COMPETITION BILL CONSULTATION PAPER

INTRODUCTION

1. In February 2003, the Economic Review Committee recommended that Singapore enact a national competition law as part of our efforts to create a pro-enterprise environment.

2. The Ministry of Trade and Industry (MTI) has studied the competition legislation of various jurisdictions around the world, including Australia, Canada, India, Ireland, the United Kingdom and the United States. Based on the experiences and practices that we have studied, MTI has prepared a draft of the proposed Competition Bill, taking into account Singapore's context as a small open economy.

3. MTI invites comments from the public on the draft of the proposed Competition Bill ('draft Bill').

COMPETITION POLICY

4. A key tenet that underpins Singapore's economic policies is competition. This is because competition spurs firms to be more efficient, innovative, and responsive to consumer needs. Consumers enjoy more choices, lower prices, and better products and services. The economy as a whole benefits from greater productivity gains and more efficient resource allocation. Therefore, wherever appropriate, Singapore has opened up sectors of the economy to competition.

COMPETITION LAW

5. Enacting a competition law would help to reinforce our pro-competition business environment. By preventing companies from engaging in restrictive anti-competitive activities, competition law will enhance the efficient functioning of markets in Singapore and strengthen our microeconomic competitiveness. Hence, competition law would be an important element of our pro-competition and pro-enterprise policies.

APPROACH

6. The draft Bill is based on the following guiding principles:

   a. While our 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.

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. In particular, our competition law will adopt the following approaches to minimise regulatory compliance costs:

i. Instead of attempting to catch all forms of anti-competitive agreements or conduct in all markets, focus will be placed on anti-competitive agreements or conduct that will have an appreciable adverse effect on markets in Singapore. This is also the approach taken by most jurisdictions. In deciding if an agreement or conduct is anti-competitive, we will take into account the fact that there are differences between industries, including the way they compete and the importance of economies of scale and innovation.

ii. For sectors that already have (or are going to have) sectoral competition regulatory frameworks, there should be alignment between these sectoral frameworks and the draft Bill, where possible and appropriate. This will ensure that businesses do not end up being regulated on the same competition matter by more than one regulator.

FRAMEWORK OF THE DRAFT BILL

7. The draft Bill covers the following key areas:

a. Activities prohibited;

b. Scope of application;

c. Enforcement; and

d. Appeal process.

8. **Activities Prohibited**: Part III of the draft Bill prohibits the following activities (Details are in Annex A):

a. Anti-competitive agreements (*cl. 34*) such as agreements among competing firms to fix prices of their goods and services; agreements between competing firms to reduce the quantity of their goods and services they will sell (which indirectly increases prices to consumers); and agreements to

share a market between competing firms according to a fixed proportion.

b. Abuse of dominant position (*cl. 47*), or the abuse of a firm's substantial market power. The draft Bill does not prohibit firms from increasing market power through cheaper or innovative products, nor will it prohibit firms from having a high degree of market power, for example, monopolies. Instead, it seeks to prohibit firms with dominant market power (whether in Singapore or elsewhere) from abusing such power in ways that are anti-competitive and which work against long-term economic efficiency. One example is the use of predatory pricing to prevent a new, more efficient competitor from competing on the merits of its goods and services.

c. Mergers and Acquisitions (M&As) that substantially lessen competition in Singapore (*cl. 54*). Firms may decide to merge to create or reinforce a dominant position (making it easier to drive out competitors from the market), or to make it easier to collude and so enter into anti-competitive agreements. Some mergers could substantially lessen competition in a market in Singapore.

However, not all M&As will have anti-competitive results. Being a small open economy, highly concentrated markets are at times inevitable, due to economies of scale and scope. Therefore, M&As will be allowed unless they substantially lessen competition and there are no offsetting efficiencies. There will be no requirement for prior notification of M&As, but companies may voluntarily submit their M&A proposals for guidance.

9. Exclusions and exemptions from these provisions may be allowed if there are net public benefit or strong public interest reasons (*cl. 35-41, 48 and 55*).

