



The Association of Consulting Engineers of Hong Kong

香港顧問工程師協會

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**By email: bc 12 09@legco.gov.hk**

Ms Debbie Yau  
Clerk to Bills Committee on Competition Bill  
Legislative Council Building  
8 Jackson Road, Central  
Hong Kong

Dear Ms Yau

**COMPETITION BILL**

The Association of Consulting Engineers of Hong Kong (ACEHK) is pleased to present to the Bills Committee the attached submission on Hong Kong's Competition Bill.

ACEHK is a non profit making association representing the consulting engineering profession in Hong Kong. The association currently has a membership of over 35 consulting engineering firms. More information on ACEHK is available at <http://www.acehk.org.hk>

ACEHK believes the submission will assist the Bills Committee to work to secure appropriate refinements to the Bill, so as to strike an appropriate balance between deterring anti-competitive behaviour and ensuring the law does not impede the legitimate activities of associations whose activities advance the interests of members and benefit the general public in Hong Kong.

ACEHK would be pleased to respond to any questions the Bills Committee has regarding the matters dealt with in this submission.

Yours sincerely

Fergal Whyte  
Chairman  
The Association of Consulting Engineers of Hong Kong

Enc.



The Association of Consulting Engineers of Hong Kong  
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# Submission to the Bills Committee of the Legislative Council regarding the Competition Bill

## Association of Consulting Engineers Hong Kong (ACEHK)

Please note that capitalised terms used in this submission have the meaning given to those terms in the Hong Kong Competition Bill unless it is indicated otherwise.

### Introduction

#### *About ACEHK*

ACEHK was established in 1977 with the objective of promoting the advancement of the consulting engineering profession in Hong Kong. The key roles of ACEHK include:

- To establish standards of conduct for consulting engineers in Hong Kong;
- To confer with Associations representing manufacturers, contractors and others engaged in engineering works, on matters of common interest; and
- Generally to represent the profession to the Government and to the public.

The members of our association are consulting engineers in Hong Kong. Membership of the association is open to all such professionals in Hong Kong who meet our membership qualification standards.

#### *About consulting engineers*

Consulting engineers are independent contractors retained to provide engineering services on a project-by-project basis. An outline of the services most commonly provided by consulting engineers in Hong Kong is set out in the Annexure.

### ACEHK's comments on the Competition Bill

ACEHK has been monitoring developments in relation to the Competition Bill ("Bill"), in accordance with its responsibility to members and to the broader community to play an active role in consultation on new legislation and regulatory matters.

Following introduction of the Bill into the Legislative Council in July 2010 and formation of the Bills Committee in October 2010, ACEHK wishes to communicate to the Bills Committee the following observations in relation to the Bill:

<b>1. ACEHK believes that the activities of professional associations such as ACEHK should be exempt from the Bill</b>
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Like most associations representing professionals in Hong Kong, ACEHK:

- (a) provides members with guidance and directions on matters such as:
  - (i) prudent standards of behaviour for the profession;

- (ii) appropriate remuneration levels for the profession;
  - (iii) suitable conditions of engagement between members and clients; and
- (b) from time to time collectively represent members in pursuing fair and equitable terms for contracts to be used in relation to engineering-related projects in Hong Kong,

which activities are referred to hereafter as "**Professional Supervision and Representation**".

ACEHK understands that Professional Supervision and Representation activities by professional associations have from time to time been successfully challenged under the competition laws of jurisdictions outside Hong Kong (such as in Singapore and the United Kingdom), notwithstanding that it is widely recognised (including by competition law regulators in those jurisdictions) that such activities provide clear benefits for professions, clients and the community as a whole.

In this context, ACEHK has consulted with competition law experts to ascertain whether professional associations in Hong Kong may face similar issues in Hong Kong if the Bill is passed. We have been advised that such issues could arise under the current drafting, particularly in relation to the First Conduct Rule (the prohibition of agreements or arrangements that prevent, restrict or distort competition in section 6 of the Proposed Law).

Specifically, ACEHK understand that Professional Supervision and Representation activities by professional associations in Hong Kong may be deemed to have the effect of restricting competition, because when such associations seek to facilitate (and/or members agree to act in accordance with) a degree of uniformity in relation to aspects of market participation this may be considered to lessen the scope of competition in the market. The fact that the guidance provided by professional associations such as ACEHK is clearly designed to benefit the profession, clients and the community as a whole is apparently not taken into account when assessment is made under the relevant section 6 of the Proposed Law.

