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COMMENTS OF MICROSOFT SINGAPORE ON THE DRAFT COMPETITION BILL AND CONSULTATION PAPER

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SUMMARY OF MAJOR POINTS

1. Microsoft strongly endorses the overall direction of the Consultation Paper and Draft Bill and has limited suggestions for refinement.

2. It is observed that the discrimination and tying infringements in Section 34(2)(d) and (e) are outdated holdovers from the EU Treaty, address primarily vertical customer relationships that are in any event excluded from the scope of the Bill, and are not generally regarded as appropriate to treat as infringements in the absence of substantial market power. Accordingly, it would be more efficient to delete these provisions and leave them to be dealt with as potential abuses of a dominant position under Section 47(2)(c) and (d).

3. We recommend the addition of a provision to Section 34 expressly recognizing that horizontal competitors may enter into agreements of the type covered by Subsections (2)(a)-(c) when they are reasonably necessary to facilitate a procompetitive joint venture.

4. We recommend amending Section 34 to exclude agreements between parent and subsidiary companies, or other entities under common ownership or control.

5. It is recommended that the term "predatory behavior" contained in Section 47(2)(a) be amended to read "predatory pricing" as per the focus in the Consultation Paper, so as to avoid any implication that the provision be misunderstood as creating an open ended standard condemning any form of aggressive competition, and that the standard for predatory pricing be further clarified as pricing below variable cost with a probability of recouping such losses following market exit by competitors.

6. It is recommended that "or elsewhere" be deleted from Section 47(3) so as to eliminate conflict with the jurisdictional approach taken in Section 47(1) and consistently elsewhere in the draft Bill, and so as to avoid conflating market power anywhere in the world with market power in Singapore.

7. We recommend clarifying, if necessary, that the rule of reason approach to intellectual property rights described in the Consultation Paper, Annex C, qualifies the application of Sections 34 and 47 and does not create an independent basis to challenge the exercise of intellectual property rights.

8. We recommend adding a provision to Section 47 stating that the ownership of intellectual property rights shall not be presumed to create a dominant position, and that Section 47 does not limit the right of an owner of IPR to refuse to license its IPR or to restrain infringements.

9. We recommend limiting the private right of action under Section 75 to those directly harmed by an infringement, so as to limit speculative litigation and duplicative payments, and to limit the level of exemplary damages that may be awarded under Section 75(8)(b) – for example, that exemplary damages not exceed three times the level of the claimant's actual damages, so as to avoid excessive claims designed to force a higher settlement.

10. It is recommended that the new Commission be strengthened institutionally through funding from general revenues according to a fixed annual budget rather than being dependent on

retention of fines and borrowed money, and by increasing the political independence of the Commission and Board of Appeals by specifying fixed terms of office and broadening participation in the appointments process.

STATEMENT OF INTEREST

Microsoft Corporation, a company registered in the United States, develops and licenses software for use on Personal Computers and on other computing devices and is a world leader in this area. Microsoft does business in Singapore through a wholly-owned subsidiary, Microsoft Singapore Pte. Ltd.

COMMENTS

Microsoft welcomes the Singapore Government's steps to develop a draft Competition Bill and appreciates the opportunity to provide these comments on the draft Bill and Consultation Paper.

I. <u>Overview</u>

It is clear from the Paper and the draft Bill that MTI has given careful and thoughtful consideration to the competition laws of other countries, including the models of many of its major trading partners. A well-designed competition policy that draws effectively on the experiences of other systems will ultimately serve to maximize the benefits that Singapore consumers derive from a well-structured competitive system in which innovation, lower prices, and higher output result from vigorous competition among companies. The result of the MTI's effort promises to be a progressive statute that will protect competition and consumers while ensuring that companies are not deterred from engaging in procompetitive activities.

In addition, international harmonization is critically important in an increasingly global trading system. In order for Singapore companies to expand and compete effectively internationally, it is beneficial that they should become accustomed to operating under competition law structures which closely approximate those that will govern them when doing business within the territories of important trading partners. Likewise, multinational companies like Microsoft will have increased incentives to further expand their business activities in Singapore if they know that they can rely on the same compliance assumptions and structures that have been applied to their business activities elsewhere. Indeed, idiosyncratic national competition rules on such matters as “tie-ins” or “bundling” may make it difficult or even impossible to market in such countries new products that have been designed in compliance with international norms of competition.

As a basis for establishing a modern, globally harmonized approach for Singapore’s law and policies governing competition, the draft Bill is in almost all respects an excellent starting point. Much will depend, of course, on the manner in which the proposed Commission builds upon many of the general provisions contained in the draft Bill through block exemptions, guidelines, and its responses to requests for guidance and decisions.

