RESPONSE TO INVITATION TO COMMENT ON MTI'S PROPOSED COMPETITION BILL

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* The views expressed in this paper are held by the author in his personal capacity. The author welcomes feedback and comments.

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CONTENTS:

SUMMARY OF MAJOR POINTS:

The comments made in this submission are directed towards refining the legislative framework proposed by the draft Bill, with a few recommendations made for changes to the language used in the relevant substantive provision. Issues for which require further consideration and more careful scrutiny are also highlighted.

STATEMENT OF INTEREST:

The author has an academic and professional interest in Competition Law and Policy in Singapore. In particular, he is interested in the regulatory challenges of adopting and adapting the legislative frameworks established in the United States and the European Community.

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1. Introduction

The team responsible for putting together the first draft of the Competition Bill (the 'draft Bill') should be commended for their effort in assembling a legislative framework that will potentially change the complexion of the commercial landscape in Singapore. They have undertaken the unenviable task of attempting to balance a variety of complex competing policy considerations: enhancing the open and competitive character of Singapore's market economy while preserving the commercial freedom of economic entities to operate within their respective markets, elevating the status of economic efficiency as a policy goal of regulatory intervention without marginalising consumer and national interests, complying with Singapore's obligations under the US-Singapore Free Trade Agreement while safeguarding the government's commitment towards reducing business compliance costs, attracting foreign investment in sectors traditionally dominated by local firms while permitting local firms to develop into 'national champions' that may compete regionally and internationally.

The draft Bill represents the penultimate step to an ambitious enterprise which seeks to introduce a comprehensive package of competition laws into Singapore's legal system at one go. In borrowing legislative language from jurisdictions which have more mature systems of competition regulation, the drafters have also imported a number of conceptual and practical problems that need to be addressed. This note attempts to outline some of the more important questions related to the substantive provisions of the draft Bill which require further scrutiny.

2. Prohibited Activities: General

Part III of the draft Bill is heavily influenced by the European and American models of competition regulation. §34 and §47 of the draft Bill are close parallels to Articles 81 and 82 of the Treaty of Rome, while §54 replicates key provisions in Regulation 4064/89 but employs the test used in §7 of the US Clayton Act. While this may provide the proposed Competition Commission with a considerable databank of useful precedents, the conflation of the approaches which have been adopted by these two jurisdictions may have the unintended side-effect of complicating the application of the proposed competition law if the approach taken in Singapore is not defined with sufficient precision.

2.1 Scope of Application

§33 of the draft Bill provides that the competition law will apply whenever an "agreement, dominant position or merger has infringed, or is *likely to infringe*, any prohibition in this Part" (emphasis added). It is submitted that the Commission's jurisdiction to exercise its considerable powers of investigation and enforcement should be strictly confined to cases of actual infringement. Intervention by the regulator should proceed, apart from merger cases, on the basis that there is an appreciable detriment to the competitive process, and not based on the *likelihood* or *potential* that harm will materialise. Inchoate liability of this sort has no place in a regulatory framework that does not seek to criminalise anticompetitive conduct.

The Commission should not put itself in the uncomfortable position of having to articulate the degree of likelihood that will trigger the application of §34 and §47. In contrast, the likelihood of an anti-competitive consequence is an entirely appropriate threshold for the merger regulation provision in §54, since merger regulation is, by its very nature, a speculative and forward-looking exercise.

The phrase "likely to infringe" is, in any case, superfluous, given that §34 is already infringed once the agreement is entered into (using the "object" limb) and that §47 is infringed when the dominant firm commences the abusive conduct, regardless of the external effects of such conduct. The phrase is also misleading as it might suggest that the Commission's jurisdiction may extend to encompass the preparatory acts a dominant firm that may or may not crystallize into an instance of abusive conduct. In the context of the merger prohibition, the phrase is unnecessary given that §54 already contains the phrase "resulted, or may be expected to result, in a substantial lessening of competition".

I would suggest altering the relevant portion of §33(1) to read:
"...this Part shall apply to such party, agreement, abuse of dominance or merger which infringes any prohibition in this Part".

