ASIA PACIFIC BREWERIES (SINGAPORE) PTE LTD

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

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I. INTRODUCTION

1. Asia Pacific Breweries (Singapore) Pte Ltd ("***APB***") welcomes the opportunity to submit its comments on the draft Competition Bill (the "***Bill***").

2. As a leading brewery in Singapore with a wide portfolio of national and regional beer brands, APB is a rigorous advocate of innovation and competition. The benefits of competition are well documented and APB believes that the introduction of national competition law is timely and appropriate.

3. The comments set out herein by APB are in response to the first round of the public consultation of the draft Competition Bill issued by the Ministry of Trade & Industry ("***MTI***") on 12 April 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 draft Competition Bill.

II. SUMMARY OF MAJOR POINTS

1. APB strongly supports the introduction of competition law in Singapore. As part of the development of the legislative framework for the new law, APB agrees broadly with MTI's approach in the Bill.

2. Apart from a few sectors, competition law will be something new for all businesses in Singapore. Companies (some much more than the others) will require time to adjust to the new legislative framework. In particular, for some enterprises, educating employees on the impending regulatory regime will be integral while for others, a culture change in the manner of doing business may be necessary. A longer transition period is clearly required for businesses to develop and implement some form of compliance initiatives. Further, in order for businesses to manage any such compliance initiatives effectively, MTI should be more forthcoming in setting out its approach, process and procedures in statutory instruments instead of relying too dependently on developing non-binding guidelines.

3. In the same connection, while vertical agreements are at first instance excluded from the scope of the section 34 prohibition, the Third Schedule provides for the possibility of the Minister issuing an order to specify such vertical agreement to be included within the ambit of section 34. To assist the industry from a compliance perspective, MTI should set out the factors to be considered by the Minister when exercising its discretion to order section 34 to be applied to a vertical agreement.

4. Aside from setting out the prohibitions, the Bill allows a relevant party to notify the Commission of the agreement, conduct or merger in question and to apply to the Commission for guidance or a decision on the permissibility of such an agreement, conduct or merger (as the case may be). APB wishes to inquire whether an administrative fee will be imposed in respect of such notifications for guidance and decision.

5. Section 47 sets out the prohibition against conduct amounting to an abuse of dominant position in any market in Singapore. APB notes that the proposed legislation does not seek to punish undertakings by the mere fact that they are dominant. This approach can only be right as these undertakings are likely to have achieved its current dominant position through superior innovation, foresight, enhanced productivity or sheer competitive drive. Instead, the emphasis is directed at the conduct of a dominant undertaking to the extent that such conduct is abusive. While a dominant undertaking may perceive its abusive conduct as a 'legitimate' strategy as far as its business is concerned, such conduct will nonetheless be attacked on the basis of a test that is related to economic efficiency within a given market. In this regard, competition law is often contrasted with

environmental regulation. For any given standard in environmental law (eg. 'oil content in an effluent discharge to be no more than fifteen parts per million'), it is relatively easy to ascertain whether the standard is indeed contravened by testing a given sample. It is much harder to set similar tests in the area of competition law as under the Bill, the standard of conduct for a dominant undertaking that it should not 'abuse' its 'dominant position' within any market cannot be assessed without recourse to economic analysis. In this connection, the broad-brush approach taken in the language of section 47 clearly affords the Commission the flexibility to give due consideration to the economic reality of the relevant market in determining whether section 47 has been infringed. We are therefore strongly in favour of retaining this section in its current form as what amounts to 'dominant position' (particularly in the context of the Singapore market) should not be subject to prescriptive specification.

6. Unlike section 34(5) which provides for the application of section 34 prohibition to agreements, decisions and concerted practices implemented before, on or after the date of commencement of the Competition Act, it is not entirely clear whether section 54 has any retrospective operation. MTI should put it beyond doubt that section 54 does not apply to mergers that has occurred prior to the commencement of the Competition Act.