10. Scope of Application: The draft Bill applies to all economic activities by private sector entities (defined in *cl.2(1)* as undertakings[1]), including individuals operating as sole traders, businesses, companies, firms, partnerships, societies, co-operatives, business chambers, trade associations and non-profit organisations. This applies regardless of the ownership of the entity, whether it is foreign-owned, Singapore-owned or Government-owned.

[1] An undertaking means any person, being an individual, an association, a body corporate or an unincorporated body of persons, capable of carrying on commercial or economic activities relating to goods or services.

11. The intent of our competition law is to regulate the conduct of market players. Therefore, as with other jurisdictions, the draft Bill will not apply to the exercise of government functions, i.e., Government, statutory bodies and any entity carrying out activities on behalf of the Government or statutory bodies (*cl. 33(4)).*

12. The draft Bill applies to activities in all sectors, except where:

a. They relate to services of general economic interest;

b. The activities are needed to comply with legal requirements, or for the avoidance of conflict with international obligations;

c. There are exceptional and compelling reasons of public policy;

d. There already exists (or there are plans to put in place) a more appropriate sectoral regulatory framework that balances competition issues with other policy concerns; or

e. The activities involve vertical agreements[2], unless the Minister by order prescribes otherwise.

13. Exclusions are set out in the *Third and Fourth Schedules* of the draft Bill. A number of the exclusions set out in the *Schedules* relate to activities in sectors that have recently been liberalised, and are in transition to a more competitive market environment. There are considerable technical matters affecting competition in these sectors and so sectoral regulators are better positioned to address and balance competition goals with other policy concerns, given their industry knowledge and expertise. In particular, many issues concerning market structure and access are closely inter-related with competition issues. Therefore, the sectoral regulators, rather than the Competition Commission (see paragraph 17 of this paper), will take charge of competition issues arising in their sectors. However, where there is an anti-competitive activity relating to more than one sector and where the respective sectoral regulators do not have jurisdiction, the Competition Commission will take the lead to investigate and act. This will be done in consultation with the relevant sectoral regulators.

14. Some exclusions are due to public interest considerations such as national security, defence and other strategic interests. Provisions for such exclusions are necessary to safeguard our national interests.

---

[2] Vertical agreements are agreements between players along the same value chain, for example, between manufacturer and distributor. This is contrasted with horizontal agreements between players on the same level of the value chain, for example, between manufacturer and manufacturer; or between distributor and distributor.

15. Annex B provides more information on the basis for the exclusions and the approach to deal with competition issues should these arise.

16. Treatment of Intellectual Property (IP): Singapore's IP laws may provide inventors, creators, IP owners and undertakings with market power over a newly created product, process, work, mark or design during which the IP can be exclusively exploited. The more certainty that an innovator can reap the rewards from a new idea provides greater incentives for creative activities and leads to more product and process innovation. IP laws are thus not inconsistent with competition law, as both competition law and IP laws are designed to promote long-term economic welfare and greater market efficiency. However, situations can arise where an undertaking abuses its IP rights by acting anti-competitively for either inefficient or unfair commercial advantage. Long-term economic welfare may be diminished as a result. Where the exercise of IP rights is anti-competitive, it would be subject to the provisions of the competition law. Annex C elaborates further on the relationship between IP laws and competition law.

17. **Enforcement**: A *Competition Commission* will be set up as a statutory body under MTI to administer the competition law (*Part II*). It will have powers to grant exemptions for anti-competitive agreements (*cl. 36-41*), to investigate (*cl. 62-65*), and impose sanctions if the law has been infringed (*cl. 69*).

18. The Competition Commission will be responsible for enforcing the competition law. It is not the Government's intention to catch each and every instance of anti-competitive activity. Many such activities may only have negligible anti-competitive impact on markets, and the costs of enforcement could well outweigh the benefits. The Competition Commission will therefore focus primarily on anti-competitive agreements and conduct that have appreciable adverse effect on markets in Singapore.

19. Power to investigate: Under *cl. 62*, the Competition Commission may conduct an investigation if there are reasonable grounds for suspecting that there has been a breach of the law, for example if the Competition Commission receives a complaint or information about an alleged prohibited activity. *Cl. 63* empowers the Competition Commission to require any person to provide information relevant to the investigation. The Competition Commission will also have powers to enter premises subject to certain conditions (*cl. 64-65*). The draft Bill provides for criminal sanctions for non-compliance with the Competition Commission's power of investigation (*cl. 80-83, 87*). Confidential information revealed during the course of proceedings will not be published nor disclosed (*cl. 78*), except under certain situations.

