ARNOLD & PORTER LLP

Memorandum

To: Ministry of Trade and Industry, The Treasury, Singapore,
Attn: Ms Ng Cher Keng, Director, Market Analysis Division
MTI_draftcompetitionbill@mti.gov.sg

From: Arnold & Porter LLP

Date: 24 May, 2004

Re: Consultation on Draft Competition Bill 2004

1. INTRODUCTION

1.1 Arnold & Porter LLP has been requested by its client Philip Morris Singapore Pte, to submit a response to the Ministry's consultation on the draft Competition Bill 2004 (the "Draft Bill", or "Act" where the reference relates to the Draft Bill as enacted). We are very grateful to the Ministry for the opportunity to do so. In the following paragraphs we present specific comments on particular provisions in the Draft Bill, in an attempt to be helpful to the Government of Singapore as it progresses the Draft Bill through the legislative process. References to pages and line numbers are to the draft Bill as it appears on:
www.mti.gov.sg/public/PDT/CMT/form_LEG_Competition_Bill.pdf.

1.2 Before setting out our comments, we briefly describe the Firm and the author of this Memorandum.

Arnold & Porter LLP is a leading US law firm; its Antitrust/Competition and Trade Regulation practice group provides legal counsel for clients throughout the United States and Europe. More than 60 attorneys in its offices in Washington, DC, Brussels, London, New York, Los Angeles, Century City, Northern Virginia, and Denver practice antitrust law. Its partners have held significant senior government positions in the U.S., including those of Chairman of the Federal Trade Commission (FTC); Director of the FTC's Bureau of Competition; Deputy Assistant Attorney General at

the Antitrust Division, Department of Justice; General Counsel of the FTC; and Chief of the Communications and Finance Section of the Antitrust Division.

Tim Frazer, the author of this Memorandum, is a competition partner in Arnold & Porter LLP. He was previously a Professor and Dean of Law at Newcastle University, UK. He is the author of two leading books on current UK competition law, *The Enterprise Act 2002: The New Law on Mergers, Monopolies & Cartels*, Law Society Publications, February 2003; and *The Competition Act 1998: A Practical Guide*, Jordans, 1999, as well as many other books and articles on competition law and theory. His profile is published by Legal 500 at: http://www.icclaw.com/us500/formex/pps/amp44074.htm

1.3 We would be delighted to provide any clarification, or to discuss any aspect of this memorandum with the Ministry. Please feel free to contact us by email (Tim_Frazer@aporter.com), by telephone (+44 207 786 6124) or by fax (+44 207 786 6299).

2. GENERAL PRINCIPLES

2.1 The approach of the Draft Bill and the principles articulated in the consultative paper published by the Government of Singapore appear to us to be orthodox and consistent with modern competition law regimes adopted worldwide, and sensitive to recent developments in the legal approach to the regulation of competition. We are mindful of the Singapore-specific provisions incorporated as a means of responding to the nature of the Singapore economy.

2.2 It will be important to reassure industry and consumers that the large body of precedent existing in the major jurisdictions that rely on similarly-worded legislation will be captured. This will enable consumers and industry to determine in advance how the law will be applied, and will enable the Competition Commission of Singapore, the Minister and the courts to call on an established body of law to guide their decisions and judgments. Such a process could be established, for example, through the publication, in the Guidelines envisaged in the Draft Bill, of a statement that the Act will be interpreted in a manner consistent with the principles recognised

internationally except where the particular features of the Singapore economy require otherwise.

3. DEFINITIONS – SECTION 2(1)

3.1 Page 3, line 7. In the definition of "*merger*", we recommend the removal of the expression "*or significant interest in*". There is no requirement for a broader scope than is provided for by the concept of 'control', as that term is defined in Section 54. This is further discussed in paragraph 9.2 below.

3.2 Page 3, line 16. We suggest the addition of "*by the Minister under this Act*" at the end of this paragraph.

3.3 Page 3, line 26. In the definition of "*undertaking*", we recommend the removal of the expression "*capable of*". The Act should apply to entities that engage in commercial or economic activities, as provided for in modern competition legislation. However, there seems to be no reason for it to apply to an entity that, although capable of such activity, does not engage in it. Failure to carry on such an activity should not be regarded as capable of bringing about any of the infringements provided for in the Act. Moreover, it is difficult to envisage any anti-competitive activity on the part of an inactive entity. Although the UK's Office of Fair Trading guidelines on the Competition Act 1998 use the words *"capable of"* in this context, EU law defines an undertaking as

> *"every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed"* (judgment of the European Court of Justice in Höfner and Elser v. Macroton GmbH, Case C-41/90 [1991] ECR I-1970).

Since UK law is required to follow EU law, it is thought that the different wording of the UK guidelines is without effect. It is recommended that this expression be removed; it is preferable for this point not to be left to the guidelines since it affects the fundamental scope of the Act.