7. APB is concerned that the test for invoking the Commission's power of investigation under section 62 and one of the condition precedents for the imposition of interim measures pending the conclusion of the investigation under section 67, do not accurately reflect the differing standards to be applied in the two situations. Further, APB is of the view that the standard of 'reasonableness' in section 62 should be an objective one. In the premises, the Commission's power to investigation should only be used sparingly given the intrusive nature and disruptive effect of investigations on the affected party. As such, the threshold of "reasonable grounds for suspecting" in section 62 must be sufficiently high given the potential for an abuse of process by a complainant on a 'fishing expedition'. Section 67 on the other hand, calls for an even higher standard given that it allows the Commission to institute interim measures against a party suspected of infringing the prohibitions under the Bill. The language in these two sections should be revised to accurately reflect the proper respective legal standards required in order for these sections to be called into operation.

8. APB is supportive of the proposed appeal framework in Part IV of the Bill. However, APB believes that the Bill should require the Commission and the Competition Appeal Board to state the grounds of their decisions to enable an aggrieved party to effectively lodge an appeal against their decisions.

9. While APB agrees that financial penalties will serve as a deterrent against anti-competitive behaviour, APB is concerned over the quantum of financial penalties that can potentially be imposed under section 69. APB requests MTI to explain the rationale behind pegging the maximum financial penalty at 10% of the annual

turnover of the business of the infringing undertaking. APB observes that the Info-communications Development Authority of Singapore ("***IDA***"), the sectoral competition regulator for the telecommunications sector, has the power to impose a maximum financial penalty of S$1 million under the Telecommunications Act for breach of the Telecom Competition Code. Similarly, the maximum penalty that can be imposed by the Media Development Authority of Singapore ("***MDA***") under the MDA Act for breach of the Media Market Conduct Code is S$1 million. In this regard, MTI should ensure that the financial penalties under the sectoral and the proposed national competition law frameworks are proportionate, if not consistent. In the alternative, MTI should at the very least, subject the quantum of financial penalty to a maximum figure instead of a percentage of the turnover of the business of the offending undertaking.

10. APB is against the introduction of the concept of rights of private action in section 75 of the Bill. The imposition of financial penalties is already an adequate deterrence against anti-competitive behaviour.

11. While it is open to a person to lodge a complaint to the Commission for an infringement of the prohibitions in the Competition Act, there is notable absence of sanctions against the bringing of baseless complaints. Complaints that are not founded on any sound and reasonable basis can constitute an abuse of process and will result in a waste of time and resources for both the party complained against as well as the Commission. As such, MTI should create a strong disincentive in the Bill to minimise the number of frivolous complaints.

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. This submission represents the views of Asia Pacific Breweries (Singapore) Pte Ltd.

IV. DETAILED COMMENTS

General Comments

1. MTI has indicated that a transition period of at least 12 months will be provided before the prohibition provisions of the competition law come into force. While APB agrees with MTI that a transitional arrangement is necessary, APB is of the view that a transition period of 24 months will be more appropriate in the circumstances. The requirement for a longer transitional period arises from the need to understand how the broad prohibitions and tenets of the competition law will apply in the Singapore context. For example, following the entry into force of national competition law, businesses such as APB may have to undertake in-house or engage various professional consultants to conduct market analysis studies and research. Statistical data on consumer and business information in Singapore will have to be collated and evaluated in the context of competition law compliance. This is especially so in a dynamic commercial environment such as Singapore, and the process will inevitably require a substantial period of time. Therefore, APB feels that MTI should extend the transition period to 24 months to better reflect the commercial realities and complexities of Singapore's economic and business environment.

2. While APB is aware that MTI intends to supplement the Competition Act when it comes into force with the issuance of guidelines by the Commission pursuant to section 61, APB is of the view that certain aspects of the Bill are couched in language that is too general. In the interests of transparency and certainty, APB urges MTI to be more forthcoming in setting out its approach, process and procedures in statutory instruments instead of relying too dependently on the avenue of developing non-binding guidelines.

