SECOND PUBLIC CONSULTATION ON THE DRAFT COMPETITION BILL

INTRODUCTION

1. On 12 April 2004, MTI launched the first round of public consultation on the draft Competition Bill ('draft Bill'). Besides posting the draft Bill on the MTI website (www.mti.gov.sg), MTI also wrote to over 120 business chambers and trade associations to invite comments. In conjunction with the Singapore Business Federation ('SBF'), 3 briefings on the draft Bill were conducted for the business community.

2. We received a total of 50 submissions when the public consultation exercise ended on 29 May 2004[1]. We thank all the contributors for their comments. Most were supportive of the draft Bill, and there were several good suggestions on how the draft Bill could be improved. MTI, after carefully reviewing the submissions, has made appropriate changes to the draft Bill. This paper outlines the changes made, as well as the reasons why some suggestions have not been adopted.

GUIDING PRINCIPLES AND FRAMEWORK OF THE DRAFT BILL

3. Guiding Principles: In reviewing the submissions and proposed changes to the draft Bill, MTI continues to be guided by the following principles[2]:

a. 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

b. 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.

4. The framework of the draft Bill also remains unchanged. However, specific provisions have been revised, taking into account the comments received.

COMPETITION COMMISSION ('COMMISSION')

5. Several contributors highlighted the importance that the Commission should not only be independent, but also seen to be so. MTI agrees.

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[1] The original deadline of 15 May 2004 was extended in response to requests.
[2] As first set out in the 12 April 2004 public consultation document.

6. Taking into account the feedback received, we propose to make the following changes to better safeguard the independence of the Commission:

a. Appointment of Commissioners:

i. To spell out the broad criteria for the appointment of Commissioners (*First Schedule, para. 1(3)*). They should be chosen for their ability and experience in industry, commerce or administration, their professional qualifications, or other relevant expertise.

ii. To extend the maximum tenure of office from 3 years in the earlier draft Bill, to 5 years (*First Schedule, para. 3*). This is to assure Commissioners of a longer service term, and to enable us to better tap the experience that they gain.

b. Financial Matters of the Commission:

i. To remove the earlier provision allowing the Commission to receive donations (*1st draft Bill, Second Schedule, para. 15*).

ii. To amend the earlier provision which allowed all monies from financial penalties to be retained by the Commission (*cl. 13*). The Commission will no longer keep such monies.

c. Directions by Minister (*cl. 8*): To make clear that the Minister's direction to the Commissioner will be limited to general and strategic policy directions, and not to intervene in individual cases.

7. Some have expressed concerns about the Minister's discretion to amend the Third and Fourth Schedules on exclusions *(cl. 92)*. This is necessary for flexibility reasons. However, it will not be exercised lightly. Before any amendments to the Schedules, we intend as far as possible to first conduct public consultations to take into account the public's views and comments.

PROHIBITED ACTIVITIES

8. Guidelines (*cl. 61*): There were requests for further clarifications and elaborations on the definitions of certain terms, as well as the implementation and enforcement processes and procedures[3].

[3] For example, contributors were concerned about possible timelines for decisions to be made; procedures for the application of exclusions/exemptions; what types of agreements or conduct would be viewed as anti-competitive and when they would have an appreciable adverse effect in

9. MTI appreciates the need for clarity of the terms used, the implementation processes and enforcement procedures. It intends to lay these out in guidelines following the enactment of the competition law. These are more appropriate to be specified in guidelines rather than in the competition law itself, in order to provide the needed flexibility to cater to changing economic circumstances and market developments. Most jurisdictions world-wide adopt the same approach. Annex A lists a proposed set of guidelines that the Commission would be developing in the course of 2005. The Commission will conduct public consultations before finalising the guidelines, as well as engage in extensive outreach programmes to explain its implementation and enforcement approach.

10. Anti-competitive Agreements - Individual Exemptions: The earlier draft Bill had provided for the Commission to grant individual exemptions for anti-competitive agreements if they satisfy certain criteria (*1st draft Bill, cl. 36, 37 & 41*). This provision will be removed because, as some contributors have pointed out, such a system could impose significant resource costs on the Commission. Moreover, with the provision of block exemptions, there should be sufficient flexibility for exempting anti-competitive agreements that have net positive economic outcomes. Such an approach is also in line with international developments.

11. Anti-Competitive Agreements – Treatment of Vertical Agreements: The draft Bill excludes vertical agreements (*Third Schedule, para. 8*), but provides for Minister to issue an order to declare that the competition law will apply to certain types of vertical agreement (safeguard clawback provision). There were suggestions that the opposite approach be taken i.e. all vertical agreements should be subject to the competition law, but the Commission can exempt certain types of vertical agreement where appropriate.

12. However, there is general consensus amongst economists that the majority of vertical agreements have net pro-competitive effect. As such, it would be more appropriate to retain the current approach to exclude vertical agreements, subject to the safeguard clawback provision. This will reduce regulatory costs, and is now the approach adopted by many jurisdictions. Vertical agreements involving a dominant player remain covered by the prohibition against abuse of dominance (*cl. 47)*.