Most of our constructive comments on the draft Bill relate to one of the most important considerations in drafting any competition law -- ensuring that companies will not face liability for engaging in procompetitive conduct that ultimately benefits Singapore consumers. It is clear that the MTI has given broad consideration to drawing a careful balance between condemning anticompetitive conduct and encouraging procompetitive activity. We do, however, believe that certain amendments would further refine that balance in ways that would best serve Singapore’s interests and at the same time advance economic development and the international harmonization of competition laws.

In the following sections, we elaborate on the recommendations provided in our Summary of Major Points above. Again, these comments are in the context of overall enthusiasm for the scope, quality, and wisdom of the Consultation Paper and draft Bill.

II. Section 34: Agreements, etc. preventing, restricting or distorting competition

Section 34 defines types of agreements among competitors that are prohibited if they have as their object or effect the prevention, restriction or distortion of competition. While Subsections (2)(a)-(c) are closely consistent with international norms, Subsections (2)(d) and (e) involve types of behavior that arise primarily in vertical relationships between upstream seller and downstream customer, and are generally regarded as being potentially procompetitive, rather than harmful, in the absence of substantial market power. Accordingly, we recommend dealing with these two issues only as a potential abuse of dominance under Section 47, where they are now already separately treated in the draft Bill.

In addition, even agreements of the type addressed in Subsections (2)(a)-(c) are generally treated differently when they are incidental to a bona-fide joint venture or other pro-competitive collaboration between horizontal competitors with sufficiently modest market shares. Accordingly, we recommend an express recognition that such agreements are not illegal when reasonably necessary to give horizontal competitors the appropriate incentives to combine efforts in procompetitive joint ventures or other collaborations that may boost innovation and output in ways that are beneficial to consumers.

Finally, we suggest clarifying that Section 34 does not apply to agreements between entities that are under common ownership and control, such as a parent and its subsidiary.

We will now elaborate briefly on each of these subjects.

Discriminatory Agreements. Subsection (2)(d) would prohibit agreements that "apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." We note that this provision has been carried over from Article 81 of the EU Treaty, and that the US has a similar concept, at least for sales of commodities, under its Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a. However, it is important to recognize that the EU itself has no significant caselaw or history of enforcement under its Article 81(d), and the US government enforcement agencies likewise have brought virtually no cases in this area under the Robinson-Patman Act in the last 20 years. ABA Section of Antitrust Law, *Antitrust Law Developments* p. 456 (5th ed. 2002). In each case, this is for good reason: While there are many legitimate, procompetitive reasons for firms to apply differing treatment to its customers on price, terms of sale, and many other aspects of their dealings, there is virtually no potential for this conduct to cause harm to competition where the company engaging in such "discrimination" has no market power.

Firms charge different prices to different customers for a variety of procompetitive reasons, including to meet reduced prices of competitors or to pass on cost savings related to a transaction, such as savings in manufacturing or distribution costs. For example, US price discrimination law provides several defenses against accusations of price discrimination, including the meeting of a competitor's price, cost-justified prices and prices that are changed to reflect changing market conditions. Robinson-Patman Act, 15 U.S.C. § 13(a).

Pricing flexibility, including the including the ability to charge different prices as warranted by particular competitive conditions, is often critical to a firm's ability to compete effectively in the marketplace. Both economists and regulators have recognized that price discrimination is often consistent with efficient commercial behavior and that it can have substantial procompetitive effects, especially in industries with high development costs but low marginal costs. The UK Office of Fair Trading, for example, recently noted that:

> "Price discrimination raises complex economic issues and is not automatically an abuse. There are many areas of business where it is a usual and legitimate commercial practice. For example, it might be objectively justified in industries where there are large fixed costs and low marginal costs."

Assessment of Individual Agreements and Conduct, OFT 414, September 1999. *See also, e.g.,* William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 Antitrust L.J. 661 (2003) (contestable markets may force firms to price discriminate where feasible); Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* at 642 (3d ed. 2000) ("Many economists view the Robinson-Patman Act as special-interest legislation designed to protect small firms from competition from larger, more efficient firms that would be able to purchase supplies at low cost in the absence of the Act. One consequence of the Robinson-Patman Act is higher prices to consumers, who are deprived of the benefits of economies of scale in purchasing that the chain stores would otherwise be forced by competition (among themselves) to pass along to consumers).

In industries with low marginal costs, such as software, firms often price discriminate to meet varying levels of value that different consumers attach to a single product or service. This is procompetitive because it maximizes output of the product in question at efficient prices. *See Akzo N.V. v. ITC*, 808 F.2d 1471 (Fed. Cir. 1986) (upholding value-in-use royalty provisions as allowing for expanded use of licensed technology); *Carter-Wallace, Inc. v. United States*, 449 F.2d 1374, 1379 (C. Cl. 1971) (upholding drug pricing program that provided for lower prices for some uses of the drug, with a requirement that the buyer pay an additional amount to the manufacturer if the buyer changed its mind after purchase and made different use of the drug).

