ASIA PACIFIC BREWERIES (SINGAPORE) PTE LTD

Submission to the Ministry of Trade & Industry on the Second Round of Public Consultation of the Draft Competition Bill

20 August 2004

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ASIA PACIFIC BREWERIES (SINGAPORE) PTE LTD

I. INTRODUCTION

1. Asia Pacific Breweries (Singapore) Pte Ltd ("***APB***") is grateful to the Ministry of Trade & Industry ("***MTI***") for considering its comments for the first round public consultation of the draft Competition Bill (the "***Bill***"). APB welcomes the opportunity to submit its further comments on the Bill for the second round of public consultation of the Competition Bill.

2. APB is encouraged that MTI continues to incorporate relevant international best practices while taking into account Singapore's unique characteristics as a small, open economy. In addition, APB applauds MTI's commitment to keep regulatory compliance costs to a minimum.

3. The comments set out herein by APB are in response to the second round of the public consultation of the draft Competition Bill issued by MTI on 26 July 2004.

4. APB's submission is set out in the following manner:

   (a) Part I contains this Introduction;

   (b) Part II contains a summary of the major points of APB's submission;

   (c) Part III contains APB's statement of interest;

   (d) Part IV contains APB's detailed substantive comments; and

   (e) Part V contains APB's conclusion to this submission.

5. Unless otherwise stated, references in this submission to section numbers are references to the corresponding sections in the second draft Competition Bill.

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II. SUMMARY OF MAJOR POINTS

1. APB notes that MTI has accepted a number of constructive comments from the responses to the first round public consultation of the Competition Bill. As such, APB believes that the contents of the draft Competition Bill which has been put up for the second round public consultation ought to be generally well-received by the public at large, having had the benefit of invaluable inputs from industry players, legal advisers, trade associations, foreign agencies and academics.

2. However, APB also notes that the draft Bill can still be improved in a number of ways.

3. For one, MTI has still not indicated a definite transitional period in the second round public consultation. APB maintains that a longer transitional period of 24 months is necessary given the complexity of the draft Competition Bill and the change in mindset required to comply with the spirit of the provisions. Moreover, once the Competition Act is enacted, enterprises will be embarking on their respective compliance initiatives. Without the benefit of precedents, the initial phases for the enterprises will expectedly be time-consuming. Any transitional period that is instituted must necessarily take into account the fact that competition regulation is a concept that is novel to many businesses.

4. In addition, larger companies will require more than 12 months to review existing agreements and to renegotiate agreements that may raise competition law concerns. In this regard, a longer transitional period of 24 months will send out the right signal to the industry that it is MTI's policy intent all along to foster a compliance culture and companies will be given the opportunity to structure, organise and implement their compliance initiatives meaningfully within a realistic time-frame.

5. While much of the draft Bill incorporates international best practices, MTI should be mindful that certain developments in mature competition law jurisdictions might not be immediately applicable to the Singaporean context. Specifically, APB believes that the system of individual exemption (which has been removed in the competition legislation of EU and UK) should be reinstated as it provides a potentially ideal avenue for parties to an anti-competitive agreement to seek an exemption from the section 34 prohibition based on the criteria set out in section 41 of the Bill. This is in recognition of the commercial reality that very few agreements are wholly anti-competitive. Many agreements while appearing anti-competitive at the outset do possess pro-competitive benefits that may not be immediately apparent from the drafting of the agreement (for example, joint R&D agreements between competitors). In such instances, parties to such agreements should be entitled to seek individual exemption from the Commission if such agreements are not covered by an existing block exemption. The rationale and

bases for removing such a system in certain mature competition law jurisdictions do not apply with equal force to Singapore since Singapore will be embarking on the experience curve at a different entry point from where mature competition law jurisdictions are now at. Given that companies will be coming to terms with the scope and nature of the prohibitions and tenets of the competition law in the initial period, this system of individual exemption should be offered, at least in the early years of implementation of competition law in Singapore.