13. Merger Notifications (*cl. 56 – 60)*: The draft Bill does not require mandatory notifications of mergers and acquisitions (M&As), but the Commission is empowered to dissolve an M&A if it is found to substantially lessen competition. Some were concerned that there could be significant

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the relevant markets; clarification of concept of single economic entity in the context of agreements between undertakings; whether market share or turnover would be used as a filter for investigating suspected infringements of the law; clarification of merger in the context of group shareholding; how certain terms, such as “market” or “dominance” would be interpreted etc.

disruption and costs incurred if the Commission does dissolve a merger after it had been completed. Some contributors have suggested making mandatory filing and prior approval for M&As. This would however add to overall business compliance costs.

14. To give businesses greater certainty, instead of requiring mandatory notification of M&As, the Commission will:

a. Indicate that its concern will primarily be with M&As involving entities with turnover and/or market share above a certain threshold; and

b. Undertake to review such M&As and determine if there is any concern within a stipulated timeframe, from the time the M&A comes to the knowledge of the Commission.

15. These considerations and procedures will be spelt out in guidelines. In addition, parties can still choose to seek guidance or decision from the Commission for their merger (*cl. 57 - 58*).

SCOPE OF APPLICATION - EXCLUSIONS

16. The draft Bill excludes a number of sectors/activities which already have sectoral competition regulations[4]. Among the feedback received, some suggested narrowing the extent of exclusions, while others were in favour of excluding additional activities.

17. Arguments against Sectoral Exclusions: Some felt that the competition law should apply to all sectors with no exclusions. The reasons for the exclusions were outlined in Annex B of the 12 April 2004 public consultation document, and are reproduced in Annex B[5] here. In summary, these are sectors that already have, or will soon have, alternative competition regulatory frameworks in place. This means that although the sectors do not fall under the scope of the competition law, undertakings in these sectors will still have to abide by the relevant sectoral competition rules (e.g. the Telecom Competition Code in the telecommunications sector and Electricity and Gas Acts in the electricity and gas sectors, as enforced by their respective sectoral regulators).

18. Given the stage of market development of these sectors and the technical complexities that accompany competition issues in these sectors, the competition rules in these sectors have been specifically designed to

[4] These are: electricity, gas, telecommunications, media, armed security services by an auxiliary policy force, ordinary letter and postcard services, piped potable water, wastewater management, scheduled bus services, rail services, cargo terminal operations, clearing house activities and M&As regulated under other laws (*Third and Fourth Schedules*).

[5] Annex B has been updated to reflect the enactment of the new Police Force Act 2004. The substantive details remain unchanged.

cater to the unique characteristics of the particular sectors. Therefore, it would be more appropriate for the relevant sectoral regulators, with their industry knowledge and expertise, to administer their own competition rules in these sectors, than to subject these sectors to the competition law. Cross-sectoral competition issues that arise, even if between excluded sectors, will however be dealt with by the Commission.

19. The sectoral exclusions are not intended to be permanent. They will be reviewed by the Commission, with inputs from the relevant agencies and taking into account market developments, after the competition law has come into force for a period of time.

20. In the meantime, to facilitate greater consistency in the way competition cases are dealt with across and within the various sectors, institutional mechanisms will be developed to engender consultation and co-ordination between sectoral regulators and the Commission.

21. Requests for Other Exclusions: There were also requests for other activities to be excluded from the competition law as well. However, as they do not fulfil the criteria of having a more appropriate alternative competition framework in place and a sectoral regulator that can manage competition cases in these areas, MTI does not intend to exclude them.

ENFORCEMENT

22. Sanctions *(cl. 69)*: Some suggested that the proposed financial penalty cap of up to 10% turnover (up to three years) (*cl. 69(4)*) be raised, or criminal penalties be introduced, to provide more deterrence. MTI feels that the existing levels of penalty provided in the draft Bill is sufficient for now. Besides financial penalties, violators of the competition law are liable to be sued by affected parties for civil damages. However, the amount of penalties can be reviewed again after the competition law has come into force for a period of time, and increased if necessary.

23. Leniency/Whistleblower Programmes: There were also suggestions for leniency and whistleblower programmes to be introduced. Such programmes can help the Commission to better discover and investigate possible breaches of the competition law. The Commission will introduce such programmes administratively when it is established. Programmes being considered could include providing for immunity from, or reductions in, penalties to participants of anti-competitive agreements as is the practice elsewhere. The Commission will draw up guidelines for such arrangements and conduct public consultations as far as possible before finalising these programmes.

24. Powers of the Commission to Investigate (*cl. 62 - 65*): There were some concerns raised about the wide powers of the Commission to

investigate, including entering premises and requiring the provision of information. These powers are needed to enable the Commission to effectively carry out its investigations. They are also similar to the powers that competition authorities overseas have.

APPEAL PROCESS

25. The draft Bill provides that appeals against the decisions of the Competition Appeal Board (CAB) can be made to the courts on points of law and the quantum of financial penalty (*cl. 74*). There were suggestions to let the courts hear the full facts rather than be limited to points of law and quantum of financial penalty.