3. Moreover, save for a few industries where competition law exists at a sectoral level, competition regulation is a concept that is novel to many businesses in Singapore. The merits of having a piece of legislation that maps out the prohibited and accepted boundaries will mitigate the risks of goalposts shifting, thereby ensuring that businesses are able to operate in an environment of certainty with minimal areas of regulatory risks.

4. In the same connection, taking a more prescriptive approach will enable businesses to conduct themselves with greater assurance as to their rights and obligations with the consequent effect of lowering compliance costs. Any savings in this regard are likely to be passed on to the consumers ultimately.

Specific Comments

5. The general approach taken by MTI towards the introduction and administration of a national competition law should be applauded. In particular, APB notes that in exercising its competition functions under the proposed legislation, the Bill provides that the Commission should have regard to the differences in the nature of various markets in Singapore [see section 6(2)(a)]. APB shares MTI's belief that different markets will possess characteristics and structures that are distinctive. This is likely to impact on the way a particular arrangement, practice or conduct is viewed as either being pro-competitive or anti-competitive under the Bill. For instance, barriers to entry can differ between markets and can potentially affect the question of dominance in respect of particular industry players within such markets.

6. In addition, APB is supportive of MTI's approach of focussing on anti-competitive agreements or conduct that will have an appreciable adverse effect on markets in Singapore, instead of attempting to capture all forms of anti-competitive agreements or conduct in all markets. Specifically, section 6(2)(c) which requires the Commission to have regard to 'maintaining the efficient functioning of the markets in Singapore' can be said to be a step in the right direction as business activities should not be stifled by overzealous regulatory intervention.

7. Nonetheless, APB has identified a number of areas for improvements in the Bill for MTI's consideration. Our specific comments on the Bill are set out below.

Exclusion from section 34 prohibition

8. APB agrees with MTI's approach of excluding vertical agreements from the scope of section 34. Anyone arguing in favour of including vertical agreements within the scope of the section 34 prohibition would be concerned that the blanket exclusion of all vertical agreements from the proposed legislation could have far-reaching and potentially costly consequences for consumers. APB believes that this would be self-serving in its purport, as this would in fact be disregarding the inherent pro-competitive benefits of such agreements. Many vertical agreements are essentially harmless from a competition law point of view and businesses would face an unnecessary burden if they were required to examine all such agreements for conformity with the new competition law requirements. Such exclusion will also lend stability to the business environment as business relationships between undertakings operating at different levels of the production or distribution chain should be preserved.

9. Moreover, the majority of vertical agreements such as distribution agreements are in fact pro-competitive. Therefore, APB applauds MTI's move to remove vertical agreements from the scope of the section 34 prohibition in order to reduce the

compliance burdens on industry and the costs of administration to be incurred by the soon-to-be established Competition Commission.

10. However, APB recognises that there may be some vertical agreements which can be found to be have an appreciable adverse effect on competition. APB notes that paragraph 8(1) of the Third Schedule of the Bill provides for the Minister to issue an order to specify such vertical agreements to be included within the ambit of section 34. As no such order is in force currently, save for vertical agreements that are accompanied by market dominance, from a compliance perspective, the industry is none the wiser as to the categories of vertical agreements that could potentially be included within the scope of the section 34 prohibition.

11. While it may not be realistic or appropriate at this stage to specify such categories of vertical agreements, MTI should at the very least set out the factors to be considered by the Minister when exercising its discretion to order section 34 to be applied to a vertical agreement. While APB notes that the criteria for individual and block exemption set out in section 41 may be instructive as to what agreements should remain outside the scope of the section 34 prohibition, these criteria may not be sufficiently helpful in deciding whether a vertical agreement should be subject to the section 34 prohibition. As such, MTI should clarify the relevant considerations to be taken into account by the Minister in the event any decision is made to extend the scope of the section 34 to cover any genre of vertical agreements.