4. MONIES RECOVERED – SECTION 13

4.1 Section 13 provides that monies recovered under the Act shall be paid to the Commission – rather than falling into the general treasury funds of the Government of Singapore (as is the case, for example, in the UK). If this is intended to cover penalties and fines levied under the Act, then the provision may give rise to the criticism of the Commission's activities. For example, should the Commission decide to levy fines that are heavier or more frequent than had been anticipated by industry, the motives of the Competition Commission may come under suspicion. This may impede the acceptance by industry of the Competition Commission's enforcement activities.

5. PART III OF THE DRAFT BILL

5.1 Page 17, lines 15-18. Section 33 provides for the extra-territorial application of the Act to parties and conduct outside Singapore.

5.1.1 In line 15, we believe that the expression "*abuse of*" should be inserted before "*dominant position*"; and that in line 17 the expression "*dominant position*" should be deleted and replaced by the word "*abuse*".

In common with most competition regimes, the Draft Bill has adopted the 'effects doctrine' under which conduct or agreements taking place elsewhere may be sanctioned if the anticompetitive effect is felt within the national territory. However, if the undertaking concerned has no dominant position within Singapore, it is unrealistic to believe that its conduct would have a sufficient effect in Singapore.

The important issue for the proper enforcement of the Act will be the ability to proceed against conduct taking place abroad, where such conduct constitutes an abuse of dominant position that exists, at least partly, within Singapore. Our proposed amendments will deal with this point, and will remove the possibility of an undue extra-territorial impact that might cause problems in relation to international comity – namely the possibility that undertakings might be proceeded against for unilateral activity taking place abroad even though they have no dominant position in Singapore.

We believe that this point should not be left to the guidelines nor to judicial discretion, since it is of vital importance to companies trading internationally to be capable of knowing in advance what their legal obligations might be.

5.1.2 Page 17, line 18. We recommend that the expression "*has infringed, or is likely to infringe,*" should be deleted and replaced by the expression "*infringes or has infringed*". The application of the Draft Bill to conduct or agreements that are only "*likely to infringe*" might be regarded as diverging from international legal norms. Under such a provision, undertakings may be penalised for conduct that does not currently infringe, merely on the speculative basis that an infringement is "*likely*". In view of the very significant commercial impact of a decision under the Act, and in view of the stated desire of the Government to use the Act only in relation to significantly anti-competitive conduct and agreements, it is strongly recommended that this provision be amended as proposed. It is also to be noted that the section 54 prohibition itself contains the ability to prohibit mergers that "*may be expected to*" have an anti-competitive effect. There is therefore no requirement, in relation to merger control, to include the reference to "*likely*" infringements. There is no reference in the other two prohibitions to conduct "likely" to infringe. We support that approach, which suggests that the reference to "likely" infringements should be removed from section 33.

6. THE SECTION 34 PROHIBITION

6.1 We believe that it would be preferable for the Draft Bill to include a specific reference to the fact that the Act will apply only to appreciable adverse effects on competition. This reference was dropped from the UK Act principally because of a desire not to set up an apparent difference between the UK text and that of Article 81 of the EU Treaty. If it is not possible to incorporate such a provision (such as by the insertion of the word "*appreciable*" before the word "*prevention*" on page 18, line 23), then it will be important that the guidelines envisaged in the Draft Bill make it clear that the prohibition will apply only where the adverse impact on competition is appreciable. This may be achieved through the publication of a 'de minimis' notice or through other guidance.

6.2 Page 19, line 13. Section 34(4) extends the prohibition to a "*concerted practice*". Since no definition of the phrase is included in the Draft Bill, it will be important for an explanation to be provided in guidelines. It is also recommended that such explanation follow the jurisprudence adopted internationally – for example by the European Court of Justice.

6.3 Page 19, lines 14-15. Section 34(5) provides that the prohibition shall apply to agreements, decisions and concerted practices implemented, inter alia, "*before ... the appointed day.*" The retroactive nature of these words may unfairly interfere with the legitimate expectation of undertakings that they will not be subject to penalties for having engaged in conduct that, at the time, was lawful. In order to avoid a significant departure from international legal norms concerning retroactive legislation, we strongly recommend that it be made clear that the prohibition applies to such agreements, etc. only insofar as they are implemented or carried on after the appointed day.

This might be achieved by deleting the words of the subsection after "*concerted practices*", and inserting in their place "*whenever implemented, insofar as they are carried on or implemented after the appointed day*".

Alternatively, section 94 might be amended to incorporate a transitional period for industry following the entry into force of the Act. Such a transitional arrangement could include words such as : *"There is a transitional period, beginning on the date of entry into force of this Act and lasting for [one year], for any agreement made before that date. The section 34 prohibition, the section 47 prohibition and the section 54 prohibition do not apply to an agreement, conduct or transaction respectively to the extent to which there is a transitional period relating to it or them".*

7. INDIVIDUAL EXEMPTIONS

7.1 Page 20, line 5. Section 36(5) provides that an exemption may be granted so as to have effect from a date earlier than that on which it was granted. It would be preferable for it to clarify whether such date might be earlier than the date on which the application for exemption was made. Retrospective exemption of this nature (dating back to the date of the agreement) is recommended, to prevent undertakings

from having to make defensive or superfluous applications merely to protect themselves against possible future challenge. This may be achieved through the addition of the following sentence at the end of the sub-section: "*For the avoidance of doubt such date may be earlier than the date of the request referred to in sub-section (1) of this section.*"

8. ABUSE OF DOMINANT POSITION

8.1 Page 28, line 1. Section 47(2)(a) provides that the abuse of dominance may consist in "*predatory behaviour towards competitors*". No definition of predatory behaviour is provided in the Draft Bill. Since this is a controversial topic, the concept should be covered in the guidelines published under the Act. It is recommended that the concept be interpreted in a manner consistent with EU law.