Given the dearth of enforcement of the somewhat outdated provisions regarding discrimination by non-dominant firms in the EU and the US, it would seem to be inefficient for Singapore to now promulgate just such a provision, only to have to cut it back severely through block exemptions or guidelines that would inevitably be needed to reflect the fact that most such behavior is likely to be procompetitive, and certainly unlikely to harm competition when engaged in by firms that lack market power. We therefore recommend that Singapore be guided by this history to streamline its approach, delete Section 34(2)(d), and rely instead on the application of Section 47(2)(c). This will reduce the compliance burden of the new Bill on companies doing business in Singapore, and avoid the administrative burden on the new Commission to clarify and narrow such provisions.

Even in the context of Section 47, we would recommend clarifying that it should not be a violation of subsection (2)(c) thereof if the enterprise applies dissimilar prices or conditions for objectively justifiable reasons unrelated to maintaining or extending a dominant position, including but not limited to meeting competition, passing on cost savings, or reflecting different values in use for particular customers. This is a clarification that may perhaps be handled at the guideline stage if not in the Bill itself.

Tying Agreements. Section 34(2)(e) presents a similar situation. Section 34(2)(e) would prohibit agreements that "make the conclusion of contracts subject to acceptance by the other parties of supplemental obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." This language, modeled on EU Article 81(e), concerns conduct generally referred to as "tying", which arises almost exclusively in a vertical relationship between a vendor and its downstream customers where the seller bundles two distinct products together and declines to offer them separately. Because vertical agreements are generally exempted from the scope of the draft Bill under Third Schedule, Section 8, this provision promises to be at most largely inactive at the time the Bill is passed, unless and to the extent that the Minister may order otherwise.

A more substantive reason for the provision to remain inactive is that tying is generally thought to cause competitive harm only when the seller has sufficient market power over the sales of one of the products in the bundle that large numbers of customers are compelled to take the second product as well, thereby undermining competition in the second product market. But absent such market power, customers are free to accept or reject the bundle on its competitive merits, depending on how attractive the package and price are relative to buying one or both products from other competing sellers.

Thus, in the United States, tying arrangements challenged under Sherman Act Section 1 are subject to per se illegality only where a seller has market power conferring "some special ability to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984). In that leading case, a market share of 30% was deemed insufficient, and lower courts have generally demanded much higher market shares for a finding of per se illegality. *See* 10 Areeda, Elhauge & Hovenkamp, *Areeda on Antitrust Law* ¶ 1736e1 (2d ed. 2004) (supporting a presumption that "market shares below 50 or 60 percent do not imply [sufficient market] power" for purposes of tie-in analysis). In theory, a tying claim can be sustained in a US Section 1 case on a lesser rule of reason showing, but such cases are rare or nonexistent. *See Western Power Sports, Inc. v. Polaris Industries Partners*, 744 F. Supp. 226 (D. Idaho 1990) (stating that, as of 1990, no tying claim had ever been sustained on a rule of reason analysis).

Translating this US precedent into the EU context, market shares high enough to sustain a per se tying claim in the US would also support a finding of a dominant position in the EU, *see Akzo Chemie BV v. Commission,* [1991] E.C.R. I-3359 (in the absence of exceptional circumstances, a market share of 50% is sufficient evidence of dominance so that the undertaking will bear the burden of establishing that it is not dominant). Thus, to the extent that MTI has modeled its abuse of dominance threshold under Article 45 on the EU approach, it is apparent that tying cases in the US involving market shares high enough to suggest competitive harm would also be within reach of the tying provision of Article 47(2)(d), which contains anti-tying language identical to Article 34(2)(e).

Indeed, under EU precedent, the more significant decisions condemning tying have arisen under Article 82, involving abuse of a dominant position, see, e.g., *Tetra Pak International SA v. Commission*, [1996] ECR I-5951; *Hoffmann-La Roche v. Commission* [1979] ECR 461; *Hilti v. Commission,* [1991] ECR II-439 (abuse of dominance for conditioning supply of dominant nail guns and cartridges on purchase of non-dominant nails), *affirmed on appeal*, *Hilti v Commission,* [1990] ECR II-163, and *Hilti v. Commission* [1994] ECR I-667. While the possibility of an infringement of Article 81(d) by a non-dominant firm remains a narrow possibility, many tying arrangements have been eligible for a safe harbor under the Vertical Restraints Block Exemption since 1999 provided that the market share of the supplier in both the tied market and the tying market does not exceed 30%. *Vertical Restraints Block Exemption*

Regulation, OJ (1999) L336/21. And in cases where the 30% market share threshold is exceeded, but the supplier is not dominant, a tying arrangement falls outside the safe harbor but may still be eligible for individual exemption under Article 81(3), which takes into account efficiencies in a rule of reason-style test.

