMPTIONS

The 2nd Bill has removed the ability for businesses to apply for individual exemptions. Whilst SCI recognises that there are cost implications, the benefits associated with

enabling businesses to apply for individual exemptions is likely to far outweigh the costs. It would also ensure a more efficient and fairer business environment. Allowing for individual exemptions recognises that there are certain businesses present which do not fall within the scope of an industry wide category to qualify for block exemption, but yet require protection from competition from a security, defence or national interest perspective. Hence, SCI requests a reconsideration of the decision to delete individual exemptions.

Further and in the alternative, SCI reiterates its Initial Submission that for greater efficacy of business, the section on block exemptions be modified to allow for companies and individuals, as the case may be, to also apply for block exemptions to be granted in the same way as it can or could have for individual exemptions. At informal feedback sessions previously, the MTI had indicated that the intent is that individuals and companies will be able to submit requests and / or suggestions for block exemptions to be granted. If indeed this is the case, then this should be made clear by an amendment to the proposed section. As the language of the provision currently stands, only the Commission can make recommendations for block exemptions to be granted. This clarification in the 2nd Bill is particularly important if MTI decides not to take in the submission for the re-inclusion of the individual exemptions into the 2nd Bill. A failure to clarify will leave businesses with no effective recourse to obtain exemptions.

Further, SCI submits that the criteria for the grant of block exemptions should be extended. Currently, the criteria upon which a block exemption will be granted are where the relevant agreement has the effect:

- of improving production or distribution; or
- of promoting technical or economic progress,

SCI submits that an additional criterion based on national security and defence should be included. Essentially, SCI recommends that any agreement which has the effect of protecting the national security and or defence of the country or which involves confidential information relating to national security and or defence should be subjected to the possibility of a grant of block exemptions. Such agreements may not necessarily have the effect of improving production or distribution or of promoting technical or economic progress, but yet require exemption from anti-competitive laws given their nature.

Finally, it is helpful to include a provision that prior to introducing a block exemption, an opportunity to be heard should be accorded to all interested parties who are likely to be affected by the proposed block exemption. Currently, this is only mentioned in the 2nd Consultation.

3 INDUSTRIES / SECTORS SUBJECT TO OTHER COMPETITION LAWS

SCI had noted in its Initial Submission that the Consultation Paper suggests, as does the Third Schedule of the Bill, that industries / sectors regulated by industry / sector specific competition laws will not be regulated under the Bill. Yet, there were specific provisions in the Bill which suggested that parts of the Bill continued to apply to industries / sectors regulated by existing competition laws. These included (not exhaustive) the following:

- Paragraph 5 of the Third Schedule of the Bill states that only sections 34 and 47 of the Bill will not apply to industries / sectors regulated by industry / sector specific competition laws. This suggests that the rest of the Bill will apply.

- Section 33(2) of the Bill, in dealing with the authority available to the Commission as opposed to the sector / industry specific regulator and vice-versa, suggests that portions of the Bill will apply to industries / sectors which nevertheless have specific competition laws regulating them.

- Section 61(3) of the Bill suggests that the Commission can prescribe guidelines applicable to specific industries / sectors which are subject to the regulation and control of another regulatory authority.

It was also not clear if the appeal process to the courts available under the Bill was also to be made available to the energy and gas markets, which are regulated under the provisions of the Electricity Act and the Gas Act respectively.

Whilst the 2nd Consultation Paper makes clear that the 2nd Bill will not apply to sectors subjected to sectoral regulation, the 2nd Bill itself is not so clear. In other words, the anomalies stated above continue to exist.

SCI, therefore, reiterates its proposal that the 2nd Bill be clarified to make it clear when it is to apply to industries / sectors regulated by existing industry / sector specific competition laws and when it will not. To this end, SCI proposes that the appeal process to the courts be made available to the energy and gas markets as well, for which there is presently no such provision.

However, if the intent is that the entire 2nd Bill is not to apply to industries / sectors regulated by existing industry / sector specific competition laws, then this should be made clear.