20. Power to make decisions: Upon completing its investigation, the Competition Commission may make a decision as to whether the party concerned has breached the law (*cl. 68*). The Competition Commission will notify the parties likely to be affected by its decision and provide opportunity for the parties to make representations to the Competition Commission.

21. Power to impose sanctions: *Cl. 69* provides for sanctions ranging from financial penalties[3] to structural remedies[4], to act as a strong deterrent to anti-competitive activity. The Competition Commission will impose a penalty that is proportionate to the breach of the competition law.

22. **Appeal Process**: A *Competition Board of Appeals* (*cl. 72-73*) will be established to hear appeals against decisions of the Competition Commission (*cl. 71*). The Competition Board of Appeals will be an independent body comprising members appointed by the Minister. However, appeals on decisions by the Competition Commission relating to exemptions are to be made to the Minister instead of the Competition Board of Appeals (*cl. 71*). This is consistent with the powers of the Minister to make exclusions.

23. Parties may make further appeals against the decisions of the Competition Board of Appeals to the courts, but only on points of law and the quantum of the financial penalty (*cl. 74*).

24. Once the Competition Commission has determined that a party, X, has engaged in anti-competitive activities and the appeal process has been exhausted, other parties who have suffered a loss or damage arising from the prohibited activity may take civil action to seek damages and compensation from party X (*cl. 75*). This serves as an additional deterrent against anti-competitive activities. The onus would be on the parties seeking damages to prove to the court that actual damages had resulted from the prohibited activities. The normal court practice will apply, and it will be for the court to award appropriate damages as well as legal costs.

25. **Transitional Arrangements**: A transition period of at least 12 months will be provided before the prohibition provisions of the competition law comes into force. This is to allow time for the Competition Commission and undertakings to prepare for its implementation. Some provisions, such as those relating to M&As are highly complex and technical and will be

[3] Up to a maximum amount equal to the sum of 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years.

[4] Unlike some jurisdictions that criminalise anti-competitive activities, there should be no need for us to do so for now. We do not want to unduly create onerous burdens on businesses. The threat of financial penalties and the possibility that parties can be liable to be sued for damages and compensation should be sufficient deterrence (see paragraph 24 of this paper).

gazetted to come into force at a later date. This preparation time is necessary as the competition law is a new legislation for which we will have to build up resources, capabilities and expertise for effective implementation and enforcement.

26. Outreach Programmes: MTI will also conduct outreach programmes for the business community and the general public on the draft Bill. These will include seminars to businesses to explain how the competition law will be implemented, and what issues businesses need to be aware of to comply with such law. MTI will work directly with the Singapore Business Federation (SBF) and interested business chambers and associations.

27. Competition Commission's Guidelines: Following the enactment of the competition law, and during the transition period before the law actually comes into force, the Competition Commission will develop guidelines relating to implementation and enforcement. The guidelines will cover:

a. How the Competition Commission will implement and enforce the competition law, including the types of agreement and conduct that would likely be deemed anti-competitive, and hence prohibited under the law;

b. The procedures and processes that the Competition Commission will adopt in implementation and enforcement of the competition law; and

c. The consultation and co-ordination process between the Competition Commission and the sectoral regulators.

28. Where appropriate, there will be public consultation on the guidelines prior to their adoption.

MODE OF CONSULTATION

29. MTI seeks public feedback on the draft Bill. 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

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

a) cover page (including the information specified in paragraph 31 of this consultation document;

b) table of contents;

c) summary of major points;

d) statement of interest;

e) comments; and

f) conclusion.

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.

31. All submissions should be made on or before 12 noon, **15 May 2004**. Submissions must be written and 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.

32. 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.

33. MTI will review the submissions and revise the draft Bill accordingly, where appropriate. The revised draft Bill will be released for a second

phase public consultation of certain specific areas of concern by July/August 2004.

. . . . . .