The foregoing considerations suggest that the inclusion of Section 34(2)(e) is unnecessary in light of the general exemption of vertical agreements under the draft Bill, coupled with the history of US and EU jurisprudence, in which enforcement aimed at tying arrangements involving firms with non-dominant market share are exceedingly rare. At best, Section 34(2)(e) will prove largely irrelevant to preventing anticompetitive situations from arising. At worst, it will create lingering uncertainty that may serve to deter conduct that is likely to be procompetitive as non-dominant sellers experiment with various bundles in an effort to tempt consumers away from their competitors, and burden the new Commission with further clarifying the limited circumstances where the section should apply. This suggests that it would be efficient to delete Section 34(2)(e) and rely on Section 47(2)(d) to control tying abuses on the rare occasions where true harm to competition may arise.

Joint Ventures: The prohibitions of Section 34, including Subsections (a) through (c) as well as (d) and (e), read literally, could prevent a vast array of existing procompetitive economic activity, including research and development collaborations, cooperative marketing efforts for small producers, reciprocal distribution agreements that enhance consumer choices, joint buying organizations for small retailers, and standard setting. Absent immediate substantial clarification through guidelines or block exemptions, the draft Bill creates a risk that legitimate joint venture activity would be condemned without sufficient consideration of economic benefits resulting from the collaboration. We suggest that a presumption of illegality not be imposed on agreements that are reasonably related to such procompetitive activities.

US law includes categories of restrictive agreements, similar to those contained in Section 34(2)(a)-(c), that are deemed per se violations under US competition law when entered into between horizontal competitors, meaning that they are deemed to be anti-competitive without further examination of anticompetitive impact. However, the category of cases to which the per se rule is applied is very narrow and does not apply where restrictions are reasonably related to a lawful collaborative venture and reasonably necessary to achieve the procompetitive effects from the venture. Restraints in the context of a joint venture are instead subject to the "rule of reason," permitting courts to weigh procompetitive benefits against anticompetitive harm. By refusing to apply a per se rule to agreements that are reasonably related to procompetitive activities, US antitrust law avoids deterring the efficiency-enhancing benefits of joint ventures and other procompetitive collaborations.

The US FTC/DOJ *Antitrust Guidelines for Collaborations Among Competitors*, available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, elaborate on this principle:

> [O]ne participant may have special technical expertise that usefully complements another participant's manufacturing process, allowing the latter participant to lower its production costs or improve the quality of its product. In other instances, a collaboration may facilitate the attainment of scale or scope economies beyond the reach of any single participant. For example, two firms may be able to combine their research or marketing activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products. Consumers may benefit from these collaborations, as the participants are able to lower prices, improve quality, or bring new products to market faster.

Id., § 2.1.

To ensure that the beneficial effects of "joint ventures, trade or professional associations, licensing arrangements, or strategic alliances" are not stymied by the threat of antitrust liability, the FTC/DOJ Guidelines apply a rule of reason to restrictions reasonably related to integration necessary to the joint venture:

> If . . . in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered illegal. . . .

Id., § 3.2.

Similarly, Article 81(3) of the European Community Treaty provides an exemption from potential liability for joint activities that "contribute[] to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit . . . ." The European Commission's Guidelines on Horizontal Cooperation provide that certain types of collaborative agreements can be assumed to have satisfied the exemption criteria of Article 81(3), particularly research and development and production agreements, "where the combination of complementary skills or assets can be the source of substantial efficiencies." *European Commission Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements* § 37. According to the Guidelines, most research and development agreements "bring out economic benefits by means of cost savings and cross fertilisation of ideas and experience, thus resulting in improved or new products and technologies that would otherwise be the case." *Id.* § 40. The Guidelines explicitly recognize that, in the joint venture context, activity that might otherwise be considered illegal price setting would be justified if it were indispensable to an integration of marketing functions that would generate substantial efficiencies. *Id.* § 151.

Joint ventures may also presently qualify for a block exemption from Article 85(1) under the EU Specialization Block Exemption provided the parties do not have a combined market share greater than 20% in the affected relevant market and provided that their agreement does not contain certain so-called hard core restrictions that have some overlap with Sections 34(2)(a)-(d) of the Competition Bill. However, the *Commission Notice on Horizontal Cooperation Agreements*, http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_003/c_00320010106en00020030.pdf makes clear that joint ventures involving "hard core restrictions" and falling outside this market share safe harbor can still be justified under the rule of reason-like balancing test of Article 81(3).

We believe that US and EU law reflect the clear international trend in the treatment of joint ventures. The OECD's Committee on Competition Law and Policy has thus recently recommended that if "a joint venture will probably have a net positive effect on consumers, any further review . . . should focus on whether any restrictions on competitive behavior are reasonably related to the joint venture's efficiencies." *See* OECD, *Competition Issues in Joint Ventures*, 10 (2001), http://www.oecd.org/dataoecd/0/33/2379097.pdf. *See also,* Corones, *Competition Law in Australia,* LBC Information Services (1999) at 45-50 (describing the practice of the Australian Competition and Consumer Commission and the Australian Competition Tribunal in applying an ancillary restraints analysis to applications for authorization of joint venture agreements).