4 RELATIONSHIP BETWEEN SECTOR / INDUSTRY SPECIFIC REGULATOR AND COMMISSION

Given that no single global regulator has been constituted under the 2nd Bill, as was submitted in the Initial Submission, the lack of clarity as regards how the proposed Commission will work in conjunction with the sector / industry specific regulators remains. SCI reiterates its request for clarification on how this will work.

Further SCI reiterates its proposal from its Initial Submission, that the Commission should indeed be a single global regulator which has overall jurisdiction and oversight of competitive matters in Singapore with investigative and enforcement powers carved out to individual sub-agencies in respect of certain industries.

Drawing from the United Kingdom experience, the two bodies can function in parallel. In the United Kingdom, the Office of Fair Trading and the Office of Gas and Energy Markets have concurrent jurisdiction under the United Kingdom Competition Act to investigate and enforce the United Kingdom Competition Act. The Office of Gas and Energy Markets operates under the direction and governance of the Gas and Electricity Markets Authority which makes all major decisions and sets policy priorities for the Office of Gas and Energy Markets. The rationale for parallel application is that the Office of Gas and Energy Markets has the expertise and in-depth knowledge of the gas and electricity markets in the United Kingdom and hence issues relating to such markets are more competently dealt with. Yet, the Office of Gas and Energy Markets works under the purview of the Office of Fair Trading. This has ensured consistency in the application of the laws, yet recognising separate policy considerations that could affect the gas and energy market.

SCI proposes that there should be similar set-up in Singapore. Note that the intent is not to have the Commission rule on gas and energy market matters, but rather to ensure consistency in the competition laws. Such an approach will also ensure that there are no anomalies as set out in the preceding section 3 above.

5 APPEAL TO COURT BY SECTORS SUBJECT TO SPECIFIC COMPETITION REGULATION

The 2nd Bill continues to provide for an appeal to the court on points of law. As noted in SCI's Initial Submission, this is in contrast to the process under the Gas Act and the Electricity Act, where the final arbiter is the Minister. Even if separate regimes are to be

maintained, there should be consistency in the appeal process to the court, which can and must be the final arbiter on points of law.

6 LACK OF CLARITY AS TO WHICH AGREEMENTS ARE VOID

Section 34(5) of the 2nd Bill provides that 'subsection (1) applies to agreements, decisions and concerted practices implemented before, on or after the appointed day'. This suggests that even existing agreements, decisions and practices that businesses are now involved would be caught by the competition laws when it comes into force. Section 34(3) has been modified in the 2nd Bill to expressly provide that agreements are void on or after the appointed day to the extent that it infringes subsection (1). Although this subsection (3) was intended to be clarificatory, given the juxtaposition with sub-section (5), the anomaly continues to exist.

If no change is introduced, then businesses may be subjected to uncertainty. SCI thus reiterates its view in its Initial Submission that this is too onerous and recommends that a clear date be provided as to when the competition laws are applicable to agreements. SCI, therefore, proposes that section 34(5) be deleted, and section 34(3) be allowed to stand on its own. Additionally, it might be useful to provide clearly in transitional provisions as to when the laws are applicable to agreements, decisions and practices.

7 TRANSITION PERIOD

It is to be noted that paragraph 29 of the 2nd Consultation Paper provides that 'parties to contracts that were entered into five years prior to the implementation of the competition law may apply to the Commission for a longer transition period and an exemption from prohibition provisions of the competition law during this transition period'.

At informal feedback sessions, MTI had indicated that the calculation of the five years in the preceding statement referred to agreements that had been entered into pre 1 January 2000, assuming that the 2nd Bill is passed into law with effect from 1 January 2005. Such an interpretation is obviously flawed as there is no reason why the longer transition period and exemptions from prohibition should not also apply to contracts entered into between 1 January 2000 and 1 January 2005.

The clearer interpretation is that the calculation in the statement in the first paragraph to this section is a period of five years backward from 1 January 2005. This would mean that only contracts between 1 January 2000 and 1 January 2005 are granted the longer

transition and exemptions from prohibition relief. Whilst this is the preferred interpretation, SCI submits that the time frame of five years be done away with. This is because some typical long term contracts can go on for longer than five years and even extend beyond ten years; and would have been drafted more than five years prior to the introduction of competition laws into Singapore. In any event, the criteria of five years backward from 1 January 2005 is artificial as contracts drafted in the 1990s or in the 2000s (prior to 12 April 2004) would have been drafted without the existence of or at the very least without the benefit of the proposed form of the competition laws in Singapore.