2.2.1 Anti-Competitive Agreements: *per se* illegal or subject to a rule of reason?
By adopting a framework where agreements or concerted practices which "have as their object or effect the prevention, restriction or distortion of competition within Singapore are *prohibited unless they are exempt* in accordance with the provisions of this Part" (emphasis added), the draft Bill conveys the impression that a *per se* rule of illegality is intended, such that the validity of these agreements or practices hinges on the parties obtaining an individual exemption under §36, or qualifying under a block exemption under §38, from the Commission.

The upshot of adopting this particular approach to regulating multi-lateral anti-competitive conduct is this: even if there are perfectly pro-competitive justifications for an agreement which fixes prices or divides markets, that agreement with an anticompetitive object or effect must still obtain an individual exemption from the Commission before it is legally valid. This will have far-reaching consequences on the workload of the Commission. Given that §34(3) prescribes that agreements which contravene §34(1) of the Act are void, it is likely that the Commission will be inundated with requests for individual exemptions or negative clearance from parties who want to be certain about the validity of their transactions.

In laying down the criteria for granting individual exemptions, §41 provides for the Commission to consider whether or not the agreement contributes to "improving production or distribution" or "promoting technical or economic progress" (echoing Article 81(3) of the Treaty of Rome). These are essentially criteria which *could* be used in applying the test articulated in §34 itself, such that only those agreements which fail a 'rule of reason' assessment are considered as having "their object or effect the prevention, restriction or distortion of competition". Adopting a US-style 'rule of reason' standard will simplify the structure of this part of the draft Bill and, more importantly, will prevent the Commission from being bogged down with a flood of processing requests for individual exemption.

It is submitted that individual exemptions be confined to truly exceptional cases which do not fall within a block exemption. Alternatively, the individual exemption provisions can be removed altogether from the legislative framework since these exceptional cases may already be covered by Article 4 of the Third Schedule. Block exemptions, on the other hand, should be retained as they serve the useful function of defining convenient categories of agreements which should be allowed to proceed notwithstanding §34. I would suggest modifying §41 and bringing it forward to a position just after §34 to read as follows:
"In determining whether or not an agreement or concerted action has as its object or effect the prevention, restriction or distortion of competition within Singapore under section 34, it shall be relevant to consider whether such agreement or concerted action contributes to –
(a) improving production or distribution; or
(b) promoting technical or economic progress,
but which does not –
(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question."

2.2.2 Anti-Competitive Agreements: Exempting Vertical Agreements
The decision to generally exempt vertical agreements from the scope of §34 (paragraph 8, Third Schedule) is premised on the belief that "[r]elative to horizontal agreements, most vertical agreements have pro-competitive effects that more than outweigh the potential anti-competitive effects" since "firms in such agreements have a mutual interest in ensuring that as many goods and services are sold to consumers as possible" (paragraph 3, Annex A, Consultation Paper). Instead, the current proposal is that only those types of vertical agreements which are specified in an order by the Minister are subject to the statutory prohibition in §34. This is inconsistent with the approach taken under the existing sectoral Competition Codes (see §8.5 of the TelecomCompetition Code and §7.5.5 and §7.5.6 of the Media Market Conduct Code).

It is submitted that this is an overly generous approach to take towards vertical agreements. While it is true that many vertical agreements are pro-competitive, by promoting inter-brand competition for example, many other common vertical agreements can have devastating effects the competitive process. Exclusive dealing arrangements may tie up distribution channels for goods and services, foreclosing competition either upstream or downstream by limiting access to distributors or service providers. Similarly, exclusive buying or selling agreements, or 'requirements' contracts, may effectively shut out competitors from a particular market. Non-dominant parties may be able to foreclose competition with these vertical arrangements without being subjected to the prohibition in §47. Firms which impose anti-competitive vertical restraints may not have sufficient market power to be considered 'dominant', and even if they did, the mere fact that they have imposed such restraints may not amount to an abuse of their dominance. Furthermore, vertical agreements may be used as a façade to mask a horizontal agreement between parties occupying the same level of the value chain. It would be administratively cumbersome to rely on Ministerial orders to define these and other categories of vertical agreements before they are subjected to the test in §34.