In order to promote international harmonization and protect the procompetitive benefits that arise from certain joint or collaborative activities, we would recommend adding a new Section 34(6) similar to the following:

> If participants in an efficiency-enhancing integration of economic activity, such as a joint venture, trade or professional association, licensing arrangement, strategic alliance, standard setting organization or other similar activity, enter into an agreement that is reasonably related to the integration and its procompetitive

> benefits, the agreement shall not be void under subsection (3). For purposes of this subsection, an "efficiency-enhancing integration" is one in which participants collaborate to perform or cause to be performed one or more business functions, such as production, distribution, marketing, purchasing, standard setting or research and development, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation. For purposes of this subsection, an agreement that is "reasonably related" need not be essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the agreement is not "reasonably related."

Agreements among commonly controlled companies. Section 34 as presently drafted prohibits agreements between two undertakings without regard to whether such undertakings are parent and subsidiary, or otherwise affiliated through common ownership or control. Yet it is generally understood that commonly owned companies seek to coordinate their behavior for the common good of the owners, rather than competing head-to-head with each other for the same customers. Consequently, agreements within a corporate family that might otherwise fall under Section 34, such as transfer and resale price setting, or division of geographic markets or product production, represent normal behavior and involve no loss of consumer welfare. On this basis, in the US the courts have generally exempted such agreements among commonly controlled entities under what is known as the *Copperweld* doctrine, after the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752 (1984), *see generally* ABA Section of Antitrust Law, *Antitrust Law Developments* 25-34 (5th ed. 2002). The EU has followed a similar rule, *see* Case 15/74 Centrafarm v. Sterling Drug [1974] ECR 1147 [1974] CMLR 480, §41; Bellamy & Child, Common Market Law of Competition, 2-005 (Sweet & Maxwell 1993).

Accordingly, Microsoft recommends that Section 34 be amended to include a subsection (6) which reads:

> The prohibition of subsection (1) shall not apply to agreements between undertakings that are parent and subsidiary or otherwise subject to common control as defined in Section 54(3).

III. <u>Section 47: Abuse of dominant position</u>

Section 47 sets forth the basic definition for finding abuse of a dominant position, modeled primarily on Article 82 of the EU Treaty. Subsection (2)(a) departs from that model, however, in defining an open ended abuse described as “predatory behavior towards competitors.” We recommend that this open ended definition be narrowed to focus on the specific issue of predatory pricing, as in the consultation paper, and that the term “predatory pricing” be further defined so that it is clear that the term allies solely to pricing below variable cost where there is a realistic chance of recouping the resulting losses following the exit of competitors from the market.

Secondly, Section 47(3) states that “’dominant position’ means a dominant position within Singapore or elsewhere,” thereby seeming to contradict Section 47(1) and inappropriately condemn behavior that cannot harm competition in Singapore in the absence of a dominant position on the Singapore market.

We will now elaborate briefly on each of these subjects.

Predatory Behavior and Predatory Pricing. Section 45(2)(a) states that it shall be an abuse of dominant position to engage in “predatory behavior.” This appears in the first instance to be a wise departure from the text of EU Article 82(a), which more broadly condemns “unfair” purchase or sales prices and trading conditions, and has largely been abandoned in EU enforcement as an unworkable invitation to engage in second guessing market forces. What is not clear, however, is whether the term “predatory behavior” is meant to narrow the focus exclusively to predatory pricing, the sole example discussed in the Consultation Paper at paragraph 8.b., or whether the term embraces a more open-ended concept of behavior that appears intended to harm specific competitors.

If the term is in fact meant to have some broader meaning, it will introduce considerable uncertainty given that it has no clear statutory counterpart in US, EU or other competition law systems. We do recognize that the term "predatory" is used with some frequency in caselaw and policy discussion of competition law issues, but suggest that it tends to be used not as a distinct category of abusive conduct but rather as a conclusory label, effectively interchangeable with terms like "anticompetitive" and "exclusionary," *see, e.g, Aspen Skiing Co. v. Aspen Highlands Skiig Corp,* 472 U.S 585, 602 (1985). As such, it does not identify specific conduct that should be avoided or proscribed, and therefore does not provide any real guidance either to the new Competition Commission, or to companies doing business in Singapore. It could be construed to encompass almost any type of behavior by a dominant firm designed to take additional market share from competitors, conduct that in most cases should prove beneficial to consumers, resulting in lower pricing and a wider range of choices. To the extent that it evokes an element of intent to harm competitors, it should be borne in mind that fierce competitive instincts and statements, by themselves, should not be regarded as amounting to a competition law violation, and that modern competition law analysis uses evidence of intent only sparingly.

Consider, for example, this statement by the Australian High Court regarding the proper application of Section 46 of its Restrictive Trade Practices Act, that country's provision regarding conduct by companies with "a substantial degree of power in a market":

> Competition, by its very nature, is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales

> away. Competitors almost always try to 'injure' each other in this way . . . These injuries are the inevitable consequence of the competition section 46 is designed to foster.

