Comments on the Singapore Draft Competition Bill by the Singapore Manufacturers' Federation (SMa)

(submitted to the Ministry of Trade & Industry)

Introduction

The Singapore Manufacturers' Federation (SMa) welcomes the introduction of the Competition Bill by the government. SMa thinks that with such a Bill, consumers and the business community will benefit in the long run.

Below are our comments on certain aspects of the Draft Competition Bill (DCB). Apologies are in order if we appear to be summarizing the DCB. This is necessary before we can proceed by furnishing our comments (in bold italics).

1. General

1.1 On 12 April 2004, the Ministry of Trade and Industry ("the MTI") released a Consultation Paper seeking public feedback on the draft Competition Bill (the "Bill"). This is the first of 2 rounds of public consultation of the Bill.

1.2 The main purpose of enacting a competition law is to prevent businesses from engaging in anti-competitive activities and therefore assist in Singapore's pro-competition business climate. The Bill will apply to all economic activities by private sector entities (known as "undertakings" in the Bill). It will not be applicable to the Singapore Government, statutory boards, and other sectors already regulated by an industry body.

1.3 The Bill has been prepared after studies had been made of competition laws of different jurisdictions such as Australia, Canada, India, Ireland, the United Kingdom and the United States.

1.4 A Competition Commission (the "Commission") will be set up to administer the Competition Act to be enacted.

1.5 The guiding policies for the Bill are based on the following:

1.5.1 Any competition law should take into consideration that Singapore is a small open economy with a fairly competitive domestic economy.

1.5.2 Minimise regulatory compliance costs. For this purpose, the MTI is adopting the following approaches:

(a) Focus on anti-competitive agreements or conduct that will have an appreciable adverse effect on Singapore markets; and
(b) Aligning the competition regulatory frameworks for certain sectors (which either already have or are going to have anti-competition regulations) with the Bill.

2. **Prohibitions**

Essentially, the Bill prohibits the following activities:

2.1 Anti-competitive agreements (Section 34, p18);
2.2 Abuse of dominant position (Section 47, p27); and
2.3 Mergers and Acquisitions that substantially lessen competition in Singapore (Section 54, p31).

Notwithstanding these, there are exclusions and exemptions from the above provisions which are permitted if there are net public benefits or strong public interest reasons. The Bill is intended to have extra-territorial application if any agreement or conduct outside of Singapore is likely to infringe any of the prohibitions.

3. **Anti-competitive Agreements** (Section 34, p18)

3.1 Subject to excluded agreements and exemptions, the Bill strictly prohibits **agreements** between undertakings, decisions by associations of undertakings or concerted practices **which have as their object or effect the prevention, restriction or distortion of competition** within Singapore. This applies in particular, to agreements, decisions or practices involving:
(a) price fixing agreements or arrangements;
(b) output restrictions or limits;
(c) market supply sharing;
(d) agreements which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
(e) agreements which make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3.2 Exclusions
The Third Schedule of the Bill sets out exclusions from the prohibition in Section 34. Please refer to paragraph 6.1 below for the exclusions.

3.3 Exemptions
(a) The Commission is empowered to grant exemptions from Section 34 prohibition if an agreement contributes to:

(i) improving production or distribution; or

(ii) promoting technical or economic progress,

but does not:

(1) impose restrictions that are not essential to the attainment of these objectives; or

(2) afford the possibility of eliminating competition in respect of a substantial part of goods or services in question.

(b) The Commission may grant individual exemptions or block exemptions subject to conditions or obligations imposed by the Commission and such exemptions shall remain in force for a period determined by the Commission.

(c) An individual exemption may be cancelled or varied if there has been a material change in circumstance since the exemption was granted or if information relied upon by the Commission was incomplete, false or misleading. Alternatively, the Commission may impose additional conditions or obligations.

(d) Further, an agreement which does not qualify for block exemption but satisfies specified criteria and is notified to the Commission, may be treated as falling within the block exemption.