I would suggest deleting paragraph 8 of the Third Schedule and perhaps replacing it with a more limited exemption concerning intellectual property licences (but see paragraph 2.3.3 below). Adopting a US-style 'rule of reason' approach described above in paragraph 2.2.1 above would achieve the desired effect of permitting pro-competitive vertical agreements to proceed unscathed. Alternatively, block exemptions could be issued under §38 to remove pro-competitive vertical restrictions from the ambit of §34. By eliminating the need for an additional category of Ministerial "orders" in this area of regulation, greater consistency is achieved in the competition law framework by relying on block exemptions as far as possible.

2.3.1 Abuse of a Dominant Position: "Within Singapore or elsewhere"

The wording used in §47(3) – where 'dominant position' means "a dominant position within Singapore *or elsewhere*" (emphasis added) is somewhat puzzling. On the face of it, it appears inconsistent with §47(1) which requires the "abuse of a dominant position *in any market in Singapore*". If the firm in question occupies a dominant position in a market abroad and not in Singapore, then it does not have a dominant position which it can abuse in Singapore.

If the intention of the drafters was for the reach of §47 to extend to those actions taken by a foreign firm, dominant in a foreign geographical market, but which nevertheless have an adverse *effect* on a parties in a market in Singapore, then a separate statutory provision is recommended. The essence of such a provision would be to enable the Commission to take action where the foreign firm's market power, which is derived from a geographical market abroad, is abused in Singapore – or more specifically, in any market in Singapore.

This may be a matter of legitimate concern to the Commission, given Singapore's vulnerability as a fairly open economy. Adopting a specific provision which addresses this problem is therefore a necessary addition to the European or US models of competition law because of the inherent market differences between Singapore and these other jurisdictions. If the proponents of the draft Bill had intended to ensure that the legislative framework could deal with foreign firms which abused their dominance in one market (a geographical market outside of Singapore) by leveraging or extending their market power into an adjacent market (in Singapore), then I would suggest replacing §47(3) with a provision along the following lines:

"Any conduct by one or more undertakings occupying a dominant position in a market outside Singapore, which abuses that position of dominance in a market in Singapore, amounts to an abuse of a dominant position in Singapore that is subject to the provisions in this Part"

2.3.2 Abuse of a Dominant Position: Joint and Collective Dominance

Paragraph 9 of Annex A of the Consultation Paper explains that §47 of the draft Bill is intended to encompass situations where more than one undertaking enjoy dominance collectively. Extending the concept of 'dominance' to include 'collective dominance' or 'joint dominance' will give the Commission a valuable regulatory tool in concentrated markets occupied by a few large firms without a single firm possessing sufficient market power on its own. What this means is that the Commission will be empowered to address abusive practices engaged in by firms in markets with oligopolistic characteristics.

Heavily concentrated oligopolistic and duopolistic markets are a familiar feature of several segments of Singapore's economy. The recently liberalised telecommunications, media and energy markets are good examples: they each have their own respective competition codes which are evolving to deal with the competition problems associated with market structures characterised by the joint or collective dominance of two or more firms. Even though these markets are excluded from the scope of the draft Bill (under paragraph 5 of the Third Schedule), similar heavily concentrated market structures are evident elsewhere in other segments of the economy. The banking, supermarket, cinema and retail petroleum industries are some of the more obvious candidates.

The competition problems associated with such market structures are complex and require far more scrutiny than space permits here, but for the purposes of the clarifying the legislative framework erected around §47 of the draft Bill, the following questions need to be closely considered:

- What does the abuse of a jointly or collectively-held dominant position entail?
- Are economic linkages and/or tacit collusion required?
- Is a position of joint or collective dominance abused jointly or collectively by the firms which share that position?
- Can a single firm *unilaterally* abuse a position of joint or collective dominance which it shares with other firms?

Drawing from the European experience with the concept of an "abuse of a dominant position", it is foreseeable that these issues will necessarily be encountered by the Commission given the present market structures already existing in the various segments of the Singapore economy. The 'abuse of dominance' prohibition has traditionally been viewed as one concerned with unilateral conduct, as opposed to the prohibition in §34 which involves more than one firm. Expanding the concept of a 'dominant position' to include situations of joint or collective dominance begins to blur this distinction, and the problem is compounded by the difficulty in distinguishing unilateral conduct by a firm in a concentrated oligopolistic market that is an 'abuse' from conduct that is a perfectly rational response to prevailing market conditions.

