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I. INTRODUCTION

1. Singapore Exchange Limited ("***SGX***") welcomes the opportunity to submit its comments on the second draft of the proposed Competition Bill (the "***Bill***").

2. SGX's comments are also made on behalf of SGX's wholly-owned subsidiaries, namely, Singapore Exchange Securities Trading Limited ("***SGX-ST***"), Singapore Exchange Derivatives Trading Limited ("***SGX-DT***"), the Central Depository (Pte) Limited ("***CDP***"), and the Singapore Exchange Derivatives Clearing Limited ("***SGX-DC***"), and the businesses that they operate.

3. The comments set out herein by SGX are in response to the second round of the public consultation of the Bill issued by the Ministry of Trade & Industry ("***MTI***") on 26 July 2004.

4. SGX's submission is set out in the following manner:

   (a) Part I contains this Introduction;

   (b) Part II contains a summary of this submission;

   (c) Part III contains SGX's statement of interest;

   (d) Part IV contains SGX's detailed comments; and

   (e) Part V contains SGX's conclusion to this submission.

5. Unless otherwise stated, references in this submission to section numbers are references to the corresponding sections in the Bill.

II. SUMMARY OF MAJOR POINTS

6. SGX welcomes the opportunity to make further submissions in relation to the Bill. In making these further submissions, SGX has taken cognisance of MTI's guiding principles:

   (i) While the competition law should incorporate relevant international best practices, it should also take into account Singapore's characteristics, including the fact that we are a small, open economy with a fairly competitive domestic economy; and

   (ii) Regulatory costs should be kept to a minimum. Businesses should not face undue regulation, which would add to business costs and reduce Singapore's international competitiveness.

7. We regretfully note that our request for SGX and its subsidiaries to be excluded from the scope of the Bill in our submission to the first round of consultation was not accepted.

8. In this submission, we highlight our concerns arising from the inclusion of SGX in the Bill, namely, that we will be subject to double regulation of our business. Double regulation may also cause conflicting decisions to be made by the two regulators. Detailed comments can be found in Part IV of this submission and Annex A (Confidential).

9. The following issues are also highlighted in Part IV of this submission:

   (i) ambiguity in definition of "*dominant position*" under Section 47;

   (ii) definition of predatory behaviour under the first limb of Section 47(2) is too wide;

   (iii) absence of an upper threshold limit in the penalties provision under Section 69;

   (iv) ambit of secrecy provision under Section 78 is not wide enough to protect confidential information; and

   (v) absence of an enabling provision for Commission to award costs.

III. STATEMENT OF INTEREST

10. SGX is Asia-Pacific's first demutualised and integrated securities and derivatives exchange.

11. SGX was demutualised on 1 December 1999, following the merger of two established and well-respected financial institutions – the Stock Exchange of Singapore Limited and the Singapore International Monetary Exchange Limited.

12. On 23 November 2000, SGX was listed via a public offer and a private placement. Listed on our bourse, our stock is a component of benchmark indices such as the MSCI Singapore Free Index and the Straits Times Index. At present, SGX and its subsidiaries operate a securities exchange, a derivatives exchange, and two clearing houses.

13. This submission represents the views of SGX and its subsidiaries.

IV. DETAILED COMMENTS

PROBLEM OF DOUBLE REGULATION AND CONFLICTING DECISIONS

14. Double regulation

As we will not be excluded from the ambit of the Bill, we face the prospect of double regulation by the Monetary Authority of Singapore ("**MAS**") and the Competition Commission ("**Commission**") in relation to our business. In our view, this may lead to an increase in the regulatory costs and blunts our international competitiveness which is contrary to the second guiding principle. For details, please see Annex A (Confidential).

15. Inherent conflict between regulatory objectives and competition policy

Double regulation may also lead to conflicting decisions by the two regulators as they may be arriving at decisions based on different regulatory objectives. In our view, there seems to be an inherent conflict between regulatory objectives and competition policy in relation to the activities of exchanges and clearing houses. For example, under the Securities and Futures Act, MAS requires the exchanges to conduct a fair and orderly market to ensure investor protection and confidence in the exchanges and clearing houses. In compliance, SGX has imposed prudential and market conduct requirements. However, the Commission is focussed on competition issues such as removing barriers to entry. As such, when a complaint is lodged with the Commission that the exchange has imposed high barriers to entry, would the Commission be compelled to review such prudential and market conduct requirements? In addition, if the two regulators could not agree on a unanimous decision, it will lead to market confusion as to whose decision would prevail.

