RESPONSE TO INVITATION TO COMMENT ON MTI'S PROPOSED COMPETITION BILL
(SECOND PUBLIC CONSULTATION – 20 AUGUST 2004)

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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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SUMMARY OF MAJOR POINTS:

The comments made in this submission are directed towards further refining the legislative framework proposed by the second draft of the proposed Competition Bill. The writer encourages the drafters to better articulate the legal standards which will be introduced when the Bill is passed, as well as to reconsider the decision to offer a blanket exclusion for vertical restraints on competition. Other issues relating to the relationship between the general competition law and the sectoral regimes, as well as the scope of the exclusions in the proposed Third Schedule, are also considered.

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 amendments to the Competition Bill in response to the first round of public consultation were generally rational and pragmatic in nature, though more could have been done to clarify the legal standards used in the relevant statutory provisions, the scope of application of these provisions (and the statutory exclusions which are inextricably tied to them), as well as relationship – procedural or otherwise – between the proposed general Competition Law and the pre-existing sectoral competition regulatory regimes.

2. Guidelines vs. Statutory provisions

It is submitted that, on the whole, a lot more attention needs to be paid by the proponents of the Bill to the language used in defining the statutory prohibitions – bearing in mind, always, that they choice of words in these legislative provisions will be elevated into legal standards to which a very large segment of the commercial world will be subjected when the new laws take effect. While the guidelines which the proposed Competition Commission will issue may have an integral role in clarifying the scope of the statutory prohibitions, more could and should be done from within the statutory framework to enhance the exactitude of the terminology which has been employed in the interests of legal certainty and fairness.

While it may not be practical for precise definitions to be given to the key words and phrases used in the statutory provisions, many of which are based on economic concepts which mean different things in different contexts, it is entirely appropriate for the statute to articulate *how* these words and phrases will be interpreted and applied – a non-exhaustive list of relevant factors, major considerations, and other qualifying criteria would provide much-needed depth to the legal framework. For example, a provision similar to the one set out in §41 of the proposed Bill – which deals with the situations in which a block exemption will be issued – could be introduced to expand upon the scope, objectives and philosophy underlying the §34 and §47 prohibitions. The guidelines issued subsequently by the proposed Competition Commission would then only serve an *illustrative*, rather than a *definitional*, function.

3. Removal of Individual Exemptions – Formal and Informal processes

The removal of individual exemptions from the regulatory regime, and the consequent amendments to the draft Bill, is very sensible policy decision which will prevent the proposed Competition Commission from being overwhelmed with specific exemption requests. While the proposed Act does contain provisions for guidance (formal) and decisions to be taken by the Commission when notified by parties unsure as to whether or not a statutory prohibition applies to them, it might be worth considering the introduction of an informal process – possibly on a no-names basis – by which a party can obtain guidance

or a non-binding negative clearance (for a reasonable administrative fee) before it engages in commercial conduct which involves significant financial or other commitments.

The Commission should then publish the results of its guidance, after removing any confidential information and details which might compromise the privacy interests of the parties involved, thereby making valuable precedents available to the public that would complement its formally-issued guidelines. Having such an informal process – at least for an initial period of 2-4 years – will encourage undertakings to step forward with their queries without having to subject themselves to the thorough scrutiny of the Competition Commission. This will, in turn, ensure that local firms gain a better understanding of how the regulatory framework operates and will eventually put them in a better position to evaluate (with the help of their legal counsel) whether or not their proposed commercial conduct is lawful or not.

4. Vertical Agreements – Exclusion from §34 prohibition

The current blanket exclusion of vertical agreements from the §34 prohibition is manifestly over-broad, and relying solely on the §47 prohibition against abuses of dominance to address the problem of anti-competitive vertical restraints is unwise. International practice in this area typically involves the creation of "white-lists" of acceptable vertical restraints by the regulatory authority instead of a blanket exclusion of the sort contemplated by the proposed Bill. While it may be administratively convenient to apply a blanket exclusion from the application of §34 to vertical agreements, the proposed exclusion encompasses far too wide a range of restraints – both the pro- and the anti-competitive – and is difficult to justify as a matter of principle or policy.

Not all anti-competitive vertical restraints amount to the abuse of a dominant position – a situation typified by the imposition of restrictive contractual obligations by a party in a stronger bargaining position on a party in a weaker bargaining position. Indeed, an anti-competitive vertical agreement may be reached by consensus between two or more willing parties in a vertical relationship – dividing markets or setting price-floors – to the overall detriment of the consumer as a result of the impairment of the competitive process. The effects of such vertical agreements may also be extensively felt across the local economy if an undertaking has a wide network of distributors and retailers for its products and services. If a distributor in this extensive chain enjoys particular economies of scale or scope, or other efficiencies which enable it to charge lower prices, but is obliged under a vertical restraint not to charge below a certain price, why should the law allow the vertical agreement to escape the scrutiny of the §34 prohibition?

