ARNOLD & PORTER (UK) LLP

Response to the Ministry of Trade and Industry

on the

Second Round Public Consultation on the Draft Competition Bill 2004

13 August, 2004

Tim Frazer
Arnold & Porter (UK) LLP
Tower 42
25 Old Broad Street
London EC2N 1HQ

+44 207 786 6124
+44 207 786 6299 (fax)

tim_frazer@aporter.com

CONTENTS

1. SUMMARY OF MAJOR POINTS

This response recommends amendments to Clauses 33, 38, 44, 54, 65 and 79 of the Second Draft Bill. The reasons for all such recommendations are provided in the detailed discussion that follows.

2. STATEMENT OF INTEREST

2.1 Arnold & Porter LLP has been requested by its client Philip Morris Singapore Pte, to submit a response to the Ministry's second round public consultation on the draft Competition Bill 2004 (the " Second Draft Bill", or "Act" where the reference relates to the Second Draft Bill as enacted).

3. COMMENTS

Introduction

3.1 We note that the Ministry has, in the Second Draft Bill, adopted many of the comments made by us and other commentators in relation to the First Draft Bill. We have only a few comments on the Second Draft Bill, and we remain very grateful to the Ministry for the opportunity to comment on the draft legislation. We agree with the Ministry that many important issues relating to the application and interpretation of the Act will best be dealt with in the guidelines to be published under the Act. We would be grateful for the opportunity to comment on the draft guidelines as they are published from time to time. References below to pages and line numbers are to the draft Bill as it appears on:
http://www.mti.gov.sg/public/PDF/CMT/frm_LEG_Competition_Bill.pdf

3.2 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).

Clause 33: Application of Part III

3.3 Clause 33 provides that Part III of the Act shall apply to conduct that "*has infringed, or is likely to infringe*" the prohibitions in that Part. We continue to believe that the inclusion of the words "*likely to infringe*" is contrary to the Ministry's stated objectives in relation to the competition reforms, and that it will act contrary to the interests of those doing business in Singapore. We also believe that it will create very significant difficulties for the judiciary in the interpretation of the Act; this will add to the costs of compliance and enforcement, while distracting the Competition Commission from its central role.

3.4 The provision effectively introduces a new form of liability in relation to undertakings whose conduct does not breach any of the prohibitions in the Act, but where the Commission asserts that such lawful conduct is nevertheless "likely" to infringe it. This inchoate liability will give rise to very serious concerns. For example, will "likely" refer to the situation where non-compliance cannot actually be

demonstrated, but where there nevertheless seems to be a "likelihood" that conduct is unlawful? If so, this will remove the need for the Commission to prove its case in accordance with the appropriate legal standards; it will only be necessary to demonstrate that it is "likely" that the conduct is unlawful. Having regard to the consequences for undertakings of such a finding, this is a very significant concern.

3.5 Additional difficulties will arise where this concept of "likely" unlawfulness is combined with the concept of concerted practice. A concerted practice, when defined in the guidelines, will no doubt include situations where the presence of collusive conduct has to be implied from the surrounding economic or factual circumstances. Although the normal rules of standards of proof will apply in these circumstances, there is frequently a need to speculate as to the causes of conduct. Where parallel conduct follows contact between competitors, there is frequently a shift in the burden of proof (whether formal or informal) to the undertakings – who must demonstrate that their conduct is not collusive. This will be all but impossible for such undertakings where they have to disprove even the "likelihood" that perceived market effects spring from collusive conduct.

3.6 Difficulties will also arise where the concept of "likely" unlawfulness is combined with Clause 54. Under that provision, mergers that "*have resulted, or may be expected to result, in a substantial lessening of competition*" are prohibited. This provision is based partly on a speculation as to future competitive concerns, in that the prohibition covers mergers that "*may be expected*" to be anti-competitive. Where this speculative concept is attached to a concept of "likelihood" – thereby providing for the regulation of a merger that is expected to be likely to result in a substantial lessening of competition – the threshold for intervention becomes unacceptably low.

3.7 Alternatively, "likely" may be taken to refer to the likelihood of lawful conduct becoming unlawful at some future time, or in certain envisaged circumstances, or as a result in market changes yet to occur. In such cases, conduct that is lawful now, will become unlawful. A provision based on such a speculative basis clearly departs from international norms on the rule of law.

3.8 Having regard to existing case law on the meaning of "likely", where the term is generally equated with "probable"[1] it is to be anticipated that the threshold will be inappropriately low to achieve the non-interventionist objectives of the Ministry as set out on the consultation paper.

3.9 In view of all these concerns, we strongly recommend the removal of the concept of likely unlawfulness. We do not believe that there are any features peculiar to Singapore that would explain the need to retain this concept. Moreover, we do not believe that these concerns would be met by the general reassurance of the Commission that it intends to intervene only where anti-competitive agreements or conduct will have an appreciable adverse effect on markets in Singapore.

3.10 We therefore recommend that, on page 17, line 17-18, the expression "*has infringed, or is likely to infringe,*" be deleted and replaced by the expression "*infringes or has infringed*".

