From: Eugene Lim / Loi Chit Fai, DONALDSON & BURKINSHAW

To: The Ministry of Trade & Industry ("MTI")

Date: 29 May 2004

Re: Comments on the Draft Competition Bill 2004

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1. SUMMARY OF MAJOR POINTS

In addition to some other general comments, our brief comments herein relate chiefly to the need for certainty in scope and operation of the prohibitions in Clause 34, Clause 47 and Clause 54; and emphasise that these prohibitions should not have any retroactivity, so as to promote commercial certainty and not to unnecessarily upset past transactions or arrangements.

2. STATEMENT OF INTEREST

Our firm, DONALDSON & BURKINSHAW (established in 1874), is one of the oldest law firms in Singapore and we service many well known clients, including, inter alia, business concerns such as foreign MNCs and their local subsidiaries.

As a law firm servicing business concerns such as MNCs and their local subsidiaries, a number of MNCs and their business groups, as a result of their large presence and large market share in their respective field of interest, have expressed their concerns to ensure that their operations and business plans do not contravene the draft Competition Bill when it comes into force. It would be essential for there to be certainty and clarity in the scope and operation of the draft Competition Bill.

As a partnership engaging in legal professional business, we are interested to the extent that law firms may be affected by the operation of the draft Competition Bill when it comes into force, as it may determine the lawfulness of the manner in which law firms may compete or merge with one another.

3. COMMENTS ON THE DRAFT COMPETITION BILL 2004

(a) Clause 34 of the Bill

Clause 34(1) of the Bill seeks to "prohibit" agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore; and Clause 34(3) makes it clear that any agreement or decision which is prohibited by Clause 34(1) is "void". Further, Clause 34(5) provides that the Clause 34(1) prohibition applies to "agreements, decisions and concerted practices implemented before, on or after the appointed day".

According to Clause 2(1), the word "appointed day" refers to "the date of commencement of this Act".

It was pointed out by the MTI's representative during a Seminar / Briefing Session (held by the Singapore Business Federation / MTI on Thursday 6 May 2004 at the SP Auditorium (Singapore Power Building)) that the MTI's intention was that the prohibitions in the Bill, when it is passed by Parliament as the Competition Act, would have a transitional period of at least 12 months before coming into force. It was said that the MTI's intention was that Clause 34(1) read with Clause 34(5) would not retrospectively prohibit all agreements, decisions, or concerted practices entered into before the Act came into force or before the expiration of the transition period. Instead, it was said that the MTI's intent was for Clause 34(5) to capture agreements, decisions or concerted practices entered into before the Act came into force only insofar as there are continuing obligations arising thereunder which would offend Clause 34(1).

Unfortunately, the present wording of Clause 34(1), read with Clause 34(3) and Clause 34(5), is not so limited in terms of retroactivity. As presently worded, the combined effect of Clause 34(1), Clause 34(3) and Clause 34(5), regardless of the transitional period to be provided by the MTI, would cause all old agreements, decisions or concerted practices offending Clause 34(1) to become unraveled since their beginning, because they would all be void under Clause 34(3).

This unintended effect is reinforced by the use of the word "prohibited" in Clause 34(1). While the Bill does not provide expressly that whatever is "prohibited" by the Bill is to be void ab initio, it is reasonably arguable that it might be held that agreements, decisions or concerted practices offending Clause 34(1) would, quite apart from Clause 34(3) or Clause 34(5), be void ab initio for illegality.

Such extensive retrospective effect is unwarranted because it would actually be extending the effect of Clause 34 beyond what was in fact intended by the MTI.

The policy intent is to catch anti-competitive agreements or conduct that will have an "appreciable adverse effect" on markets in Singapore, which language advocates a higher degree of prevention, restriction or distortion of competition within Singapore, before such conduct is prohibited. Due to the width of Clause 34(1) of the Bill, subsequent legal interpretation may unintentionally capture conduct which were not intended to be prohibited. The wording of Clause 34(1) would need to be reconsidered, to better reflect the policy intent.

It is also suggested that Clause 34(3) and Clause 34(5) be deleted so that there is no retrospective effect for Clause 34 at all, in order to preserve some certainty in respect of commercial transactions and arrangements which have already been entered into.

Additionally, it is suggested that in order to avoid any unintended retroactivity arising from the use of the word "prohibited" in Clause 34(1), the MTI will have to take care to ensure that when the Bill is Gazetted to come into force, it would be expressly stated in the Gazette that Clause 34(1) would only apply to agreements, decisions or concerted efforts which were entered into, taken, or undertaken on or after a specified date.

(b) Clause 47 of the Bill

Clause 47(1) provides that conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited. Due to the reading together of Clause 47(1) and Clause 47(3), the operative prohibition is in reality conduct which amounts to the abuse of a dominant position within Singapore or elsewhere in any market in Singapore.

It should therefore be clarified whether it is in fact intended that only abuses within Singapore would be prohibited.

While the Bill does not provide expressly that whatever is "prohibited" by the Bill is to be void ab initio, it is reasonably arguable that it might be held that agreements or transactions amounting to conduct abusing a dominant position in contravention of Clause 47(1) would be void ab initio for illegality.

Such uncertainty and retrospective effect are unwarranted and there should be no retrospective effect for Clause 47, so as to preserve some certainty

in respect of commercial transactions and arrangements which have already been entered into.