I would suggest either expanding §47 to address these concerns or making it a priority for the Commission to issue guidelines on the scope of this aspect of the §47 when the Act is implemented.

2.3.3 Abuse of a Dominant Position: Patent Licences

One aspect of the Intellectual Property-Competition Law interface which needs further examination is the conduct of a patentee who, because of the exclusive rights he obtains through the patent grant, occupies a dominant position in the market for platform technologies or fundamental research and development technologies. Such patentees are in a position to impose onerous vertical restraints on their licensees and obtain *de facto* control over a particular area of technological development. While §51 of the Patents Act mitigates some of the problems in this area, its scope is limited to tie-in clauses and exclusivity arrangements. It does not deal with reach-through clauses, for example, which may be used

by the patentee to compel licensees to assign, grant licences or share in any intellectual property rights in products developed through the use of the licenced invention. Contractual restraints imposed by the patentee of this sort may have a chilling effect on the willingness of licencees to develop further innovations using these patented technologies.

2.4.1 Merger Regulation: Substantial Lessening of Competition

§54 is a curious blend of the US test for merger clearance and the European merger regulation provisions. Bearing in mind the divergent decisions which regulators from both sides of the Atlantic have arrived at in the past, where merging parties have sought clearance from both the FTC/DOJ and the European Commission, articulating a coherent merger policy based on legislative provisions which have been drawn together from these two jurisdictions will be a real challenge for the Commission.

All horizontal mergers – that is, mergers between actual or potential competitors – will necessarily lessen competition in the resultant post-merger market. The question which arises becomes this: when is this lessening of competition *substantial*? Will a merger which results in a post-merger entity acquiring market power – by creating a position of dominance – cross this threshold of substantiality? If an existing position of dominance is strengthened or enhanced as a result of the merger, what degree of strengthening is required for the merger to infringe §54(1)? If market already exhibits sub-competitive characteristics, will a small dent in the level of competition which results from the merger be enough, or is a significant blow required to trigger the substantiality threshold?

Paragraph 11 of Annex A of the Consultation Paper notes that highly concentrated markets are at times inevitable in a small open economy. This is probably an economic reality in many markets in Singapore. The question remains, however, whether the concentration process should be allowed to result from mergers between competitors, or whether it should be brought about by vigorous internal expansion and competition on the merits of the products or services provided. The latter route may compel firms to behave more efficiently and raise its quality standards to meet the preferences and expectations of the consuming public. If this results in a growth in market share and the eventual exit of a competitor (who could have simply merged with the expanding firm), such that market concentration levels rise as a result, then the end-result is justified by the rigorous operation of market forces. The market, and the consumers who comprise it, would have catalysed the result rather than firms themselves. A firm which is able to achieve its size and market share by internal growth is likely to operate more efficiently than a similarly sizes firm which has been artificially created by the merger of two competitors.

2.4.2 Merger Regulation: Offsetting Efficiencies

Balancing the lessening of competition against the efficiencies generated by a proposed merger is a central feature of any model of merger regulation. Paragraph 8c of the Consultation Paper and paragraph 11 of Annex A make it clear that offsetting efficiency benefits are relevant considerations in assessing whether the prohibition in §54 has been infringed.

Drawing on the US and European experience on this issue, clarifying this aspect of the regulatory framework will require the Commission to articulate its position on the following issues:

- Does the Commission have to be satisfied that these efficiencies could not have been achieved without a merger between the parties? What if the efficiencies could have been achieved, in the absence of the proposed merger, by independent internal expansion?
- Are the efficiencies generated by the merger enjoyed by consumers or by the post-merger entity? Should the Commission require the post-merger entity to commit itself to passing some of these efficiencies on to consumers?
- To what extent can the lessening of competition be quantified and correlated against the efficiencies which are generated by the merger?

3.1 Enforcement: Appreciable Effect on Competition

Paragraphs 6(b)(i) and 18 of the Consultation Paper emphasise that the Competition Commission will focus its regulatory efforts on agreements and conduct that "have an *appreciable adverse effect* on markets in Singapore" (emphasis added). It is unclear, however, how the concept of appreciability will be understood or applied. Is it to be measured in terms of the monetary value or gravity of the restraint on competition, or in terms of its pervasiveness across the market, or by some other standard?