3.4 Guidance by the Commission

(a) A party may apply to the Commission for guidance on an agreement which may breach the prohibition in Section 34. The guidance may indicate whether an agreement is likely to be exempt from prohibition under a block exemption, or whether the Commission is likely to grant the agreement an individual exemption if the Commission is asked to do so.

(b) If the Commission gives guidance that an agreement is unlikely to breach the prohibition in Section 34, it can only take action in respect of the agreement in limited circumstances set out in Section 45. These include (i) a material change in circumstance since the guidance was given by the Commission; (ii) information on which the Commission based its guidance was incomplete, false or misleading in a material particular; (iii) one of the parties to an agreement applies for a decision from the Commission; or (iv) a complaint about an agreement has been made to the Commission by a person who is not a party to the agreement.

3.5 Decision of the Commission

(a) Apart from seeking guidance, a party may apply to the Commission for a decision as to whether the prohibition under Section 34 has been infringed by a particular agreement, and, if it has not been infringed, whether that is because

of an exclusion or because of an exemption. A request for a decision may also include a request for the agreement to be granted an individual exemption.

(b) In the event that the Commission finds that there is no infringement under Section 34, it shall take no further action with respect to the agreement unless (i) there is a material change in circumstances, or (ii) information on which it based its decision was incomplete, false or misleading.

Comment:

(1) In Section 5 (p5) under "Constitution of Commission", it is recommended that a large percentage (50%) of the Commission consists of businessmen, academia, and specialists from the private sector. The idea is that private sector individuals can give another perspective to the issue as well as the practical business perspective.

(2) The general test for a prohibition under Section 34 seems to be based on "prevention, restriction or distortion of competition". Compare this with the test for mergers and acquisitions (see paragraph 9 below) which relies on the "substantial lessening of competition". In addition, MTI has indicated that with respect to intellectual property rights (see paragraph 6.2 below), a "rule of reason" approach will be adopted. With these various types of tests, clear guidelines need to be set as to the interpretation of the Section.

(3) Agreements that may contain these principles may not necessarily prevent, restrict or distort competition. For example, a firm could enter into fixed price agreements with customers etc. These agreements do not prevent, restrict or distort competition. Section 34(2) of the Bill should be reworded if the agreements, decisions or practices do not prevent, restrict or distort competition.

(4) The Third Schedule of the Bill identifies certain exclusions to the Section 34 prohibition. The most relevant being "vertical agreements". These are agreements between persons or companies at a different level of the production or distribution chain (for example manufacturer and distributor) and which agreements include provisions relating to the assignment to the buyer or use by the buyer of intellectual property rights. How about outsourcing finished/semi-finished products for competitors at fixed prices?

(5) In Section 42, requests can be made for the Commission to examine agreements. However, no time frame is given for the Commission to give its response.

(6) Since the Bill allows other parties to lodge a complaint with the Commission, it should be made clear that where such complaints are found to be unfounded and frivolous or vexatious, the complainant should bear the costs of all submissions to

the Commission (including those incurred by the party against whom the complaint was made) and such affected party should be entitled to take a private action for loss or damage against the complainant. This will deter against frivolous complaints which hamper business activity.

4. **Abuse of Dominant Position** (Section 47, p27)

4.1 **Conduct** on the part of one or more undertakings **which amount to abuse of dominant position** in any Singapore market is prohibited. In particular, conduct will constitute abuse if it comprises in:

(a) predatory behaviour towards competitors;

(b) limiting production, markets or technical developments to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transaction with other trading parties, thereby placing them at a competitive disadvantage; or

(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to their commercial usage, have no connection with the subject of the contracts.

4.2 Exclusions

The Third Schedule sets out exclusions to the "abuse of dominant position" provision. Please see paragraph 6.1 below.