3. APB observes that MTI has not clarified whether section 54(1) is intended to apply to mergers that are completed prior to the commencement date of the provision ("Pre-Act Mergers"). In the interests of providing the much-needed certainty and assurance to the business community which continues to have to consider proposals and initiatives in relation to mergers and consolidations as a matter of course, APB urges MTI to confirm that section 54(1) does not apply to Pre-Act Mergers.

4. APB remains opposed to the concept of rights of private action in section 75 of the Bill. Competition law exists for the public good and should not be used as a tool to unduly enrich the complainant at the expense of its infringing competitor. Again, abuse of section 75 remains a concern to APB.

5. The revised draft Bill has been improved in a number of significant aspects, which APB believes will have long-term practical ramifications in the way business can continue to be conducted in Singapore. APB wishes to single out for commendation, MTI's move to clarify section 34(3) of the Bill to provide that an anti-competitive agreement is only void on or after the date of commencement of section 34 to the extent that it infringes the section 34 prohibition.

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III. STATEMENT OF INTEREST

1. Asia Pacific Breweries (Singapore) Pte Ltd is a company incorporated in Singapore, and is engaged in the manufacture, marketing and distribution of various brands of local and foreign beer, stout and other alcoholic beverages within Singapore.

2. As with its previous submission for the first round public consultation of the Competition Bill, this submission represents the views of Asia Pacific Breweries (Singapore) Pte Ltd.

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IV. DETAILED COMMENTS

General Comments

1. In MTI's consultation paper, MTI recognised that certain long-standing agreements require a longer transitional period to sort out the contractual issues that may arise. However, reviewing and re-negotiating agreements is only one aspect of competition compliance. Often, businesses will have to engage professional consultants to collate information on market share and market structure as well as to advise on issues of dominance and market definition. At the same time, existing business arrangements and practices have to be reviewed against the new competition law. Employees will need to be re-trained and internal procedures (for example, policies on document retention) have to be instituted.

2. From APB's experience with its own compliance initiatives, a similarly sized enterprise will require approximately [18] months to formulate and implement an effective competition law compliance programme. A 24-month transitional period would therefore provide adequate time for the larger enterprises to put in place a credible compliance programme.

Specific Comments

3. APB has the following specific comments relating to particular provisions of the draft Bill.

Removal of the system of individual exemption

4. APB is surprised that MTI has decided to remove the system of individual exemption which is an important feature of the first draft Competition Bill. In particular, APB disagrees with MTI's reasoning that such a system could impose significant resource costs on the Commission. Section 93(2)(f) of the Competition Bill allows the Commission to make regulations to prescribe "fees to be charged in respect of anything done or any services rendered by the Commission under or by virtue of this Act". Given that it is reasonable that an applicant should bear the costs of seeking an individual exemption, by stipulating a fee payable for each application to cover the costs of the Commission in granting the individual exemption, APB believes that it is unlikely that the Commission will be inundated with applications for individual exemptions. Moreover, the system of individual exemption represents the only avenue for a party to an anti-competitive agreement to seek exemption from the section 34 prohibition if such an agreement does not fall within the scope of any block exemption. APB's view is that such a system is an integral aspect of Singapore's competition law framework and the reasons set

out above for its inclusion in the Competition Bill clearly outweigh any justification (including increased resource costs) for its removal.

5. Contrary to suggestions from certain quarters, the absence of a system of individual exemption does not necessarily translate to lower regulatory costs for businesses. On the contrary, it is anticipated that considerable time and expense will need to be spent renegotiating and rectifying agreements that may benefit from the availability of an individual exemption procedure.

6. APB appreciates from the consultation paper that MTI's decision to remove this system of individual exemption is in line with international developments. To APB's knowledge, EU and UK had abolished the system of individual exemptions in favour of a 'legal exception regime'. The criteria for individual exemptions are incorporated into the section 34 equivalent of the EU and UK legislation. This creates an exception to the section 34 prohibition which provides a defence to undertakings against finding for an infringement of section 34. Some commentators are in favour of this development in EU and UK as the creation of a 'legal exception' places the onus of compliance squarely on the enterprises. However in these instances, the legal developments in EU and UK may not be particularly relevant to Singapore context. To expect that the lack of a system of individual exemption will foster a compliance culture is overly optimistic given that Singapore is still far away from being a mature competition law jurisdiction. Competition compliance will be something new for businesses and the industry should be given the statutory option of seeking exemption for certain agreements which promote pro-competitive benefits.