Notification for guidance or decision

12. APB is encouraged by MTI's decision to set out avenues for undertakings to submit a notification to the Commission for guidance or a decision in respect of a prohibited agreement, conduct or merger in the Bill. At first glance, the differences between the separate processes of notification for guidance and decision are not immediately apparent from the relevant provisions. To allow the public to have a meaningful understanding of the two avenues of notification, MTI should clarify in its response to the industry, the differences (as MTI has envisaged) between the two which are not evident from the language of the relevant provisions. Matters concerning these processes that the industry will be interested include –

    (a) The administrative costs of the respective processes (if any);

    (b) The timelines under the respective processes (i.e. whether one process is quicker than the other);

    (c) The confidentiality of the proceedings (i.e. whether one process is sought and given in confidence); and

(d) The formality of the proceedings (i.e. whether one process requires the submission of more detailed information from both the party seeking guidance and interested third parties).

Section 47: Abuse of dominant position

13. Competition law is about economic regulation based on established economic principles and prevailing schools of economic thought. As such, anti-competitive behaviour cannot be analysed in a legalistic manner. In short, what is prohibited or not under the proposed legislation cannot be assessed based on a legal checklist as one would, in the case of some highly prescriptive environmental regulation. This is particularly so in the context of section 47 which relates to the abuse of a dominant position.

14. While certain provisions were crafted in too general a fashion, we believe MTI has struck the right balance when it comes to section 47. MTI has clearly avoided the pitfall of being overly prescriptive when it comes to the issue of dominance. This broad-brush approach is clearly desirable as it enables the Commission to have regard to the commercial realities of how a particular industry works. Economic data will be particularly instrumental on issues such as market definition and market power. These elements will obviously affect, in one way or another, the determination of what constitutes 'a dominant position in any market in Singapore' in a section 47 situation.

15. As the manner in which the industry players compete in a particular sector may vary, factors that are relevant for assessing dominance in one market may not be relevant for the same assessment in another. In addition, having a normative concept of 'dominant position' will avail the Commission the latitude to consider factors such as market structure, nature of the market, the way goods and services are supplied in a particular market as well as the barriers to entry, in arriving at its determination on whether the undertaking in question is dominant. APB's view is that section 47 should remain in its current form and if necessary, leaving the concept of 'dominance' to be elaborated upon by way of guidelines.

Application of section 54

16. Section 54(1) provides:

> "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 is prohibited" [emphasis added].

17. The use of the words "have resulted" creates some confusion. It appears that this phrase can possibly be interpreted to mean that section 54 may be applicable to mergers that have occurred prior to the commencement of the Competition Act ("***Pre-Act Mergers***"). APB assumes that this is not the intent of MTI. If this

assumption is correct, MTI should amend section 54 to put it beyond doubt that Division 4 of Part III of the Bill only applies to mergers occurring after the commencement of the Competition Act.

18. APB observes that MTI has provided in section 34 (prohibition against anti-competitive agreements etc.) for the section to apply to agreements, decisions and concerted practices implemented before, on or after the date of commencement of the Competition Act. Given the absence of such a sub-clause in section 54 and the statutory interpretative presumption against retrospective operation of law in the absence of express provision to the contrary, our view is that section 54 is likely to be construed as being prospective in application.

19. In any case, our position is that section 54 should not operate retrospectively and this should be clearly reflected as such, i.e. Pre-Act Mergers should be excluded from the section 54 prohibition. Mergers that are consummated prior to the Competition Act coming into force should not be subject to the new law. To do so would have the effect of severely disrupting the operations of undertakings that have been the product of mergers effected before the commencement of the Competition Act. Moreover, there should not be any concern that such undertakings would be able to adversely affect competition, as they would still be subject to the prohibitions in the Competition Act post-merger. As such, MTI should take the position that Pre-Act Mergers are excluded from section 54 prohibition.

20. On the assumption that Pre-Act Mergers are to be excluded from the scope of section 54, we seek MTI's clarification on its policy position in respect of the following situations:

    (i) where merger documents that are signed prior to the commencement of the Competition Act provide for transfers to be effected after the commencement date of the Competition Act; and

    (ii) where merger documents that are signed prior to the commencement of the Competition Act provide for the completion of the merger to be subject to conditions that can only be determined after the commencement date of the Competition Act.