4.3 Guidance by the Commission

As with the prohibition under Section 34, a person may apply to the Commission for guidance as to whether conduct is likely to infringe the prohibition under Section 47. If the Commission gives guidance that there is no infringement, it shall take no further action unless (i) there has been a material change of circumstance since it gave its guidance; (ii) the information on which it based its guidance was incomplete, false or misleading in a material particular; or (iii) a complaint about the conduct has been made to the Commission.

4.4 Decision by the Commission

A party may apply to the Commission for conduct to be examined for a decision as to whether the prohibition under Section 47 has been infringed, and if it has not been infringed, whether that is because of an exclusion. In the event that the Commission finds that there is no infringement under Section 47, it shall take no further action unless (i) there is a material change in circumstances since it gave its decision; or (ii) information on which it based its decision was incomplete, false or misleading.

Comment:

(1) The provisions of Section 47 on the prohibition against "abuse of dominant position" is similar to those of Article 82 of the EU Treaty. Although it is clear

from Section 47 that where 2 or more parties act collectively and exercise a dominant position, the prohibition is applicable, however, it is not uncommon for companies to enter into joint or collective business activities, perhaps to achieve economies of scale or benefit from each party's expertise. This may however be "caught" by Section 47. In this respect, the tests for interpreting this Section 47 are not entirely clear. Clear guidelines (or perhaps even some examples – like those provided in the Penal Code) should therefore be issued to clarify the application of this prohibition.

(2) There is no clear definition of "predatory behaviour". Article 82 of the EU Treaty uses the phrase "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". For the purpose of interpreting the extent of this prohibition, a clear definition should be set.

(3) Generally, such a prohibition against dominant <u>conduct</u> may not necessarily be entirely pro-competition. This is because competitive conduct is common to business activity. Therefore the fact that companies may be compelled by the legislation to seek clearance and thereby reveal the details of their future strategies and operations, which may then "leak" to their competitors, is clearly contrary to encouraging business competition in Singapore. Such process for clearance will also result in loss in confidentiality, the element of "surprise", as well as delays in execution of business activity.

(4) ***Since complaints may be lodged with the Commission regarding conduct, where such complaints are found by the Commission to be unfounded and frivolous or vexatious, the complainant should bear the costs of all submissions to the Commission (including those incurred by the party against whom the complaint was made) and such affected party should be entitled to take a private action for loss or damage against the complainant. While it is clear that this is meant to deter against frivolous complaints which hamper business activity, the problem is it may also open a "loophole" for competitors to go on "fishing" expeditions to try to find out more about the plans of their competitors and/or also to "sabotage" any plans where the element of surprise may be crucial. Therefore safeguards against this must be looked into and introduced before this Bill is passed into law.***

(5) Paragraph 5 in Annex A of the Competition Bill Consultation Paper states that a vertical agreement involving a dominant person or company or a person or company with a high degree of market power may have the potential for abuse and will be covered by the Section 47 prohibition. This is rather circular as vertical agreements are said to be excluded from the Section 47 prohibition yet the consultation materials propose that if a vertical agreement involves a dominant person or company, that agreement will be considered to be in breach of the Section 47 prohibition. This should be clarified

5. **Mergers** (Section 54, p31)

5.1 Mergers that have resulted, or may be expected to result, in **a substantial lessening of competition** within any Singapore market for goods or services are prohibited. A merger occurs if:

(a) 2 or more undertakings, previously independent of one another, merge;

(b) 1 or more individuals or other undertakings who or which control 1 or more undertakings acquire direct or indirect control of the whole or part of 1 or more other undertakings;

(c) the result of an acquisition by 1 undertaking (the 1st undertaking) of assets (including goodwill) or a substantial part of the assets, of another undertaking (the 2nd undertaking) is to place the 1st undertaking in a position to replace or substantially replace the 2nd undertaking in the business or the part of the business in which that 2nd undertaking was engaged immediately before the acquisition.

5.2 Exclusions

The Fourth Schedule sets out exclusions to the prohibition under Section 54. Exclusions may be permitted on grounds of public interest consideration.

