SINGAPORE TELECOMMUNICATIONS LIMITED

COMMENTS ON THE MINISTRY OF TRADE AND INDUSTRY'S CONSULTATION PAPER ON THE PROPOSED COMPETITION BILL

PART A: INTRODUCTION AND STATEMENT OF INTEREST

1.1 Singapore Telecommunications Limited (**SingTel**) welcomes the opportunity to comment on the Ministry of Trade and Industry's (**MTI**) proposed Competition Bill (**Bill**).

1.2 SingTel is licensed to provide telecommunications systems and services in Singapore. It was corporatised on 1 April 1992 and listed on the stock exchange in November 1993. SingTel is committed to the provision of state-of-the-art telecommunications technologies in Singapore. SingTel has a comprehensive portfolio of services that includes voice and data services over fixed, wireless, satellite and Internet platforms. SingTel services both corporate and residential customers and is committed to bring the best of global communications to its customers in the Asia Pacific and beyond.

1.3 As a leading provider of telecommunications services and a leading proponent of innovation and competition, SingTel has a strong interest in effective pro-competition regulation in Singapore.

1.4 This submission is structured in the following Parts:

Part A – introduction and statement of interest;

Part B – a summary of SingTel's main points;

Part C – comments on the Bill;

Part D – conclusion

1.5 SingTel's overriding comment is that this is an important consultation process that will have wide-ranging impact for competition in Singapore. However, the lack of specific details in forthcoming guidance information is a significant restriction on SingTel's ability to respond fully to this consultation. SingTel looks forward to the opportunity for greater scrutiny and input on the Bill and its implementation and enforcement in forthcoming consultations.

PART B: EXECUTIVE SUMMARY

2.1 SingTel submits the following main points:

- The expression "appreciable adverse effect" in the consultation paper sets a subjective and uncertain standard. SingTel submits that an objective test such as "substantially lessens competition" should be substituted. Consistent with Section 54, Section 34 and Section 47 of the Bill should reflect this objective standard.

- The civil penalties in the Bill are excessive. The penalties in the Bill should be subject to a statutory limit (e.g. there is a limit of S$1 million under the Telecommunications Act, Rapid Transit Systems Act and the Media Development Authority of Singapore Act).

- Private action for damages or loss is not appropriate. The Bill should make no provision for private actions for damages or loss. The focus of any general competition law is the protection of the competitive process not individual firms. The Bill should not provide financial incentives/rewards for parties to engage in regulatory gaming. Private actions only encourage the prosecution of pro-competitive activities for strategic advantage.

- The Competition Commission should engage in extensive consultation in developing forthcoming guidelines relating to implementation and enforcement of the Bill.

PART C: COMMENTS

3.1 SingTel submits the following comments on specific provisions of the Bill:

Section 34(1)

3.2 SingTel is concerned that this provision is too broad in scope. SingTel submits that Section 34 should make it clear that it deals with horizontal agreements between firms who compete with each other. Whilst SingTel endorses the approach of determining whether agreements are permissible on the basis of their purpose or effect on competition, SingTel is concerned that Section 34 does not prescribe the threshold at which anti-competitive effect will place an agreement within the prohibition. As presently worded, Section 34 appears to prohibit an agreement which has any anti-competitive effect at all.

3.3 If the threshold is intended to be an "appreciable adverse effect" as set-out in the consultation paper, SingTel submits that this would be a subjective and uncertain standard. An objective test such as "substantially lessens competition" should be substituted.

3.4 Accordingly, SingTel submits that Section 34 should be amended to make it clear that the Competition Commission will assess the permissibility of agreements on the basis of whether they have the objective or the effect of substantially lessening competition. In the absence of an explicit objective standard, determinations that agreements are impermissible may have the appearance of arbitrariness. If the standard sets a low threshold, the Competition Commission's resources are likely to be wasted in examining trivially anti-competitive implications of many agreements.

3.5 In addition, SingTel also believes that a potentially anti-competitive agreement might nevertheless be permissible because of other positive effects. SingTel submits that in assessing the permissibility, a more flexible test should be adopted which examines whether the public benefit flowing from the agreement is likely to be such as to outweigh any anti-competitive detriment. Such a test is commonplace in other jurisdictions.

3.6 Any prohibition against conduct that is thought to have an adverse impact on competition can only be assessed against objective economic principles. These prohibitions can only function with an economically sound basis for competition analysis. Unless it can be demonstrated that conduct has a detrimental impact on the level of competition in a market, then it is impossible to distinguish that conduct from what would otherwise be the competitive operation of the market. This test (or a variation on it) is the universally accepted principle by which conduct is determined to either fall within the process of rivalry that is competition, versus conduct that undermines the competitive process.