Clause 38: Opposition to block exemptions

3.11 Clause 38 provides that block exemption regulations may provide for opposition procedures, to enable undertakings to notify individual agreements to the Commission. Where such notifications are not opposed, the agreements will be treated as block exempted; where they are opposed the notification will be treated as an application for individual exemption under Clause 44. The Ministry has, for the reasons set out in the Competition Bill Consultation Paper, removed the previous provisions relating to individual exemptions from the Act. For the same reasons, the opposition procedure should also be removed. Even where the relevant opposition provisions are very limited in their scope, it will still be necessary for the Commission to convert unsuccessful applications into applications for individual exemption, thereby bringing back such exemption procedure "through the back door".

---

[1] See, for example, the discussion of judicial approaches to the concept of "likely" at http://ia.ita.doc.gov/sunset/sspolreb/jisea/exhibit1.wpd.

Clause 44: Notification for a decision.

3.12 Clause 44 is no longer necessary in its current form, following the removal of the provisions relating to individual exemption. In its current form, the Clause permits applications to be made for a decision that an agreement or conduct is, inter alia, exempted. If, as seems to be suggested by the terms of Clause 46(1), the Ministry wishes to preserve the possibility of "negative clearance" decisions (i.e. decisions that the relevant prohibition does not apply to the agreement or conduct in question), then the following changes will be necessary:

> Clause 44(2)(b). Page 24 lines 5-6. Remove the words after " *exclusion*" up to the end of the paragraph, for the reasons given above.
>
> Clause 44(3) and (4). Page 24, lines 7-16. Remove in their entirety. Where the decision procedure is limited to negative clearance, a provision for the suspension of fines may well give rise to abuse through the notification of clearly unlawful agreements.

If, alternatively, the Ministry wishes to make applications under Clause 44 available to confirm that a block exemption applies to an agreement, then the words "*under a block exemption*" should be added after "*prohibition*" in Clause 44(2)(b) (page 24, line 6), and the words "*or is exempt from the prohibition under a block exemption*" would need to be added after "*prohibition*" in Clause 46(1) (page 25, line 23). However, we would recommend that this alternative course not be adopted, since the interpretation and application of legal instruments (such as a block exemption regulation) is properly within the jurisdiction of the courts.

Clause 54: Mergers

3.13 Clause 54(2)(b) and (c). These provisions may require a slight adjustment. We believe that the intention of the provisions is to cover the situations where direct or indirect control of an undertaking (or part) passes to another undertaking or to a person that controls another undertaking. Thus, for example, (i) Undertaking U acquires all the shares in Undertaking V; U will directly control V, and will indirectly control V's subsidiaries; (ii) Undertaking A controls Subsidiary B; B acquires all the shares in Undertaking C; B therefore directly controls C, and A indirectly controls C; (iii) X, an individual, controls Undertaking Y, and acquires all the shares in Undertaking Z; X will control both Y and Z; and (iv) P, a person that controls no

undertakings, acquires all the shares in Undertaking R and Undertaking S; P will control both R and S.

3.14 It appears that situation (i) above is not catered for in the current draft. In relation to acquisitions by undertakings, Clause 54(2)(b) deals only with the situation in which "*undertakings...which control other undertakings...acquire control of...other undertakings*" (emphasis added), and Clause 54(2)(c) deals only with the situation where "*undertakings acquire…control of…2 or more other undertakings*" (emphasis added). This leaves unregulated the situation where an undertaking, that does not already control another undertaking, acquires control of one other undertaking.

3.15 In view of this, and in view of the fact that the term "person" is defined in Clause 2(1) to include any undertaking, we recommend that Clause 54(2)(b) be amended to read:

> (b) *one or more persons who control at least one undertaking, or one or more undertakings, acquire direct or indirect control of the whole or part of one or more other undertakings;*

3.16 Clause 54(2)(d). We continue to believe that Clause 54(2)(d) will introduce an unnecessary and confusing concept into the Act. This 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…*" We believe this provision to be redundant and confusing. Control through the purchase of assets is already provided for in Clause 54(2)(b) and (c). We believe that this provision will be very difficult for industry and may have a chilling effect on efficient transactions.

3.17 Although a provision of this nature is included in the Irish competition legislation, competition regimes generally extend merger control only to transactions under which undertakings merge, or under which an undertaking acquires control over another. We have discussed the provision with leading Irish competition experts, who regard the equivalent Irish provisions as comprising an "awkward and undefined test, particularly as the notion of control seems to have been discarded". We therefore recommend that Clause 54(2)(d) be removed in its entirety.

Clause 65: Power to enter premises under warrant

3.18 Clause 65(4) provides that an inspector may provide to an undertaking under investigation a copy of any document that he intends to remove from the premises. There is no obligation on the inspector to do so, and this appears to be a significant interference both with the rights of the defence and with the ability of the undertaking to carry on business. We therefore recommend that the word "*may*" in this subClause be replaced by the word "*shall*" (page 40, line 29).