5.3 Guidance by the Commission

A party may apply to the Commission for guidance for a merger to be considered. If the Commission gives guidance that there is no infringement, it shall take no further action unless (i) there has been a material change of circumstance since it gave its guidance; (ii) the information on which it based its guidance was incomplete, false or misleading in a material particular; or (iii) a complaint about the conduct has been made to the Commission.

5.4 Decision by the Commission

A party may apply to the Commission for a decision as to whether the prohibition under Section 54 has been infringed by a merger, and, if it has not been infringed, whether it is because of an exclusion. Where an application relates to a merger involving any public interest consideration, the Commission shall refer the matter to the Minister before making a decision. In the event that the Commission finds that there is no infringement under Section 54, it shall take no further action unless (i) there is a material change in circumstances since it gave its decision; or (ii) information on which it based its decision was incomplete, false or misleading.

Comment:

(1) As stated above, the test for the Commission to ascertain if there is an infringement by a merger under Section 54 differs from those under Sections 34 and 47. There is no explanation by MTI for the distinction in these tests. Perhaps

similar tests should be applied for determining infringement by anti-competitive agreements as for infringement by anti-competitive mergers.

(2) Clearly, where complaints as to mergers are determined by the Commission to be unfounded and frivolous or vexatious, the complainant should be made to bear the costs of all submissions to the Commission (including those incurred by the party against whom the complaint was made) and such affected party should be entitled to take a private action for loss or damage against the complainant. This is especially important in view that mergers are considered decisions between different undertakings and involve considerable amount of time and costs. If the merger process is placed under scrutiny by the Commission and parties to a merger are forced to reveal confidential information and face delays in their merger plans as a result of a complaint, a frivolous complainant should bear loss and damage of the affected parties.

6. **Scope of Application of the Bill**

6.1 Essentially, all activities are caught by the Bill. The **exclusions** set out in the Third Schedule comprise the following:

(a) services of general economic interest. [*Note that this is not defined.*]
(b) activities or conduct required in order for compliance with legal requirements
(c) activities or conduct required for avoidance of conflict with Singapore's international obligations
(d) reasons of public policy
(e) goods and services regulated by certain industries with competition law (ie. already existing sectoral anti-competition framework such as the telecommunications industry, the power and gas sector, the postal services)
(f) certain specified activities such as supply of armed security forces, supply of piped potable water, wastewater management, bus services, rail services and cargo terminal services
(g) clearing and exchanging of articles undertaken by the Automated Clearing House under the Banking Act Regulations, or activities of the Singapore Clearing Houses Association
(h) **vertical agreements** (these refer to agreements between players along the same value chain eg. between manufacturer and distributor), unless the Minister of the MTI by order prescribes otherwise.

Comment:

(1) The exclusions set out appear to be broad. However, some of them are difficult to understand eg. the clearing house exclusions. Guidelines should be published to clarify how these exclusions can be interpreted and the tests to be applied for them.

For example, in the EU, the EU Commission had issued specific guidelines on vertical restraints. Vertical agreements of minor importance and small and medium sized enterprises (ie. undertakings of which market share is not substantial), as well as genuine agency agreements (ie. obligations of agents as to contracts negotiated on behalf of their principals) fall outside the scope of Article 81 of the EU Treaty (which is similar to the prohibition in Section 34 of the Bill). There should be similar guidelines issued in Singapore for the Bill to give a clear understanding of the interpretation of the exclusions.

(2) Since vertical agreements are excluded, horizontal agreements (which refer to agreements between players along the same level of value chain eg. between manufacturer and manufacturer, or between distributor and distributor) which have the object or effect of preventing, restricting or distorting competition, will be prohibited.

(3) In situations of co-operations between members of associations such as the Singapore Manufacturers Association, it is not unusual that horizontal agreements will arise. Clear tests and guidelines must therefore be set down (with distinct examples) so that genuine co-operation, say between members of associations, will not be prohibited. We would also like to propose that it is considered anti-competitive if the majority or all players co-operate to raise prices or fix prices.