Queensland Wire Industries case, (1989) 167 CLR 177, 191; OBryan, *Section 46: Law or Economics?* (1993) 1 *Competition and Consumer Law Journal* 64, 84 ("but this is the old law of monopolistic practices, which has more to do with impressions of 'normal' and 'predatory' behavior than efficiencies in industry. It was this old law which the High Court sought to overturn [in *Queensland Wire Industries*]") *see, also Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989), cert denied 494 U.S. 1027 (1990) (desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws). Accordingly, it would seem highly desirable for Singapore to forego such an open-ended standard, and the uncertainty that it would entail, and rather amend the language, to read "predatory pricing" so as to provide more certainty for companies and the Commission. If there are other, more specific types of conduct of additional concern beyond those enumerated in Section 45(2)(b)-(d), an effort at greater specificity would remain desirable.

Assuming that the provision is intended, or is narrowed, to focus on predatory pricing, the restriction should be carefully drawn, because, as the US Supreme Court has stated, "the mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition, mistaken inferences are especially costly, because they chill the very conduct that the antitrust laws are designed to protect." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993).

First, it will be important to define when pricing is predatory by focusing in the first instance on marginal cost. Economic theorists conclude that sellers in a competitive market will normally set their prices at the marginal cost of production, not at the average total cost of production. In light of this economic theory, antitrust authorities and courts in both the EU and the US typically use marginal cost (or average variable cost of production, which provides an easier-to-measure substitute), as a significant benchmark in assessing whether predatory pricing has occurred.

Even with a marginal cost standard for predatory pricing, an exception needs to be recognized for promotional pricing, in which one product may be offered for a short period of time at a discounted price, or even free, in order to stimulate demand either for that product or for a second product sold in conjunction with the first. While this practice may have an impact on other firms selling products that compete with the product subject to the short-term discount, there is no improper predatory intent. More importantly, consumers benefit from such promotional pricing practices, which should not mistakenly be condemned as predatory pricing.

Second, we note that claims of predatory pricing are viewed with a high degree of skepticism in US courts, because of the implausibility of a company's sustaining losses over a substantial period of time for the purpose of generating some speculative level of monopoly profits in the future. The US courts have recognized that it is improbable that a company will willingly sacrifice the profits that the competitive market would provide, unless the company has at least a reasonable expectation of recouping, in the form of later monopoly profits, more than the losses suffered. See, e.g., Brooke Group, 509 U.S. at 224. Thus an element of predatory pricing under US Sherman Act Section 2 is that the defendant had a dangerous probability of recouping its investment in below-cost prices. *Id.*

To implement these comments, we would recommend adding a definition of "predatory pricing" as a new Section 47(3) or (4) as follows:

> “Predatory price” means the sale of a product or provision of a service at a price that is below the marginal cost of production of the goods or provision of service, with the intent to eliminate or injure competition or competitors in the sale of such product, under circumstances where there is a dangerous probability of recouping losses suffered during the period of below-cost pricing within a relatively short period of time thereafter by raising the price of the same product or service to secure monopolistic profits. For purposes of applying this provision, average variable cost may be used as a proxy for marginal cost.

Territorial Jurisdiction. Subsection 47(1) limits the scope of the prohibition on abuse of a dominant position to “abuse of a dominant position in any market in Singapore.” This seems to require, appropriately, both that the defendant have a dominant position in a relevant market in Singapore, and that the defendant abuse that position in one of the ways specified in subsection 47(2). Yet Subsection 47(3), and Section 8(b) of the consultation paper, seem to contradict this by stating that “‘dominant position’ means a dominant position within Singapore or elsewhere.”

If this language is retained, it would have the perverse effect of holding companies to the standard of a dominant firm in their behavior in Singapore if they are dominant in any market anywhere in the world, even if they lack the power of a dominant firm in any relevant market in Singapore. Thus, for example, a firm with a 20% market share in Singapore could engage in tying behavior towards its customers, because its vertical conduct is exempt from Section 34(2), and does not satisfy the likely threshold for dominance under Section 47. Yet another firm that holds a dominant position in France, but only a 5% share of the relevant market in Singapore, would be prohibited under Section 47(2)(d) from engaging in the same pricing behavior as the first competitor simply because of its position in France.

This contradicts the analysis that tying behavior is only likely to cause harm to competition when the competitor holds substantial market power, such that large numbers of consumers will be unable to reject the tie because of their dependence on the tying product. If only 5% of Singapore customers buy from the competitor, it holds no such market power in Singapore regardless of its ability to impose a tie on customers in France. Conversely, if something about its market position in France also confers power over the market in Singapore, then it holds market power in Singapore as well and there is no need to refer to a dominant position anywhere but in the Singapore market where the abuse triggering jurisdiction takes place.