3.7 For example, as long as price-cutting by a firm with a substantial degree of market power does not contravene these tests, such conduct is not prohibited under Australian law and is generally characterised as competitive in nature. In addition, commercial decisions by "dominant" firms to reduce retail prices must be tested against these thresholds before it is judged to be anti-competitive. Dominance in itself does not preclude a firm from making sound business decisions to attract customers, the practice of which is, again, described as competition. The situation in Australia is instructive because it has developed a significant body of jurisprudence that defines the necessary elements of anti-competitive conduct. In this sense, retail price reductions that are designed to match the prices of a competitor are not only a defence against claims of anti-competitive conduct. Such conduct may not necessarily fall foul of the prohibitions in the first instance. This is consistent with the rationale for competition in Australia: to foster competition, such as in the form of consumer benefits, within the boundaries of what is judged to be permissible practices. As it stands, the provisions in Section 34 are inconsistent with the notion of competition and will not assist the promotion of competition.

3.8 In determining whether a prohibition against restrictive trade practices has been breached, both courts and regulators apply rigorous tests including analysis of the relevant market and the alleged conduct. Allegations in the telecommunications sphere involve a high degree of economic modelling and price examination. Accordingly, such conclusions are a matter of evidence. It is too simplistic a notion to conclude that retail discounting of services by a dominant player, for example, is an anti-competitive practice in a telecommunications market.

3.9 As the prohibitions are currently drafted, they will only foster tension and confusion between proscribed anti-competitive conduct and the promotion of competition. A substantial lessening of competition test is recognised as critical.

Section 34(2)

3.10 These provisions make no exception for related companies. For example, no anti-competitive injury is caused where a firm agrees with another, to which it is related, not to compete in a particular area or for particular customers.

3.11 While SingTel broadly agrees with a prohibition on discrimination, such a prohibition must not require that a firm must supply a service at an identical price to all who ask for it. Instead, SingTel submits that firms should be able to discriminate between trading parties on justifiable, objective grounds.

3.12 Without such "due" discrimination, less efficient firms would receive the same conditions as more efficient firms. This would result in more efficient firms subsidising less efficient firms.

3.13 Therefore, SingTel submits that the Bill should contain a definition of discrimination that clearly states that the conduct that is prohibited is discrimination that cannot be justified on the basis of objective differences.

Section 37

3.14 SingTel appreciates that where the Competition Commission has reasonable grounds for believing that there has been a material change of circumstance since it granted an individual exemption, the Competition Commission may wish to cancel the exemption, vary and/or amend any condition or obligation or impose one or more additional conditions or obligations. However, Section 37 provides that the Competition Commission need only provide written notice to a person of cancellation, variation and/or amendment or imposition of additional conditions or obligations. SingTel submits that where the Competition Commission notifies a person under Section 37, that person should be granted a reasonable opportunity to submit representations and/or objections to the Competition Commission.

3.15 Further, SingTel submits that where the Competition Commission provides notice to a person of a cancellation, variation and/or amendment or imposition of additional conditions or obligations, the Competition Commission should give reasonable notice in advance that it has changed its views in relation to that conduct and give affected parties a reasonable opportunity to desist from or vary the conduct in question.

Sections 42, 43 and 44

3.16 SingTel welcomes provision for advisory guidance or decision regarding any agreement that a party thinks may infringe Section 34. However, SingTel submits that, for clarity and fairness, the Bill should require the notification of all parties to the agreement for which an application for guidance is received. This is to prevent the use of the guidance process by a party to an agreement for strategic advantage.

Sections 45 and 46

3.17 SingTel appreciates that guidance under Section 43 or a decision under Section 44 should not generally fetter the Competition Commission's freedom of action in the future. However, in order for parties to have confidence in the procedure, SingTel submits that the relevant provisions should be amended to provide that the Competition Commission will only take action against any party in respect of conduct if the conduct is materially different from that previously approved or if the Competition Commission has given reasonable notice in advance that it has changed its views in relation to that conduct and given affected parties a reasonable opportunity to desist from or vary the conduct in question.

Section 47

3.18 As indicated above, the lack of specific details in forthcoming guidance information in relation to key issues such as the assessment of market power, the determination of dominance, the identification of the relevant market etc. We look forward to making representations on the Competition Commission's detailed guidelines on the implementation and enforcement during the course of 2005.

3.19 Notwithstanding this, SingTel submits that emphasis must be placed on the "use" of an economic position to impede competition, as establishing a necessary causal connection between the firm's dominance and its conduct. Unless conduct involves the exploitation of the position of dominance, it is unobjectionable in competition terms. SingTel considers that this causal connection should be reflected in provisions of the Bill.