9. MERGERS

9.1 The Draft Bill introduces merger control, based on a voluntary notification system. Mergers will be assessed as to whether they may result, or may be expected to result in a "*substantial lessening of competition*" (page 31, line 11). This standard is similar to that adopted in other modern competition jurisdictions, and is replacing the previous standard, which focussed on whether a transaction created or enhanced a dominant position. The concept of substantial lessening of competition is complex in that it involves a series of substantive assessments, together with a treatment of efficiencies. It is therefore very important that the treatment of the concept be fully articulated in guidelines published under the Act.

9.2 Page 31, lines 25-26. Section 54(2)(c) provides that a merger occurs if, inter alia, an acquisition of assets places the acquiring undertaking in a position "*to replace or substantially replace the* [acquired undertaking] *in the business...in which that undertaking was engaged...*" The meaning of paragraph (c) may be difficult for industry to interpret. The scheme of the section envisages the situation where, even though the acquiror does not acquire direct or indirect control of the target (in the broad sense set out in section 54(3)), it can be taken to have "*replaced*" the target undertaking in its business. We believe that this provision will be very difficult for industry and may have a chilling effect on efficient transactions. We strongly recommend that paragraph (c) be removed in its entirety. Although a provision of

this nature is included in the Irish legislation, competition regimes generally extend merger control only to transactions under which undertakings merge, or under which an undertaking acquires control over another. These concepts are dealt with in section 54(2)(a) and (b) respectively. Since control can also be asserted through the acquisition of assets, we believe that the requirements of the Government to introduce a practicable and comprehensive merger control regime is provided for without the need for section 54(2)(c).

10. POWER TO ENTER PREMISES WITHOUT WARRANT

10.1 Page 39, line 14-16. Section 64(5)(c) gives power to investigating officers, when conducting a dawn raid, to search any person found on the premises, in certain circumstances. (A similar provision is included in section 65(2)(ii) - page 40, lines 27-29.) This power is not, in our experience, a usual feature of competition laws.

10.2 Page 39, lines 27-28. Section 64(5)(g) provides that investigating officers conducting an investigation without a warrant, may remove "*any article which has a bearing on the investigation*". This power appears to us to be extremely wide, since the term "*article*" might comprise any item (including a document). Moreover, the category of relevant articles – all those having a "*bearing*" on the investigation – is very wide. In view of the fact that no documents may be removed from the premises under the powers of section 64, it seems to us to be somewhat surprising that such a sweeping provision will permit inspectors to remove virtually anything found on the premises, so long as it has *"a bearing"* on the investigation. We strongly recommend that this paragraph be removed or clarified.

11. POWER TO ENTER PREMISES UNDER WARRANT

11.1 Page 41, lines 16-17. Section 65(2)(viii) contains a provision similar to that described in the preceding paragraph. This also appears to be inconsistent with the provisions of section 65(2)(iv), under which documents may be removed from premises only in very limited circumstances. We strongly recommend that this paragraph be removed.

12. APPEALABLE DECISIONS

12.1 Page 47, line 13. Section 71(2) provides that appeals relating to decisions of the Competition Commission concerning exemptions from the Act be made to the Minister, and not the Competition Appeal Board. We respectfully suggest that this is an undesirable scheme, especially as the decisions of the Minister are expressed in section 71(3) to be "*final*" (although no doubt subject to judicial review). We believe that it would be preferable not to draw a distinction between appeals on exemption-related decisions and those relating to other decisions of the Competition Commission. In both cases, the interests of the appellant will be the same (to have a comprehensive appeal process, capable of further appeal to the courts on points of law).

The Consultation Paper explains the difference in process on the basis that this is "*consistent with the powers of the Minister to make exclusions*" (paragraph 22). But, with great respect, we believe that this may be to conflate two different concepts - namely, decisions on exemptions (a power provided to the Competition Commission) and decisions on exclusions, (the power to make which is retained by the Minister). The two concepts are, of course, entirely different. It is strongly recommended that section 71 be amended so that all appealable decisions of the Competition Commission follow a judicial route, through an appeal to the Competition Appeal Board.

13. LENIENCY

13.1 The Draft Bill does not contain any provisions concerning the possibility of undertakings being granted immunity from fines, or leniency in the application of fines, in return for bringing infringements to the attention of the Competition Commission. It is recommended that such a scheme be introduced by way of guidelines published under the Act. It is also recommended that, where immunity or leniency is granted, then any information provided to the authorities within such scheme be not communicated to other competition authorities under the provisions of section 77.