The necessary implication of this analysis, is that Section 47(3) as written may lead to cases and decisions that discriminate against multinational firms by holding them to a different and higher standard of behavior than domestic firms, even if their position outside of Singapore confers no special competitive advantage within Singapore. If the position outside of Singapore does not confer such a position within Singapore, then the application of disparate standards is unwarranted, and will only expose Singapore to international friction. Moreover, questions of market definition, market share, and market power can be complex and administratively difficult under the best of circumstances. To place on the Commission the responsibility for determining the existence or not of market power in far-flung foreign markets would create serious evidentiary and other practical problems.

IV. The Relationship Between Competition Law and Intellectual Property

The draft Bill does not itself contain any provisions regarding the role of IPR in assessing agreements in restraint of trade or abuses of dominant position. The Consultation Paper, however, discusses the subject in Annex C, and concludes that when assessing the exercise of an IPR, "the Competition Commission would adopt an 'economics-based cost benefit analysis' or 'rule of reason' approach. This means that the Competition Commission would take a holistic view and look at the overall net welfare effects of the activity to decide whether a particular use of an IPR reduces welfare in Singapore."

Given Singapore's strong interest in continuing to develop as a focal point for technology businesses in Asia, such as computers, software, pharmaceuticals, and biotechnology, in which IP rights are of particular value and importance, Microsoft respectfully suggest that it would be appropriate to provide greater initial assurance that Singapore will take an approach under its competition laws that is at least as favorable towards the IPR developed by innovative companies as is the international norm. If this is an appropriate goal, then it may be desirable to make clear in the draft Bill certain points upon which there is strong international consensus, rather than wait for the Commission to develop guidelines.

Microsoft would first like to clarify whether the "rule of reason" approach described in Annex C should be read to be read to suggest that conduct involving intellectual property rights should never be condemned under Section 34 or 47 without first considering the procompetitive aspects of the conduct (bearing in mind that Section 34, in particular, lacks a counterpart to EU Article 81(3)). Or, should it instead be read to mean that any conduct involving the exercise of intellectual property rights can be subject to a rule of reason challenge, regardless of whether the conduct would fit under a specific provision of Section 34 or 47. The first interpretation appears more likely to be correct, since subsequent guidelines based on Annex C should only be able to narrow, rather than expand, the prohibitions that are in the statute. Such a narrowing approach would be appropriate considering the social welfare considerations in favor of protecting intellectual property.

Licensing of intellectual property rights is, in the vast majority of cases, a highly procompetitive activity, as recognized in the 1995 U.S. Department of Justice and the Federal Trade Commission *Antitrust Guidelines for the Licensing of Intellectual Property* §§ 2.0, 2.3 ("U.S. Guidelines") http://www.usdoj.gov/atr/public/guidelines/ipguide.htm, and the EU's *Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 85 (3) of the Treaty to categories of technology transfer agreements,* Preamble ¶ 5, http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_123/l_12320040427en00110017.pdf. If one begins, as one should, with the premise that the IP owner has no obligation to license its property to anyone, it follows that licensing, by expanding the introduction of innovations into the marketplace, is an inherently procompetitive activity. As the U.S. Guidelines state:

> "Licensing, cross-licensing, or otherwise transferring intellectual property . . . can facilitate integration of the licensed property with complementary factors of production. This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such arrangements increase the value of intellectual property to consumers and to the developers of the technology. By potentially increasing the returns from intellectual property, licensing also can increase the incentive for its creation and thus promote greater investment in research and development."

U.S. Guidelines § 2.3.

The U.S. Guidelines go on to explain that restrictions incorporated in intellectual property licenses are often themselves beneficial as well:

> "Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example,

> by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself."

Id.

Second, Annex C tends to suggest in paragraphs 1 and 4 that the holders of IPRs inherently possess a degree of market power, a view which could lead to overbroad application of the dominant position provisions of Section 47. The law in other jurisdictions has moved away for an early presumption that IPRs convey market power, in favor of an approach that recognizes IPRs are just one factor in evaluating which products compete with one another as substitutes in a properly defined relevant antitrust market. For example, the US Guidelines state at Section 2.2:

> "The agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power."

See also, Corones, *Competition Law in Australia,* LBC Information Services (1999) at 389 ("It is unlikely that a market can be defined by reference to an intellectual property right and the mere ownership of an intellectual property right is unlikely to confer substantial market power").