6.2 Intellectual Property Rights

Since there is no exclusion for intellectual property rights ("IPR"), the Bill will therefore apply to them. MTI in its press release of the Consultation Paper has highlighted that it considers that intellectual property laws are not inconsistent with competition law. However, it recognises that situations can arise where IPR can be abused by an undertaking acting in an anti-competitive manner for commercial advantage. In considering whether a business activity involving use of IPR will be anti-competition, the MTI has stated that the Commission will use an "economics-based cost-benefit analysis" or "rule of reason" approach. This means the overall net effect of the business activity will be scrutinised to determine if the particular exercise of an IPR reduces business welfare. In this respect, the Commission is to develop guidelines after enactment of the competition law on its view of IPR related business activities.

7. Enforcement

7.1 The Commission is empowered to investigate where there are reasonable grounds for suspecting that there has been an infringement under Sections 34, 47 or 54. The powers during the conduct of investigations include the right to require a person to

produce specified documents or information and the power of entry into premises without a warrant.

7.2 Upon completion of the investigation, the Commission will give written notice to the person likely to be affected by its decision and give such person an opportunity to make representations. Currently, the Bill does not provide for any penal sanctions.

7.3 Some of the sanctions which may be imposed for breaches of the competition law include:

(a) requiring parties to modify the agreement or conduct in question;

(b) where a merger is concerned:

(i) requiring a merger to be dissolved in such manner as the Commission may direct;

(ii) requiring such assets or shares of the merger specified by the Commission to be disposed of in a manner required by the Commission;

(iii) requiring such modifications of the merger, including sale of a portion of its operations or assets; and

(c) payment to the Commission of such **financial penalty** in respect of the infringement as the Commission may determine (up to a maximum of **10% or such other percentage of such turnover** of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of 3 years)

Comment:

(1) To allow greater degree of transparency, apart from notifying of its decision, the Commission should also reveal details of or reasons for its decision to the affected party.

(2) The financial penalty fixed by the Competition Commission cannot exceed 10% or such other percentage of such turnover of the business of the person or company in Singapore for each year of infringement for such period (up to a maximum of 3 years) as the Minister may by order prescribe. The issue arises as to whether this limitation also applies to the security provided under section 69(d)(ii) or whether it only applies to actual financial penalties imposed under section 69(d)(i). This should be clarified.

8. Appeals

8.1 A Competition Appeals Board (the "Board") will be established to hear any appeal against decisions of the Commission.

8.2 Appeals on the decisions of the Commission relating to exemptions will be made to the Minister.

8.3 Appeals against the decisions of the Board may be made to the High Court on points of law, or any decision of the Board as to the amount of a financial penalty.

9. Private Action

When a decision has been made by the Commission as to infringement under Sections 34, 47 or 54, and the appeals process is exhausted, any person who suffers loss or damage as a result of such infringement may bring a private action in court for damages and compensation against the infringing party. The burden of proof lies with the party bringing the action, to show that damage had resulted from the activities which are prohibited.

10. Transitional Arrangements

The MTI in its press release for the Consultation Paper had stated that a transitional period of at least 12 months will be provided before the competition law comes into force. The Bill is expected to be enacted on 1 January 2005.

Comment:
In view of the far-reaching effects of this competition law, perhaps a longer transition period of 18 to 24 months should be given to allow businesses to fully grasp and understand the impact and effect of the Bill after its enactment, but before its implementation.

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Submitted by the Singapore Manufacturers' Federation (SMa)

Date 13 May 2004

For enquiries, please contact: Mr TAN Kee Wee
Research & Corporate Communications Division
Tel: (65) 6826 3057
Email: keeweetan@smafederation.org.sg

Appendix: Article 81 of the EC Treaty (ex Article 85)

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;

- any decision or category of decisions by associations of undertakings;

- any concerted practice or category of concerted practices,

which contributes 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, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Appendix: Article 82 of the EC Treaty (ex Article 86)

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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