ACEHK understands that its Professional Supervision and Representation activities (and analogous activities undertaken by many similar associations) could therefore be unlawful unless it can be shown that the general exclusion from the Conduct Rules in section 1 of Schedule 1 applies to such activities. In order for that general exclusion to apply, ACEHK understands that the professional association would effectively need to demonstrate that the relevant activities:

- (a) contribute to improving production or distribution, or promoting technical or economic progress;
- (b) do not impose on the members concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a); and
- (c) does not afford the members concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Essentially, this means that a professional association would bear the onus of having to collect and furnish to a relevant enforcement body evidence demonstrating each of the factors (a) to (c) above if their Professional Supervision and Representation activities were challenged by the Competition Commission or a private litigant.

ACEHK is therefore concerned that the Proposed Law may hinder the legitimate activities of professional associations, and potentially place an unfair financial and resourcing burden on such associations in terms of the steps they would need to take to defend allegations of anti-competitive

conduct. As will be evident from the comments above, a relatively complex assessment process may apply when conduct is challenged under the conduct rules. Because this process will necessarily involve subjective elements, it will not always be clear that particular conduct will or will not withstand a challenge. The scope for challenges will be broad, and defending challenges may require that substantial resources and time be devoted to gathering and presenting evidence to the Commission and/or Tribunal. According to international experience, it may also be necessary to engage the services of economists (not to mention lawyers) to present a compelling case.

Accordingly, ACEHK submits that the Bills Committee should seek an amendment to the Bill to exempt professional associations. This will protect professional associations from the prospect of costly and resource-sapping challenges which would undermine their ability to continue to pursue legitimate pro-competitive objectives.

Alternatively, ACEHK submits that the Bills Committee should stress to the Government the need to conduct a review of the activities of leading professional associations such as ACEHK, with a view to facilitating an exercise by the Chief Executive in Council of his power under the Proposed Law to issue to issue a public policy exemption in respect of activities that and may otherwise be challenged under the law.

In terms of the legitimacy of the Professional Supervision and Representation activities conducted by ACEHK and similar associations, ACEHK considers it appropriate to make the following points:

(a) Guiding members regarding appropriate standards of professional behaviour

Professional associations are almost always established with aspirations that include advancing their represented profession, promoting the interests of individuals engaged in that profession, and the public interest. A key means to further achievement of each of these aims is the adoption of standards of professional behaviour, often in the form of a code of conduct and/or code of ethics.

In this context, ACEHK has implemented a code of professional conduct for its members. The code ensures members are aware of, and adhere to, industry best practice and that all aspects of members' relationships with consumers are conducted in a prudent and appropriately professional manner.

The code is available to the public. In their dealings with association members, consumers therefore have reference to a baseline standard of professional conduct that it can expect from any consulting engineer they engage that is a member of the association, and can better understand the scope and nature of the services they will receive from such member. Naturally, the code also helps to protect customers from malpractice by consulting engineers.

(b) Guiding members on remuneration matters

The guidance professional associations may provide to members from time to time on remuneration matters is transparent and in the interests of both the broader profession represented by such associations as well as the customers of such professions and the broader community. It is completely unrelated to the forms of price collusion that are properly a target of enforcement under competition laws.

For example, the guidance that ACEHK provides to members on fees is intended to ensure that the high quality of services provided by consulting engineers is not diminished by cost pressures. By discouraging consulting engineers from engaging in excessive fee discounting, ACEHK is endeavouring to avoid a situation where fees are reduced to a level that cannot sustain an appropriate standard of service provision. Instead, ACEHK's guidance aims to

facilitate a situation in which of selection of consulting engineers occurs primarily by reference to their service quality and skills. Given the relationship between the work of consulting engineers and not only customer satisfaction but public safety, this is a vital aspect of ACEHK's role in the industry.

ACEHK's recommended fee levels also help protect consumers from excessive charging. As ACEHK's recommended fee levels are publicly available on its website, consumers have useful information about the average or standard costs of services, and may be assisted to reduce the transaction costs of negotiating prices.