Third, there are certain aspects of the assertion of IPRs that should inherently be accorded a very high degree of deference, even where a dominant position exists. A fundamental principle that competition law must respect is the IPR owner's right <u>not</u> to license or sell its property. The exclusive right of use – including the right to preclude anyone else from using the property – is perhaps the most fundamental right conveyed under the IP laws. In addressing licensing issues, the U.S. Guidelines expressly disavow any implication of an affirmative licensing obligation, recognizing that any market power conveyed by intellectual property does not "impose on the intellectual property owner an obligation to license the use of that property to others." U.S. Guidelines § 2.2. The U.S. enforcement authorities accordingly "will not require the owner of intellectual property to create competition in its own technology." *Id*. § 3.1. In the EU, the European Court of Justice has just reiterated its similar policy in the clearest terms, stating that "In order for such a refusal to be regarded as abusive it must prevent the emergence of a new product or service for which there is a potential demand, be without objective justification and be capable of eliminating all competition on the relevant market." *IMS Health GmbH & Co. OHG* v *NDC Health GmbH & Co. KG,* Case C-418/01 (29 April 2004). Under this standard, the desire of a competitor to obtain a license to compete directly with the dominant firm in the same market in which the dominant firm offers products covered by its IPR cannot constitute an abuse. A corollary to this principle is that bona fide litigation or other enforcement efforts by a dominant firm to restrain infringement of its IPR should never be regarded as abusive. *See, e.g.,* Australian Trade Practices Commission, *Application of the Trade Practices Act to Intellectual Property,* Canberra, 1991, ¶5.4.

Based on the foregoing, Microsoft would suggest the addition to the draft Bill of a new provision to Section 47 which reads:

> The ownership of intellectual property rights shall not, by itself, be a basis for presuming that a dominant position exists, although it may be a factor in such a determination. The provisions of this section shall not restrict the right of any person to restrain any infringement of valid intellectual property rights granted in Singapore, or to determine unilaterally whether or not to license such rights to any given third party.

V. <u>Section 75: Rights of Private Action</u>

Section 75 provides a private right of action to seek relief in civil proceedings for damages suffered as a result of an infringement of Section 34, 47 or 54. Microsoft endorses the decision to limit the right of civil action in Section 75(2) so as to require a prior finding of a violation in an enforcement action initiated by the Commission, as this will help to limit speculative and wasteful private litigation.

Microsoft would, however, recommend an additional limitation by amending Subsection (1) to allow a private right of action only to a "person who suffers loss or damage as a direct result of an infringement." This direct damage requirement was established in the jurisprudence of the United States through the US Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), as a way to help ensure against duplicative and speculative damage awards in favor of so-called "indirect purchasers." Such duplicative awards could otherwise arise where the direct customers of an infringer bring an action for the higher prices or other damages suffered as a result of the infringement, and then customers of the direct customer bring a second action claiming that the damages were passed on to them in the form of higher prices as well. This doctrine has no counterpart in the EU, where private rights of action for damages have not, up until now, been permitted under the provisions of the EU Treaty.

Further, we recommend the addition of some limitation on the level of exemplary damages that may be awarded under Section 75(8)(b) – for example, that exemplary damages not exceed three times the level of the claimant's actual damages. This will avoid claims for extravagant damages, designed perhaps merely to force settlements against an accused company.

VI. Institutional Considerations

Finally, we would like to comment briefly on two issues regarding the institution of the Commission.

First, we note that under Section 13, it is provided that all fines and charges levied by the Commission are to be retained by the Commission. Other provisions in Division 4, including the power to borrow money under Section 15 and the power to issue shares under Section 16, tend to suggest that the Commission is expected to be financially self-sufficient, as there is no reference to any mechanism for funding from general government revenues. This is of some concern, as this creates an unhealthy incentive for the Commission to levy fines at least in part for its own fiancial health, rather than with sole regard to the existence of serious competition law violations meriting government enforcement action. This could easily lead to over-enforcement, and in turn, over-deterrence of competitive behavior in the Singapore market. A more stable financial mechanism, under which annual budgets are funded from general revenues, with fines returned there, would better ensure that enforcement decisions are guided solely by sound competition policy rather than budgetary considerations.

Second, we note that the Minister has complete discretion under Section 5, the First Schedule, and Section 72 to appoint the members of the Commission and the Competition Appeals Board, set the duration of their terms, and remove them at any time for any reason. This structure threatens to create at least the appearance that these key decision making bodies will be open to almost unlimited political influence, a situation that may serve to undermine the legitimacy of the new institution. We suggest that it would be desirable, at a minimum, to establish fixed terms for these position, and objective criteria for removal, such that they enjoy some degree of professional independence in carrying out their duties. Borader particiaiotn in such appointments might be desirable as well. In addition, establishing staggered terms would help ensure that the Commission and the Appeal Board are guaranteed to retain some degree of institutional memory at any point in time, a characteristics that would improve the stability and consistency of decision making and therefore the guidance for companies to conform their behavior with the law.

CONCLUSION

Microsoft believes that the draft Bill, with minor amendments as suggested above, will establish a sound basis for Singapore competition law and policy, and will help harmonize those policies with those of its major international trading partners. Microsoft appreciates the substantial work and thought that has gone into the draft Bill and thanks the MTI for the opportunity to provide comments. Microsoft would appreciate the opportunity to provide additional comments during any later stages of consideration.