21. Moreover, clarification is sought on the position under section 34 relating to agreements that are entered into before the appointed date in respect of Pre-Act Mergers. If Pre-Act Mergers are excluded from the scope of section 54, it follows that its underlying contractual documentation should similarly be excluded from the scope of the competition law. In this case, section 34 should not apply to such agreements.

Clarification of sections 62 and 67

22. Section 62 sets out the Commission's power to investigate. In particular, section 62(1) provides:

"The Commission may conduct an investigation if there are ***reasonable grounds for suspecting*** that the section 34 prohibition, the section 47 prohibition or the section 54 prohibition has been infringed" [emphasis added].

23. Based on the language of section 62(1), the Commission has the discretion to exercise its power to investigate once there are reasonable grounds for suspecting that a prohibition under the Bill has been infringed.

24. On the other hand, section 67 sets out the interim measures that the Commission may adopt prior to the completion of its investigation. Specifically, section 67(1) provides:

"If the Commission –

(a) has a ***reasonable suspicion*** that the section 34 prohibition, the section 47 prohibition or the section 54 prohibition has been infringed but has not completed its investigations into the matter; and

(b) considers that it is necessary for it to act under this section as a matter of urgency for the purpose –

(i) of preventing serious, irreparable damage to a particular person or category of persons; or

(ii) of protecting the public interest,

the Commission may give such directions as it considers appropriate for that purpose" [emphasis added].

25. Section 67 allows the Commission to institute interim measures if it considers it necessary to either prevent serious irreparable harm to third parties or protect the public interest while the Commission is investigating a prohibition under the Bill.

26. We appreciate the need for the Commission to possess broad powers of investigation under section 62, as well as the ability to institute interim measures under section 67 while investigation is still on going. However, APB fails to understand the similarity in language between the legal threshold of "reasonable grounds for suspecting" under section 62 and the standard of "reasonable suspicion" under section 67.

27. This is because, as part of the investigative process, the use of section 62 precedes the operation of section 67. The Commission should only be allowed to conduct an investigation if there are "reasonable grounds for suspecting" that a prohibition under the Bill has been infringed. Section 67, which deals with interim measures, can only operate after the Commission has commenced, but has not completed, its investigations into the matter. At present, section 67 requires the Commission to be satisfied that there is a reasonable suspicion that the investigated party will be found to have infringed the prohibition under the Bill and the Commission considers it necessary under the circumstances in section 67(1)(b) that an interim direction be issued pursuant to section 67. By this stage, however, the Commission would have already determined that there are reasonable grounds for suspecting that there has been an infringement. Therefore, it would be redundant for the Commission to again determine, for the purposes of issuing interim directions, if it has a reasonable suspicion of an infringement. This is because if the Commission had already decided that there are reasonable grounds for suspicion, there is no need to again evaluate on the basis of reasonable suspicion, as the two are similar. It follows that the threshold for section 67 must logically be higher as compared to that for section 62.

28. On a related note, APB submits that the standard of 'reasonableness' in section 62 should be an objective one. In the premises, the Commission's power to conduct investigations should only be used sparingly given the intrusive nature and disruptive effect of investigations on the affected party. Such disruptions may in certain instances result in irreparable harm that cannot be adequately compensated should the investigated party be found subsequently to be innocent. To avoid such a possibility, the threshold of "reasonable grounds for suspecting" in section 62 must be sufficiently high given the potential for an abuse of process by a complainant that is intent on utilising the Commission's statutory investigative power to embark on a 'fishing expedition' for evidence of infringement by the investigated party. Instead, there must be adequate and credible information to suggest that a prohibition under the Bill may have been infringed before section 62 can be invoked.

29. For the avoidance of doubt, MTI should amend section 67 to make a clear distinction between the legal standards in sections 62 and 67 respectively. In addition, MTI should consider issuing guidelines on when and how an investigation will be conducted by the Commission. This will be particularly relevant and helpful to the industry in general.