There is presently no clear definition for the words "abuse" or "dominant position" as used in Clause 47(1). Clause 47(2) provides illustrations as to instances of "abuse" of dominant position, without defining the same. It is also noted that Clause 47(2)(a) provides that "predatory behaviour towards competitors" amounts to an "abuse"; however, it is not clear what "predatory behaviour towards competitors" mean; for example, does "predatory behaviour" include severe price undercutting by one service provider so as to attract custom and/or gain more market share?

It is suggested that in order to avoid any unintended retroactivity arising from the use of the word "prohibited" in Clause 47(1), the MTI will have to take care to ensure that when the Bill is Gazetted to come into force, it would be expressly stated in the Gazette that Clause 47(1) would only apply to conduct which was undertaken on or after a specified date.

Further, it is also suggested that the words "abuse", "dominant position" and "predatory behaviour towards competitors" in Clause 47 would need to be defined, so as to further clarify the scope of operation of Clause 47(1). It would be conducive towards commercial business planning if commercial parties were allowed to have a better understanding whether they are parties in a "dominant position" or not, and whether their proposed course of action would amount to an "abuse" thereof.

(c) Clause 54 of the Bill

Clause 54(1) provides that mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services are prohibited.

While the Bill does not provide expressly that whatever is "prohibited" by the Bill is to be void ab initio, it is reasonably arguable that it might be held that agreements or transactions amounting to a merger in contravention of Clause 54(1) would be void ab initio for illegality.

Such uncertainty and retrospective effect are unwarranted and there should be no retrospective effect for Clause 54 at all, in order to preserve some certainty in respect of commercial transactions and arrangements which have already been entered into.

As with the case for Clause 47(1), it is suggested here that in order to avoid any unintended retroactivity arising from the use of the word "prohibited" in Clause 54(1), the MTI will have to take care to ensure that when the Bill is Gazetted to come into force, it would be expressly stated

in the Gazette that Clause 54(1) would only apply to mergers which were entered into on or after a specified date.

(d) Clause 61 of the Bill

Clause 61(1) provides that the Competition Commission of Singapore may publish Guidelines indicating the manner in which the Commission will interpret and give effect to the provisions of "Part III – Competition" of the Bill. Clause 61(4) provides, however, that the Guidelines would not be binding on the Commission.

It was pointed out by the MTI's representative during a Seminar / Briefing Session (held by the Singapore Business Federation / MTI on Thursday 6 May 2004 at the SP Auditorium (Singapore Power Building)) that while the Bill may intentionally have been drafted very widely so as not to unwittingly leave out inventive forms of anti-competitive behaviour which ought to be caught, this entailed that much of the scope of the Bill would require clarification and demarcation by Guidelines issued by the Commission.

Persons who act in accordance with the Commission's Guidelines should not be penalized subsequently because the Commission may reconsider its interpretation of the Bill.

It is suggested that Clause 61(4) be deleted, since it is reasonable for the business community and members of the public to rely on the Guidelines published by the Commission, as a form of clarification on the operational scope of the Bill.

(e) Clause 82 of the Bill

It is provided under Clause 82 that "Any person who provides information to the Commission … which is false or misleading in a material particular shall be guilty of an offence".

It is unclear what is the mens rea required under this Clause 82, and it cannot reasonably be the intention of the MTI for persons who innocently provide information, which turns out unfortunately to be inaccurate, to be liable for criminal prosecution.

It is therefore suggested that Clause 82 be amended to delete the words "which is" and replace them with "knowing it to be". As amended, Clause 82 should read: "Any person who provides information to the Commission … knowing it to be false or misleading in a material particular shall be guilty of an offence".

(f) The First Schedule, Paragraph 11(3), of the Bill

Paragraph 11 generally provides, inter alia, for members of the Commission to declare their interest, if any, in a transaction or project of the Commission; and for such members not to take part in the deliberation or decision of the Commission in respect of such transaction or project. This is a laudable step taken in the right direction to instill public confidence and trust in the impartiality of the Commission's proceedings, and is a reflection of one of the fundamental rules of natural justice that no one can be a judge in his own cause: *nemo debet esse judex in propria causa*. Unfortunately, paragraph 11(3) then takes a step backwards and provides that "No act or proceedings of the Commission shall be questioned on the ground that a member has contravened this paragraph".

In the interest of ensuring that justice is not only done but also seen to be done and for public confidence in the credibility and accountability of the Commission, it is suggested that paragraph 11(3) of the First Schedule be deleted.

4. CONCLUSION

(a) As it is provided under Footnote 12-1 to Article 12.2 of the US-Singapore FTA that "Singapore shall enact general competition legislation by January 2005", it is no longer an option for Singapore not to adopt a general law governing competition.

Nonetheless, it is essential that the general competition law to be enacted would be "business-friendly", taking into account the special circumstances of Singapore (being a small economy where most of the local enterprises are small or medium sized) and counter-balancing the objectives of competition law against the economic advantages of economies of scale and aggressive business development. It is therefore important to ensure that the draft Competition Bill will not impose unnecessary compliance burdens which might unwittingly injure the national interest by chasing away foreign investors or limiting the ability of local enterprises to co-operate and aggressively expand their business development.

These are, however, matters of economics and policy on which we make no comment herein, but which we hope would be taken into account by the MTI under advisement.

(b) We would, however, conclude that in our view, regardless of the economic or policy underpinnings of the Competition Bill, the law must at the very

least be of sufficient certainty in scope and operation so as to facilitate business planning, as we have emphasized in our comments.

We hope that our brief comments contributed would be of assistance to the MTI.

Thank you.

Yours faithfully,

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DONALDSON & BURKINSHAW