(c) Working with members on standard conditions of engagement

Professional associations commonly work with members and their clients to develop framework standard terms of engagement.

In this context, ACEHK has worked with members to develop standard Conditions of Engagement in respect of matters such as report and advisory work, structural engineer work, and the design and supervision of engineering systems in buildings.

It is widely recognized that standard contract terms can reduce transaction costs for both business and consumers, and facilitate increased competition among firms by permitting consumers to more easily compare competing offers according to the key contract variables.

Additionally, the standard Conditions of Engagement promoted by ACEHK ensure engagements are properly documented, reducing the risk of misunderstandings and disputes. It must be noted that the Government already participates in and encourages ACEHK in the development of standard Conditions of Engagement and contracts.

(d) Collective representation of members in pursuing fair and equitable terms of contracts

One of the major roles of associations such as ACEHK is to collectively represent members in pursuing the objective of achieving fair and equitable terms of contracts to be used in projects in Hong Kong (both public and private works).

This representation takes a number of forms. For example, the association is often consulted by various procurers of projects to comment on the terms and conditions of standard form agreements prior to, or even after, the procurement concerned. At other times, where the procuring body requires the use of unfair and harsh terms and conditions, we may be consulted by members and requested to discuss the possible amendment of these terms directly with the procuring body.

This type of collective representation role is absolutely necessary for trying to achieve a fair and equitable basis for tendering, and will therefore tend to produce lower priced tenders.

ACEHK understands that it remains uncertain whether Professional Supervision and Representation activities such as those referenced in the preceding paragraphs (a) to (d) would be deemed unlawful if the Bill was enacted. However, as explained further above, ACEHK considers that it would be unfair if professional association were faced with the potentially severe burden of defending allegations of anti-competitive conduct that may or may not eventually be upheld, and ACEHK is concerned that this may seriously erode their ability to continue to provide key services and assistance to their members and, ultimately, the broader community.

ACEHK considers that the various types of activities it engages in on behalf of, or in supervision of, its members are unarguably of benefit to the public, and help improve economic efficiency and

transparency in relation to the markets in which its members participate. ACEHK therefore believes that its conduct should be recognised as not only compliant with fair competition principles, but fundamental to the efficient functioning of the market.

***2. In the absence of a relevant exemption, ACEHK believes the Competition Commission should consult with professional associations and formulate guidance on how the Proposed Law will apply to them***

As noted above, ACEHK considers that there are compelling grounds for the activities of professional associations such as ACEHK to be exempt from the Proposed Law.

In the unfortunate situation that such an exemption is not introduced, ACEHK believes that it will be imperative that competition-orientated guidelines relating to the activities of professional associations are developed by the Competition Commission as a priority, and published well ahead of the commencement of the law.

ACEHK believes these guidelines should be developed in consultation with representatives of leading professional associations in Hong Kong, including ACEHK, to ensure (for example) that the guidelines address an appropriate range of professional association practices and that the Commission is furnished with appropriate information regarding the rationale for and benefits from such practices.

Accordingly, ACEHK calls upon the Bills Committee to stress to the government the importance of ensuring that appropriately framed guidelines, developed in consultation with professional associations, are introduced in a timely fashion in the event that an exemption for professional associations/ACEHK is not implemented.

***3. ACEHK supports the implementation of a broad 'de minimis' rule***

ACEHK supports the adoption of an appropriately framed 'de minimis' rule as part of the enforcement framework for the Proposed Law. Such a rule would take conduct that does not relate to a 'substantial part' of a relevant market (such as agreements between small and medium sized businesses) outside of the purview of the proposed law.

ACEHK understands that 'de minimis' rules play a key part of competition law enforcement in many jurisdictions around the world, including Singapore, the U.K. and the E.U. Introduction of an equivalent rule in Hong Kong will assist to provide comfort to smaller businesses or participants in strongly contested markets (such as ACEHK members) regarding the potential impact of the Proposed Law, and relieve those businesses of some of the administrative and economic burden that may otherwise arise relating to legal review of all agreements.

Therefore, ACEHK recommends to the Bills Committee that it take steps to ensure the Bill is amended (or later regulations will be introduced) to introduce a broad de minimis rule into the enforcement framework relating to the proposed law.