26. As competition law cases involve specialised and technical economic analyses, the Commission and CAB will be in a better position than the courts to deliberate such cases. However, we recognise that the expertise of a judge would be useful in the deliberations of the CAB. As such, we will specify that the CAB be chaired by a person who is qualified to be a judge of the Supreme Court (*cl. 72(5)*).

OTHER ISSUES

27. Frivolous Complaints: There were suggestions to impose filing fees for complaints, or to fine parties for making frivolous complaints. However, doing so may discourage real complaints. MTI is not aware that any other jurisdiction has introduced such fees or fines. This area can be reviewed after a sufficient implementation period and the extent of such problem, if any, becomes clearer. In any case, the Commission will assess the validity of complaints, and can decide not to pursue frivolous ones.

28. Transitional Provisions (*cl. 94*): There were suggestions that the transitional provisions should grandfather existing anti-competitive contracts as it would be costly to unravel some of these contracts. MTI is concerned however that grandfathering such agreements could encourage a wave of anti-competitive agreements to be concluded before the competition law is enacted. In any case, given our phased implementation approach and transition period of at least 12 months, undertakings should have sufficient time to review their agreements to ensure that these comply with the competition law.

29. Nevertheless, MTI recognises that some long-standing contracts may need a longer period of transition to sort out the contractual issues that may arise. To facilitate the transition to the competition law regime for such contracts, parties to contracts that were entered into five years prior to the implementation of the competition law may apply to the Commission for a longer transition period and an exemption from the prohibition provisions of the competition law during this transition period. The

Commission would consider such requests on their merits. All other agreements will be expected to comply with the competition law when it comes into force. Regulations for such a transitional arrangement will be put in place following the enactment of the competition law.

NEXT STEPS

30. Second Public Consultation: MTI seeks feedback on changes to the draft Bill. MTI will review the submissions and make the appropriate changes accordingly. Thereafter, MTI will table the Competition Bill in Parliament in the fourth quarter of 2004.

31. Phased implementation: As mentioned in the 12 April 2004 public consultation document, MTI proposes to adopt a phased approach for the implementation of the competition law:

a. Phase I: In January 2005, the provisions establishing the Commission (*cl. 1 – 32, First and Second Schedules*) will first be brought into force, i.e. the Commission will be formally established.

b. Phase II: A transition period of at least 12 months will be provided before the provisions on anti-competitive agreements (*cl. 34 - 46*), abuse of dominance (*cl. 47 - 53*), enforcement (*cl. 61 - 70*) appeal process (*cl. 71 - 74*) and miscellaneous areas (*cl.33, 75 – 94 and Third Schedule*), come into force.

c. Phase III: The remaining provisions, i.e. those relating to M&As *(cl. 54 – 60 and Fourth Schedule*), will be gazetted to come into force at a later date. This is in consideration that M&As are highly complex and technical.

32. This phased approach allows for the Commission and businesses to prepare for the implementation of the competition law.

33. Outreach Programmes: As with the first public consultation, MTI will work with the SBF to conduct outreach programmes for the business community. This will include seminars to explain the policy framework underlying the competition law and issues businesses need to be aware of to comply with the law. Seminar details and registration forms are available on the SBF website at: www.sbf.org.sg. Interested parties may also contact Ms. Julie Ong (68276913) or Ms. Cheryl Kong (68276902) at SBF for further details.

MODE OF CONSULTATION

34. Written comments may be sent through the following means:

Email : MTI_draftcompetitionbill@mti.gov.sg

Post/Courier : Ministry of Trade and Industry
100 High Street #09-01
The Treasury
Singapore 179434
Attn: Director, Market Analysis Division

Fax : (65) 63383782

35. Parties that submit comments should organise their submissions as follows:

a. cover page (including the information specified in paragraph 37 of this consultation document);

b. table of contents;

c. summary of major points;

d. statement of interest;

e. comments; and

f. conclusion.

36. Supporting material may be placed in an annex. All submissions should be clearly and concisely written, and should provide a reasoned explanation for any proposed revision to the draft Bill. Where feasible, parties should identify the specific clause of the draft Bill on which they are commenting. In any case in which a party chooses to suggest revisions to the text of the draft Bill, the party should state clearly the specific changes to the text that they are proposing.

37. All submissions should be made on or before **12 noon, 20 August 2004**. Submissions must be submitted in both hard and soft copies (in Microsoft Word format). Parties submitting comments should include their personal/company particulars as well as their correspondence address, contact numbers and email addresses on the cover page of their submissions.

38. MTI reserves the right to make public all or parts of any written submission and to disclose the identity of the source. Commenting parties may request confidential treatment for any part of the submission that the commenting party believes to be proprietary, confidential or commercially sensitive. Any such information should be clearly marked and placed in a separate annex. If MTI grants confidential treatment, it will consider but will not publicly disclose the information. If MTI rejects the request for confidential treatment, it will return the information to the party that submitted it and will not consider the information as part of its review. As far as possible, parties should limit any request for confidential treatment of information submitted. MTI will not accept any submission that requests confidential treatment of all, or a substantial part, of the submission.

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