Appeal framework in Part IV of the Bill

30. The appeal framework in Part IV of the Bill is conceptually sound. APB is supportive of the creation of the Competition Appeal Board to hear appeals against decisions of the Commission. In addition, APB observes that recourse to the courts by means other than judicial review is permitted under the Bill.

31. APB understands that the MTI or the Commission will specify the detailed mechanics of the appeal process in due course. One key issue that is not addressed by the Bill relates to the grounds of decision of the Commission or the Competition Appeal Board. APB believes that MTI should provide in the Bill for the Commission and the Competition Appeal Board to state the grounds of their decisions to enable the parties concerned to ascertain the reasons for the decision and to facilitate the proposed exercise of the power of review of the relevant appellate body. Such a provision would promote fair and transparent adjudication process. Further the decision and the grounds should also be published in the public domain, as they would serve as a valuable source of guidance to the industry in general.

Financial penalties under section 69

32. Section 69(4) allows the Commission to impose a financial penalty of up to 10% of the turnover of the business of an infringing undertaking in Singapore for each year of infringement, up to a maximum of three years.

33. While APB agrees that financial penalties will serve as a deterrent against anti-competitive behaviour, APB is deeply concerned over the quantum of financial penalties that can potentially be imposed under section 69. However, APB accepts that MTI may have justification for setting the maximum financial penalty ceiling at 10% of the annual turnover of the infringing undertaking. APB requests MTI to share with the industry its rationale behind pegging the maximum financial penalty at 10% of the annual turnover of the business of the infringing undertaking.

34. APB believes that the maximum penalty under the Competition Bill should be consistent with the sectors that are excluded from the scope of the Bill. For example, IDA, the telecommunications regulator has the power to impose a financial penalty of up to S$1 million under section 8(1)(c)(ii) of the Telecommunications Act for breach of the Telecom Competition Code. Similarly, the maximum penalty that can be imposed by the MDA under section 26(2)(f) of the MDA Act for breach of the Media Market Conduct Code is S$1 million. The quantum of S$1 million is clearly much less than 10% of the annual turnover of the major telecommunication and media licensees operating in Singapore. Undertakings regulated by the Competition Act should not be disadvantaged vis-à-vis their counterparts in the telecommunications and media sector.

35. In the alternative, should MTI take the view that S$1 million is not sufficient deterrence under the general competition law framework, APB suggests that MTI should at the very least, subject the quantum of financial penalty to a maximum figure (eg. S$X million).

36. Finally, APB notes that there is some ambiguity in the interpretation of section 69. Section 69(4) states that the financial penalty imposed shall not exceed 10%

of turnover "for each year of infringement for such period, up to a maximum of 3 years". Thus, in a situation where the infringement takes place for 6 months per year, for a period of 5 years, section 69(4) as presently drafted can lead to two possible interpretations. First, section 69(4) can be interpreted to mean that the Commission may only impose a financial penalty for infringements that take place within and up to 3 calendar years. As the infringement only took place for 6 months per year, the financial penalty cannot exceed 10% of the turnover for 18 months (6 months x 3). On the other hand, section 69(4) can also be interpreted to mean that the Commission may impose a financial penalty of up to 10% of turnover for 3 years. As the total period of the infringement is 30 months (6 months x 5), the Commission may impose a financial penalty of up to 10% of the turnover for 30 months, as opposed to 18 months in the earlier analysis. APB would urge MTI to review the wording of section 69(4) so as to remove this ambiguity.

Rights of private action under section 75

37. As stated by MTI in its consultation paper, competition promotes efficiency and innovation and consequently consumers enjoy greater choices, lower prices and better products and services. All these benefit the economy as a whole and in this sense, the primary function of competition law is a "public" one.