SCI, therefore, proposes that all long-term contracts entered into prior to 12 April 2004 (the date of the first introduction of the Consultation Paper and Bill) be entitled to apply to the Commission for a longer transition period and exemption from prohibitions. The decision as to whether to grant the application or otherwise is of course at the discretion of the Commission. SCI believes that this is a fairer approach to adopt than that as contained in paragraph 29 of the 2nd Consultation Paper, whether or not one even looks at the dual interpretation that that paragraph is subject to.

8 REQUIREMENTS FOR GUIDELINES

MTI has made clear that a number of substantive issues will be dealt with in guidelines, and to this end, has provided a list of items that would potentially be dealt with in the guidelines. SCI notices that visibly missing from the list of proposed guidelines are guidelines dealing with the following:

- Joint ventures
- Horizontal arrangements

As noted in SCI's Initial Submission, such agreements are usually entered into for economic reasons and which have substantial commercial benefits. Yet, it is not easy to ascertain, given the wide ambit of the competition laws, as to when such agreements could be in violation of the laws. SCI, therefore, reiterates its submission that there should be express guidelines on how such agreements are to be treated.

9 LEAD-TIME FOR GUIDELINES

MTI has indicated that it will introduce a number of guidelines over the course of Year 2005 to aid the application of the competition laws. MTI has also indicated that it would ensure that the guidelines are open to public consultation before implementation. What is not clear is whether there would be sufficient lead-time between the finalisation of the guidelines, its coming into force and compliance by the businesses, although MTI has in informal feedback candidly indicated that sufficient time will be provided.

SCI requests that a lead-time of at least six months be provided before the coming into force of any set of guidelines and its implementation by the businesses and enforcement by the Commission.

SCI also seeks clarification that the specific provisions of the 2nd Bill (when passed into law) to which guidelines pertain will only come into force at the same time the guidelines come into force and not at an earlier time.

PART 2 – COMPANY SPECIFIC COMMENTS

10 SEMBCORP UTILITIES PTE LTD

Given the imprecise language used in the 2nd Bill, it is still not clear that none of the provisions of the Bill will apply to the gas and energy markets. See section 3 above for an amplification of this point.

SembCorp Utilities Pte Ltd does see merit in some of the provisions in the Bill and proposes that the MTI consider extending the application of these provisions to the gas and energy markets through one of the following options:

- An amendment of the Gas Act and the Electricity Act through an amendment bill for each of the Acts respectively tabled in Parliament.

- An amendment of the Gas Act and the Electricity Act through an amendment to each of the Acts respectively through an express amending provision included in the Bill.

- Extension of the applicability of the relevant provisions to the gas and energy markets by express clear language in the Bill indicating that such relevant provisions apply to the gas and energy markets.

SembCorp Utilities Pte Ltd reiterates its Initial Submission that the relevant provisions in the 2nd Bill that should be extended to the gas and energy markets are as follows:

- The definition of 'dominance' contained in the Bill should be extended to the Gas Act and the Electricity Act.

- The right of dissatisfied parties to appeal to the courts on any point of law from the decision of the Appeal Board of the Commission. Such an appeal process is not currently provided for under the Gas Act and the Electricity Act, where the final arbiter is the Minister. The appeal process to the courts should be extended to the gas and energy markets as the courts are in the best position to make a final pronouncement on interpretations of specific provisions in the legislation.

SembCorp Utilities Pte Ltd has reiterated its submissions on mirroring some of the provisions of the 2nd Bill in the Gas Act and Electricity Act in these representations as such proposed changes require legislative changes, which must be mooted by the MTI rather than by the Energy Market Authority.

11 CONCLUSION

SCI hopes that the feedback provided has been helpful. Please do not hesitate to contact Ms Linda Hoon or Ms Delphine Loo if there are any queries.

Submitted for and on behalf of
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