3.19 Clause 65(2)(viii) provides inspectors with the right to remove any article which relates to any matter relevant to the investigation. This very broad power is in contrast to the more measured provisions of Clause 65(2)(iv), under which documents may be removed only in certain circumstances. In order to preserve the rights of the defence, and to enable undertakings to conduct their business during the course of an investigation, we recommend that the sub-Clause be amended to read as follows (page 40, line 32 – page 41, line 2):

> (5) *An investigating officer or inspector* ***shall, unless he has reasonable grounds for suspecting that it is necessary to remove*** ~~*, instead of removing from any premises for examination*~~ *any article which* ~~*has a bearing on*~~ ***relates to any matter relevant to*** *the investigation under subsection (2)(viii),* ***in order to preserve it or to prevent interference with it****, allow the article to be retained on those premises subject to such conditions as the investigating officer or inspector may impose.*

Clause 75(9): right of relief

3.20 Clause 75(9) provides that nothing in Clause 75 (which provides for rights by private parties) will confer a right of action for relief by a party to an unlawful agreement. Although this is a sound general principle, the Ministry may be interested to note the recent UK case of Bernard Crehan v. Inntrepreneur Pub Company (May, 2004), in which the Court of Appeal provided for a right of relief to a party to an unlawful agreement having regard to the fact that there was no equality of bargaining power between the parties. Clause 75(9) would prevent such an award being made in Singapore.

4. CONCLUSION

4.1 We believe that the changes incorporated in the Second Draft Bill provide for a better Bill. The suggestions indicated above are intended to assist the Ministry in providing for even more improvements whilst being sensitive to the special characteristics of the markets in Singapore.

ANNEX 1 – REFERRED TO IN PARAGRAPH 3.8

"Court decisions addressing statutes' use of the word "likely" include the following:

United States v. Powell, 761 F.2d 1227, 1239 n.2 (8th Cir. 1985) (Gibson and Bowman, concurring in part and dissenting in part):

In common parlance, if something is "likely" it is "probable" -- it has a better chance of happening than not. Webster's Third New International Dictionary defines "likely" as "of such a nature or so circumstanced as to make something probable" and as "having a better chance of existing or occurring than not; having the character of a probability." This meaning of "likely" is a common theme that runs through case law as the term appears in often quite different contexts. See, e.g., Munro Drydock, Inc. v. M/V Heron, 467 F. Supp. 513, 515 (D. Mass. 1979) (in context of judicial sale of ship, "likely" was synonymous with "probable"); In re Oseing, 296 N.W.2d 797, 801 (Iowa 1980)(for purposes of civil commitment, "likely" means "probable or reasonably to be expected"); Boland v. Vanderbilt, 140 Conn. 520, 102 A.2d 362, 365 (1953)(in medical testimony, "likely" meant "in all probability; probably"). Both the common understanding of the term and its use in a legal context compel the conclusion that "likely" means "probable" -- both terms referring to a greater than 50% chance that something will occur.

U.S. v. Rivera, 131 F.3d 222 (1st Cir. 1997):

But the test is not "possibility" or "some risk." It is of a significantly higher order, "likely to endanger life." Not only do logic and the need to avoid watering down the prerequisite of criminal liability support this statement, but also the common understanding of the word "likely." At times, dictionary definitions give mixed signals, or are opaque or otherwise less than compelling indicia of legal meaning. But the definitions of the adverb "likely" are consistent, clear and strong: in one dictionary the meaning is simply "probably," see Random House Dictionary of the English Language 1114 (2d ed. unabridged 1987); in another, the meanings are "in all probability" and "probably," see Webster's Collegiate Dictionary 674 (10th ed. 1993).

Wieland-Werke v. United States, slip op. 98-23 (CIT 1998):

Commerce's use of the phrases "no likelihood" and "not likely" is in accordance with the normal usages of the English language because these phrases mean the same thing. The

Oxford English Dictionary defines "likelihood" as "the quality or fact of being likely or probable." Id. at 948, vol. VIII (2d ed. 1989). "Likely" is defined as "[h]aving an appearance of truth or fact; that looks as if it would happen, be realized, or prove to be what is alleged or suggested; probable." Id. at 949. Webster's Third New International Dictionary defines "likelihood" as "probability" and "likely" as "of such a nature or so circumstanced as to make something probable." Id. at 1310 (1993).

Munro Drydock, Inc. v. M/V Heron, 467 F.Supp. 513, 515 n.5 (D. Mass. 1979):

The term "likely" is synonymous with "probable." That there is a substantive difference between a probability and a possibility is clear beyond the necessity for citation.

The courts have made clear that likely means probable, which is at least a 51 percent chance of occurrence….It is a mathematical impossibility for there to be more than one "likely" (i.e., probable) outcome in any prediction.

Probability values can be obtained objectively or subjectively. A single probability value must be between 0 and 1, and the sum of all probability values for all possible outcomes must sum to 1.

Probability. A statement about the likelihood of an event occurring. It is expressed as a numerical value between 0 and 1, inclusive.

B. Render and R.M. Stair, Jr., Quantitative Analysis for Management 39 (5th ed. 1994). "Likely" means having at least a 51 percent probability. Because all probabilities must sum to 1, there can be no more than one "likely" outcome predicted…"