16. Proposal : Commission to be empowered to delegate authority or to co-opt governmental bodies

In the light of the guiding principles and to resolve the problem of double regulation and conflicting decisions, we believe the Commission should be given the power to delegate its authority to, or enter into a co-operative arrangement with, an appropriate governmental body where the Commission deems it fit to do so.

This power to delegate or co-operate with other governmental agencies would be a useful mechanism if there are complex issues requiring specialist knowledge. For example, in order to have efficient and effective regulation of the securities and derivatives market, a high level of technical knowledge and expertise in the relevant industry is required. As such, competition issues in the market which SGX and its subsidiaries operate cannot be determined without possessing an in-depth knowledge and appreciation of the unique characteristics of the industry. The Commission is therefore going to be faced with difficulty regulating the competition issues that may arise in relation to the activities of exchanges and clearing houses. Therefore, the

power to delegate or to co-opt governmental bodies with relevant expertise would be a useful mechanism to arrive at a fair decision based on the pecularities of the industry.

17. Certainty of decisions

The primary benefit of delegation and/or co-operation is that it gives certainty to businesses as it would reduce the risk of conflicting decisions coming from a different governmental body other than the Commission. If the Commission has delegated its authority to this governmental body, businesses can legitimately rely on decisions made by the body delegated with such authority without the worry that this decision might subsequently be challenged by the Commission.

AMBIGUITY IN DEFINITION OF "*DOMINANT POSITION*" UNDER SECTION 47

18. Definition of "*dominant position*" should refer to a "*relevant market*"

We are of the view that the current definition of "*dominant position*" in Section 47 is ambiguous. It currently refers to "*a dominant position within Singapore or elsewhere*". It makes no reference to a "*relevant market*", which for reasons cited below, would be a better description.

19. Restrict scrutiny to relevant areas of business

Under the current definition, all business activities of an entity deemed to be in a dominant position would be subject to scrutiny. However, the entity may not enjoy dominance in all areas of its business. Hence, it would provide more certainty to link the definition to the relevant market. In this respect, we have cited the "relevant market" definitions used in the UK and Indian legislation for your consideration.

20. The United Kingdom/European experience

The definition of dominance applied in the United Kingdom and European Union is "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers*"[1].

21. The Indian experience

In India, "*dominant position*" means a "*position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour*"[2].

[1] Article 82 of the EC Treaty
[2] Section 4 of The Competition Act, 2002 of India

22. Proposal : Provide greater clarity to the definition of "*dominant position*"

We suggest that "*dominant position*" be clearly defined as described above. This would provide certainty especially to "at risk" entities to identify if they fall under the definition and to rectify relevant business practices accordingly. Hence, incorporating the concept of a "*relevant market*" would aid in identifying more accurately which areas of business should be subject to the Section 47 prohibition and to take pro-active corrective measures. In this respect, we suggest that MTI adopt a definition similar to that of the United Kingdom/Europe, in particular, to make reference to the "*relevant market*".

DEFINITION OF PREDATORY BEHAVIOUR UNDER THE FIRST LIMB OF SECTION 47(2) IS TOO WIDE

23. First limb of Section 47(2) for "*predatory behaviour*" is too wide

We are of the view that the wording used in the first limb of Section 47(2) i.e. "*predatory behaviour towards competitors*" is too wide. The term "*predatory behaviour*" can encompass a wide ambit of activity. For example, the term "*predatory behaviour*" could be described as encompassing the various activities specified in the second to fourth limbs of Section 47(2).

24. Proposal : Follow the UK position

We suggest adopting the UK wording on this limb namely: "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*"[3]. This will help identify clearly the activity or behaviour referred to.

ABSENCE OF A UPPER LIMIT THRESHOLD IN THE PENALTIES PROVISION UNDER SECTION 69

25. Absence of a Upper Limit Threshold

We note that the maximum threshold for the financial penalty to be imposed remains at 10% of the annual turnover of the company over 3 years. If for any reason, it is difficult to assess the annual turnover of the entity, it would be useful to have a monetary upper limit specified. An absence of an upper limit threshold prevents businesses from being able to accurately assess the risks of business initiatives as well as to seek relevant business insurance coverage.