3.20 Furthermore, the conduct described in Section 47(2) should only be expressed as indications that an entity may have abused their dominant position. For example, price discrimination may be part of an overall pattern of conduct that is not unreasonable on any objective basis. The factors in Section 47(2) normally lead to investigations that a substantial lessening of competition may have occurred.

3.21 The Bill lacks an objective test for dominance in accordance with regulatory best practice. As it stands, Section 47 appears to indicate that two or more firms could collectively enjoy and abuse a dominant position. This could mean that when an entity determined to be dominant is bundling its products with those of an entity determined not to be dominant, then that non-dominant entity may be determined to be dominant simply by association with the dominant entity. This amounts to the non-dominant entity being purely "guilty by association", not judged by reference to actual conduct or qualitative analysis. Two factors are important here:

(a) dominance must be based on a market-by-market analysis, not by entity. That is, each market in which an entity operated must be analysed to determine whether that entity is dominant in that particular market; and

(b) the analysis must examine qualitative analysis of the potential impact on competition in a certain market, not linked to any quantitative test. That is, no specific market share percentage or some other quantitative amount should be solely relied on in determining the impact on competition of conduct. This analysis includes the extent of barriers to entry, ability to increase prices, dynamic characteristics of the market and extent to which substitutes are available.

Sections 49, 50 and 51

3.22 Refer to comments in 3.16 above. Similar comments apply.

Sections 52 and 53

3.23 Refer to comments in 3.17 above. Similar comments apply.

Sections 54

3.24 SingTel agrees with the "substantial lessening of competition" test. As indicated above, this test should be applied in Section 34 and Section 47.

3.25 In light of the fact that no consolidation guidelines are available here, it is extremely difficult to provide comments. We look forward to making representations on the Competition Commissions detailed consolidation guidelines in 2005.

Section 75

3.26 There should be no provision made for the private recovery of damages. SingTel considers the focus of any general competition law is the protection of the competitive process, not individual parties. The competition law should not provide financial incentives/rewards for parties to engage in regulatory gaming.

3.27 SingTel considers that the Competition Commission should have the sole responsibility for taking action against firms found to be in breach of the proposed law. Private actions encourage the prosecution of pro-competitive activities for strategic advantage. In circumstances where the Competition Commission acts swiftly, there should be little or no harm to private persons.

3.28 It is appropriate for the general competition regulator to be the sole investigator and enforcer of the proposed law. The Competition Commission is in the best position to pursue conduct that has an anti-competitive effect on a market. The Competition Commission should investigate anti-competitive conduct so that when a breach is found, civil penalties commensurate with the conduct may be imposed. In accordance with normal practice, the penalty should be subject to a statutory limit (e.g. a limit of S$1 million under the Telecommunications Act, Rapid Transit Systems Act and the Media Development Authority of Singapore Act). As a result, the Bill should make no provision for private actions for damages or loss.

3.29 The Bill is unclear on whether private actions can be taken only after the appeal process in respect of a decision by the Competition Commission in relation to a breach of Sections 34, 47 or 54 has been exhausted. On the other hand, the Bill states in Section 75(4) that private action cannot occur whilst a decision of the Competition Commission is under appeal. However, this is not the same as allowing private action to occur only after all appeal options have been exhausted.

3.30 The scope of damages that an aggrieved party can claim includes all damages: direct and indirect. This would necessarily include damages resulting from loss of revenue, loss of income and loss of profits. The unlimited scope of available damages invites regulatory gaming. Furthermore, the threat of private action has been often used in other countries (such as Australia) to force the hand of the regulator to take certain

investigative action that, if the regulator were to apply its own objective analysis, it would not have undertaken. The availability of private enforcement action therefore has led to inefficient regulatory action that has not necessarily been in the best interests of end-users. The Competition Commission in Singapore should not be subjected to this form of regulatory gaming that results in misguided regulation.

PART D: CONCLUSION

4.1 SingTel submits that the expression "appreciable adverse effect" in the consultation paper sets a subjective and uncertain standard. An objective test such as "substantially lessens competition" should be substituted. Consistent with Section 54, Section 34 and Section 47 of the Bill should reflect this objective standard.

4.2 The penalties in the Bill are excessive. The penalties should be subject to a statutory limit (e.g. there is a limit of S$1 million under the Telecommunications Act, Rapid Transit Systems Act and the Media Development Authority of Singapore Act).

4.3 The Bill should make no provision for private actions for damages or loss. The focus of any general competition law is the protection of the competitive process not individual firms. The Bill should not provide financial incentives/rewards for parties to engage in regulatory gaming.

4.4 The lack of specific details in forthcoming guidance information is a significant restriction on SingTel's ability to respond fully to this consultation. The Competition Commission should engage in extensive consultation in developing forthcoming guidelines relating to implementation and enforcement of the Bill.