As far as the prohibition in §34 is concerned, the *per se* approach that is suggested by the structure of the legislative framework proposed in the draft Bill will have far-reaching implications because agreements or decisions which infringe §34(1) are void under §34(3). An agreement between two firms in a ten-firm market to raise prices by $10 would be caught in the same way as an agreement between all ten firms to raise prices by $0.10. From the Commission's point of view, are both instances examples of agreements which have an appreciable effect on markets in Singapore that warrant the exercise of its regulatory powers?

In the case of the prohibition in §47, a dominant firm's market power can be used in a number of ways which may make it difficult to distinguish between the mere *exercise* of market power (which is legitimate) and the *abuse* of that market power (which would be unlawful). Will a further distinction be drawn by the Commission between appreciable and non-appreciable abuses of a dominant position, such that only the former will be pursued under the Act? Or does the appreciability threshold have to be crossed before the conduct in question amounts to an abuse of dominance? Neither approach seems entirely satisfactory given the uncertainty that will inevitably be introduced into the analysis.

To overcome these conceptual and practical difficulties, I would suggest reworking the language and structure of the §34 prohibition to replace the *per se* approach with a framework that approximates to a US-style 'rule of reason'. In addition, *de minimis* numerical thresholds can be established using guidelines issued by the Commission.

3.2 Enforcement: Whistleblowers and Informants

To assist the Commission in the prosecution of cartels operating in or out of Singapore, it might be worth considering a specific provision which empowers the Commission to grant leniency to those parties to an anti-competitive agreement, arrangement or concerted practice who assist the Commission in exposing activities which infringe §34 of the draft Bill. This might encourage firms to come forward with information that might facilitate the Commission's investigations and lead to the elimination of collusive conduct that might otherwise be difficult to detect and prove. I would suggest a including a subsection within §69 along the following lines:

"Upon receiving information or assistance from an undertaking that is party to an agreement or concerted practice prohibited under section 34, or an employee or officer of such an undertaking, that results in a decision by the Commission declaring that section 34 has been infringed, the Commission may grant leniency towards the party who has provided such information or assistance in exercising its powers under subsection (2)(d)"

3.3 Enforcement: Rights of Private Action

Giving competitors, suppliers, distributors and other parties, including consumers, the right to seek relief in civil proceedings against an undertaking which has infringed §34, §47 or §54 is a progressive step towards developing a commercial culture which will complement the Commission's efforts in eradicating and deterring anticompetitive conduct in Singapore. To enhance the clarity of the legislative framework in §75 of the draft Bill, it might be useful to emphasise the underlying objectives of granting relief to the claimant who is pursuing the private action. §75(8)(b), when read with §75(1), suggests that the damages recoverable by the claimant are intended to *compensate* the claimant for the losses he has suffered as a result of the anticompetitive behaviour of the defendant. These compensatory objectives should be made more explicit in §75. The possibility of exemplary damages, as envisaged in §75(8), may serve as a useful general deterrent against anti-competitive behaviour in the same way that triple damages are available under the Sherman Act in the US. However, greater clarity is needed to identify the circumstances in which a court should award exemplary damages. Further guidance will have to be given as to how the court's discretion under §75(8) should be exercised.

Another issue which needs to be clarified is the extent to which a claim for damages under §75 is limited by the common law rules of remoteness. Should the damages available to a claimant be subjected to the principles of remoteness employed in the law of contract or torts? To what extent should the losses suffered by a claimant be attributable to the competitive process, and to what extent should it be attributable to the anticompetitive conduct of the defendant? These are just some of the more difficult questions which a court of law will have to address when applying §75 of the draft Bill.

4. Conclusion

The draft Bill is an impressive and far-reaching piece of legislation that will need to undergo further refinement to achieve the conceptual clarity required for a principled, workable, and coherent regulatory framework. Competition law, if properly implemented and enforced, has

the potential to make a significant contribution towards strengthening the competitive processes in the various segments of Singapore's economy. It is hoped that the observations and suggestions made in the preceding paragraphs have shed light on some of the challenges that lie ahead.