26. Upper Limit Thresholds in Other Jurisdictions

In Australia, there are upper limit thresholds set for different breaches of the various restrictive trade practices. Similarly in the US, upper limit thresholds for companies and individuals are set for breach of the antitrust provisions in the Sherman Act, for

[3] Section 18 of the Competition Act 1998 of The United Kingdom

example, the penalty for the illegal restraint of trade or for monopolising trade is $10 million for a corporation and $350,000 for an individual[4].

27. Proposal : To introduce an upper limit threshold

We suggest adopting an upper limit threshold in Section 69 of the Bill. In order to enable entities to better assess business risk, the Bill needs to address the needs to have a upper limit threshold, for example, the provision could read as "*10% of the annual turnover over 3 years or S$_____, whichever is lower*".

28. Ambiguity in the definition of annual turnover

We note that the definition of annual turnover is ambiguous as it could relate to the SGX's revenues or the volume turnover of the securities and derivatives markets.

AMBIT OF SECRECY PROVISION IS NOT WIDE ENOUGH TO PROTECT CONFIDENTIAL INFORMATION (SECTION 78)

29. Secrecy obligation limited to the person

We note that the secrecy obligation under Section 78 is limited to "*a member, an officer, an employee or an agent of the Commission, a member of the Board or of a committee of the Commission, an inspector or a person authorised, appointed or employed by an inspector to assist him, or a person appointed to assist the Commission*".

30. Complainant who may be a business competitor is not covered by the secrecy provision

External persons such as the complainant (who may be a business competitor of the entity investigated against) are not covered by the secrecy obligation. This might create a situation where a complainant who may come across or be made aware of commercial information relating to the party complained against, in the course of or as a result of investigations by the Commission may use the information to the detriment of the entity being investigated against.

31. Risk of disclosing valuable commercial information

We wish to highlight that for businesses, commercial information which could be price-sensitive is extremely valuable and any inadvertent disclosure of such information to competitors would have an adverse impact on the business and may lead to facilitating insider trading should the entity complained against be a listed company. This creates an unpalatable risk and vulnerability to entities.

[4] § 1 Sherman Act, 15 U.S.C. § 1 (Trusts, etc., in restraint of trade illegal; penalty),
§ 2 Sherman Act, 15 U.S.C. §2 (Monopolizing trade a felony; penalty).

32. The Australian experience: Secrecy provision to bind external person and not just Commission

In Australia, the secrecy obligation binds *persons involved in inquiries other than the Commission*. The secrecy obligation binds an "*external person*". An "*external person*" is a person who presides at an external inquiry or who provides assistance in such an inquiry to the body holding the inquiry[5].

33. Proposal : To amend Section 78 of the Bill

We suggest using an approach similar to the Australian position, where the secrecy obligations are widened to encompass more persons. However, we suggest that apart from widening to encompass "*external persons*", the Bill should also consider including all persons (specifically the complainants), who in one way or other, comes into possession of commercial information as a result of investigations or inquiries by the Commission or their appointed agents[6].

34. Ambiguity as to the penalties for a breach of secrecy provision

We note that the Bill only makes reference to a person "being guilty of an offence". However, no penalties, financial or otherwise, are specified. We are of the view that whatever penalty that is imposed should be an effective deterrent to ensure compliance with the secrecy provision. Criminal sanctions could also be considered.

ABSENCE OF AN ENABLING PROVISION FOR COMMISSION TO AWARD COSTS

34. Absence of an enabling provision for Commission to award costs

There is an absence of an enabling provision for the Commission to award costs to a successful party. This places the party being complained against in a clearly disadvantaged position vis-a-vis the complainant, who if successful, would still be able to use the findings of the Commission to commence a civil claim.

36. Proposal: Commission be given the power to award costs

We suggest that the Commission be given the power to award costs to the successful party when pronouncing its decision. This would be more equitable to the party being complained against by placing it in a more even position with the complainant.

[5] Section 95ZQ of the Trade Practices Act 1974 of Australia
[6] Section 95ZP, 95ZQ of the Trade Practices Act 1974 of Australia

V. CONCLUSION

37. SGX respectfully requests that MTI consider SGX's proposals as outlined in our submission.

38. SGX thanks MTI for the opportunity to participate in this second round of the public consultation exercise.

39. We will be happy to answer any queries MTI may have arising from this second round of public consultation.

40. SGX looks forward to future involvement in the public consultation process.