7. In any event, even if MTI were to look to EU and UK for guidance, APB observes that no corresponding amendments were made in the second draft Bill to section 34 to create a legal exception to section 34. The removal of the system of individual exemption is unwarranted and should be reinstated in the Competition Bill.

8. APB submits that if MTI nevertheless stands by its approach in the second draft Competition Bill, a legal exception should be created in section 34 in the form of a new subsection which reads:

"Subsection (1) shall not apply to in the case of any agreement which contributes to –

(a) improving the production or distribution; or

(b) promoting technical or economic progress,

but which does not -

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question."

Clarification of the operation of section 54

9. Mergers and acquisitions are part and parcel of commerce. Indeed, corporate growth and divestiture strategies often hinge on opportunities becoming available within a limited period of time. In many instances, mergers and acquisitions are not just desirable but necessary in order to achieve economies of scale or to rationalise business operations. APB has previously raised its concern over the drafting of section 54(1) of the Competition Bill in its earlier submission to MTI for the first round public consultation of the draft Bill. In its current iteration, the Bill is still unclear as to whether mergers completed prior to the commencement date of section 54 will continue to be tested against the prohibition in section 54(1).

10. APB observes that MTI has not responded directly to this concern (which is also shared by a number of respondents to the first round public consultation) over the operation of section 54. APB appreciates that merger regulation is a complex exercise and MTI will necessarily be understandably cautious at this juncture given that merger rules may well shift in accordance with the prevailing anti-trust thinking as shaped by the experiences of the mature competition law jurisdictions. However, the uncertainty over the potential scope of operation of section 54(1) is a matter of pressing concern to the industry at large. APB reiterates its position that section 54(1) should not apply to Pre-Act Mergers and implores MTI to confirm as such. In the same connection, APB submits that MTI should finalise its broad policy view on merger regulation before the enactment of the Competition Act in January 2005 and in doing so, remove the lingering doubt and uncertainty over the status of Pre-Act Mergers that currently dogs certain segments of the business community.

Rights of private action under section 75

11. The arguments against importing the concept of rights of private action into Singapore's competition law jurisprudence have already been set out in APB's submission for the first round public consultation of the Competition Bill. APB believes that these arguments continue to be relevant, forceful and cogent to support the case for the removal of section 75. As such, APB wishes to restate those arguments as part of this submission.

12. In the premises, APB urges MTI to reconsider the introduction of the concept of rights of private action in section 75 of the Competition Bill. Allowing rights of private action as an added deterrent against anti-competitive behaviour while

well-intentioned, runs the risk of sliding down the slippery slope towards a litigious culture of private enforcement, an unhealthy feature of any competition law system that MTI should be minded to avoid.

13. Moreover, given that MTI has made a policy decision not to provide for sanctions against the making of frivolous complaints, the availability of rights of private action will increasingly be subject to abuse by competitors who will not hesitate to resort to threats of private action in order to obtain an unfair advantage over their rivals.

14. APB submits that MTI should omit section 75 and determine the effectiveness of the sanctions imposed by the Commission in the initial years after competition law comes into force. MTI may only then wish to assess the compliance-breach coefficient and, if it thinks necessary, review whether rights of private action should be incorporated. A cautious and well-determined approach is clearly to be preferred, in this respect.

Clarification of section 34(3)

15. APB is grateful to MTI for clarifying the operation and effect of section 34 by way of an amendment to section 34(3). APB agrees fully with MTI's position that an anti-competitive agreement should only be rendered void on or after the date of commencement of section 34 to the extent that it infringes the section 34 prohibition. APB regards the practical effect and value of this amendment as potentially immense.

V. CONCLUSION

1. APB welcomes this opportunity to contribute to the development of the Competition Bill. We hope our comments from the perspective of the business community are useful and relevant. APB looks forward to future opportunities to participate in the shaping of a coherent and effective competition law framework in Singapore.