Moreover, relying primarily on the §47 prohibition to address anti-competitive vertical agreements is unwise given the difficulties of establishing a dominant position in markets where there are substitute products available – it would be unrealistic to expect the proposed Competition Commission to limit the market definition to just the market for the product or service that is exclusively available from the party imposing the vertical restraint, unless the Commission were to define the relevant market in such a way which reaches into a foreign or regional market in which the undertaking imposing the restraint *is* dominant, allowing for

the §47 prohibition (as it is currently drafted) to apply even if the undertaking in question has a small domestic presence.

In essence, what needs to be recognized is that firms which impose anti-competitive restraints are able to do so even if they do not have *market power* in the relevant market for the goods or services they supply – it is enough that they have sufficient *bargaining power* in relation to the parties on whom those restraints are imposed, such that it is not possible to make out a case for an abuse of dominance simply because a dominant position, as conventionally understood, cannot be established in these cases.

Furthermore, by giving a blanket exclusion to vertical agreements from the §34 prohibition, horizontal collusion between firms may be "masked" or "repackaged" as vertical restraints imposed from by an upstream party so as to circumvent the operation of this statutory provision. For example, a horizontal agreement between firms to fix the prices of the goods and services they sell could be restructured as a vertical restraint on the resale prices of these goods and services if the upstream party were to collaborate with his downstream distributors or retailers. Creating a blanket exclusion for vertical agreements would, in effect, create a significant loophole to the §34 prohibition that parties to a horizontal arrangement could potentially exploit to their advantage.

5. Existing Sectoral Regulation – Third Schedule exclusions from the §34 and §47 Prohibition

Even if the proponents of the Competition Bill believe that it would be better for the existing sectoral regulatory regimes to be kept separate from the general Competition Law framework, further clarification is needed in situations where the one party is a regulated person under the sectoral regime while another is not. For example, there may be a number of cases where one party is a telco licensee or a media company, while the other is an ordinary retailer, distributor or service provider. In these situations, how is the jurisdiction to be shared between the IDA/MDA and the proposed Competition Commission? Does it still make sense to bring these cases outside of the general Competition Law framework where the vertical restraints or commercial conduct that is alleged to be an abuse of a dominant position have nothing to do with the "technical complexities that accompany competition issues in these sectors"? Wouldn't the Competition Commission have greater expertise in determining whether the conduct of the dominant firm is anti-competitive or not? Why should a dominant telco undertaking be subject to a different regulatory regime when determining whether or not it has abused its dominant position *vis a vis* an independent service provider, as compared to a dominant bank, supermarket or insurance company? Shouldn't the "special responsibilities" which the dominant firm shoulders be articulated consistently by the same regulatory authority – when they are dealing with suppliers, retailers and other independent contractors from outside its industry – regardless of the industry segment in which it occupies a dominant position?

6. Specified Activities – Third Schedule exclusions from the §34 and §47 Prohibition

The language used in paragraph 6 of the Third Schedule is dangerously ambiguous and needs to be refined further to avoid an overly-broad interpretation of the scope of the

exemption. Sub-paragraph (1), as it currently stands, provides that the two major statutory prohibitions "do not apply to any agreement or conduct *which relates to* any specified activity" (emphasis added). More thought needs to be given to the breadth that was intended to this exclusionary provision – was it meant to bring certain specific activities outside of the regulatory ambit of the proposed Competition Law framework? If so, then those specific activities should be spelt out more precisely. As it stands, the language in paragraph 6(1) could very easily be interpreted to exclude, for example, the following situations from the scope of the statutory prohibitions:

- An anti-competitive refusal to grant access to the postal home-delivery network of a postal services provider, working in collaboration with door-to-door newspaper delivery service providers, wishing to foreclose competition in the market for a time-sensitive publication;
- A price-fixing agreement between the suppliers of rust-proof pipes used by the potable water industry;
- An anti-competitive arrangement between fuel suppliers dealing with licenced bus or rail services operators.

And so forth. It might be better for the exclusions in paragraph 6 to be worded in a way which makes them specific to individual undertakings that are licensed under a particular regulatory framework, and only in relation to the regulated activities that they have been licensed to engage in. This would be preferable to the current form of the exclusion which defines the excluded subject matter with reference to specified "activities" and "any agreement or conduct which *relates*" to them.

7. Conclusion

More could be done to refine the second draft of the proposed Competition Bill to better reflect the intentions of its proponents, the regulatory philosophy underpinning the legislative framework, and its relationship with pre-existing sectoral regulation. In this writer's opinion, it would be better if the primary legislative instrument – the statute itself – sorted out these issues as far as possible, rather than relying too much on *ad hoc* guidelines or other supplementary instruments to articulate the law. It is hoped that the comments made in this short submission have gone some way towards identifying the areas in which the Bill can be further strengthened and clarified: by enhancing the levels of certainty and precision of the relevant statutory provisions, the additions and amendments to the second draft of the proposed Bill suggested above might possibly inspire greater confidence, amongst the broader legal and commercial communities, in the value of Competition Law towards invigorating Singapore's market economy.