38. On the other hand, APB recognises that there are also private interests embodied in competition law. Often, the effects of anti-competitive behaviour fall unevenly on market participants, at least in the initial phase. Cartels cause immediate harm to their customers by fixing monopoly prices. Competitors or new entrants that are excluded from a profitable market by the abusive conduct of a dominant undertaking suffer the immediate and harmful consequences of such conduct.

39. APB believes that the private interests inherent in competition law can be served by allowing private parties to participate formally in the enforcement proceedings of the Commission through the submission of complaints or petitions and the furnishing of evidence and analysis. This form of participation is already possible under the Bill.

40. By taking this a step further to allow private parties to seek damages in the national courts pursuant to section 75 is one step too far. Private litigation is costly and time-consuming for litigants. In addition, it expends precious resources in the judicial system and therefore should not be encouraged as a form of dispute resolution. The availability of rights of private action could encourage the filing of "strategic" competition lawsuits, for the purpose of gaining an unwarranted advantage over the defendant rather than to remedy a violation of the law. Given that the infringing party is already subject to financial penalties, its competitors can unfairly leverage on the threat of litigation to its advantage. Such behaviour should not be encouraged.

41. Further, at the time of imposing the financial penalties, the Commission may not have factored in the added sanction that the infringing party may be subject to in an action for damages under section 75. As such, the quantum of financial penalty imposed may already have 'punished' the offending undertaking to the fullest extent. This is because section 75 may or may not be invoked by parties who have suffered a loss as a result of the anti-competitive behaviour in question and it is conceivable that the Commission will fix the financial penalty at a level that is proportionate to the violation. Should a right of private action be brought subsequently, the offending undertaking will be punished unfairly by way of added sanctions in the form of the damages awarded under section 75.

42. From a macro level, the availability of rights of private action under national competition law is inconsistent with the sectoral competition frameworks in the telecommunications, media and energy sectors. In these industries, rights of private action are not available and it cannot be that aggrieved competitors that are regulated under the national competition law regime enjoy an unwarranted advantage over their counterparts in these sectors. In view of the foregoing, APB urges MTI to remove section 75.

43. APB submits that even if MTI were to insist on providing for rights of private action under national competition law, exemplary damages should be excluded from the scope of section 75(8). APB is of the view that damages should be grounded on compensatory principles and to award damages that are over and above straightforward compensation for loss runs the risk of over-punishing the offending undertaking while unnecessarily rewarding the claimant. The undertaking's competitors may be motivated to vigorously seek exemplary damages as any added loss on the part of the offending undertaking translates to extra gains on the part of these competitors.

44. Lastly, the availability of exemplary damages is likely to promote a litigious culture. A party bringing an action under section 75 will be encouraged to push for exemplary damages. On the other hand, where only compensatory damages are available, the quantum of damages can be ascertainable without the involvement of the courts. This is likely to encourage settlement between the complainants and the offending undertaking as these two parties can work together to quantify the amount of damages or loss involved. As such, APB is against the inclusion of exemplary damages in the range of remedies under section 75(8).

<u>Sanctions for lodging frivolous complaints</u>

45. APB notes that the Competition Bill does not foreclose the possibility of a person bringing a complaint against an undertaking that is suspected of infringing the prohibitions under the Bill. In particular, there is notable absence of sanctions against the bringing of frivolous and baseless complaints. Complaints that are not founded on reasonable basis constitute an abuse of process and will result in the waste of time and resources.

46. If such behaviours are not curbed, the Commission will be weighed down with unsubstantiated complaints instead of directing its time and resources towards the pursuit of genuine anti-competitive behaviours. Moreover, MTI should send a strong signal to the public at large that disruptive 'tactics' in the form of baseless complaints are gravely frowned upon. APB therefore proposes that MTI create a strong disincentive in the Bill to minimise the number of frivolous complaints.

V. CONCLUSION

1. APB welcomes the opportunity to participate in this round of the public consultation exercise. We are of the view that the overall structure and approach taken by MTI is a step in the right direction. However, we strongly feel that the Bill will require fine-tuning to address the issues set out in this submission. APB looks forward to future involvements in the public consultation process.