***4. ACEHK believes that vertical agreements and 'M&A' transactions should be shielded from any prospect of challenge under the First Conduct Rule***

ACEHK understand the First Conduct Rule is worded in a manner that will permit challenges not only to so-called 'hardcore cartel' arrangements or other forms of anti-competitive collusion between competitors, but also to so-called 'vertical' agreements and M&A transactions.

ACEHK supports the Government's earlier proposal ('Proposal 26' in the Government's May 2008 *Detailed Proposals for a Competition Law* consultation paper) to exclude vertical agreements from review under the First Conduct Rule, and does not understand why the Government appears to have now deviated from this proposal. ACEHK has learnt that there is broad consensus amongst antitrust experts that vertical agreements only present competitive concerns when the businesses entering into such agreements possess considerable market power, and therefore a failure to exclude such agreements from the First Conduct Rule raises the prospect of parties challenging vertical agreements between SMEs purely as a negotiation or 'pressure' tactic, with the defendant(s) having to incur the financial and resource costs of responding to such claims notwithstanding that they will almost always have little merit.

ACEHK similarly believes that M&A transactions should be explicitly exempt from the First Conduct Rule. This will ensure there is no scope for parties to explore the potential loophole in the Proposed Law that may allow the First Conduct Rule to be used as a basis for challenge of such transactions *in any sector*, notwithstanding that the Merger Rule in the law is clearly intended to apply merger review specifically (and only) to deals relating to the telecommunications sector.

Accordingly, ACEHK recommends that the Bills Committee take steps to ensure that vertical agreements and M&A transactions are excluded from the potential scope of challenges under the First Conduct Rule.

***5. ACEHK considers that government entities should be subject to the proposed law when participating in commercial activities***

ACEHK does not believe the Government has made its case for a wholesale exemption from the Proposed Law.

ACEHK is aware of only two arguments that the Government has raised in support of the proposed exemption, being that it will protect government entities from unfounded and misconceived complaints, and that anti-competitive conduct in the private sector is the main competition-related concern of the public.

In the view of ACEHK, it is viewed as entirely self-serving to suggest that Government entities deserve more protection from the prospect of misconceived complaints that would be afforded to the private sector.

Further, ACEHK considers that it is misguided to assume that the public in Hong Kong is more concerned about anti-competitive conduct by private sector entities than by Government entities. ACEHK believes the Hong Kong public are keen to see the Government take steps to address and eradicate anti-competitive conduct wherever it arises and adversely impacts consumer interests in Hong Kong, whether that be through the conduct of private or public sector entities.

This issue is of special concern to ACEHK, as government entities are a major acquirer of consulting engineering services in Hong Kong. ACEHK considers that exempting Government entities without sound reason undermines the principles of fairness and promotion of a 'level playing field' for businesses in Hong Kong.

Accordingly, ACEHK submits that the Bills Committee should seek amendments to the Bill to ensure that the key prohibitions therein are equally applicable to relevant Government and private sector entities in the absence of those entities demonstrating their qualification for an exemption.

***6. ACEHK believes the Competition Commission should be required to consult with businesses on, and advise on the legality of, proposed arrangements where there is uncertainty***

ACEHK understands the Bill contemplates consultations being held between business operators and the proposed Competition Commission, as a means by which the Commission can provide guidance on the likelihood of proposed agreements or arrangements being considered to infringe the law (in particular by giving direction on whether a relevant exclusion or exemption from the key prohibitions is considered to apply to such agreements or arrangements).

However, ACEHK also understands the Commission is provided with wide discretion on whether to proceed with, or provide useful guidance in, such consultations. In particular, ACEHK understands the Bill would empower the Commission to refuse applications for consultation if it considered that such applications did not pose "novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions".

ACEHK is concerned this may result in a regime under which businesses are deprived of the ability to usefully consult with the Commission in many cases.

ACEHK considers it is appropriate for businesses in Hong Kong to have access to a consultation process of broad scope, given that many such businesses will have never previously been exposed to competition laws and will require time to fully understand the nuances of its application.

Accordingly, ACEHK submits the Bills Committee should seek amendments to the Bill to require the Competition Commission to consult with business operators and provide them with guidance on the Commission's view of the legality of proposed agreements or arrangements in all cases where those business operators furnish the Commission with sufficient information and assistance to facilitate its provision of such guidance.

### **Conclusion**

ACEHK respectfully requests the Bills Committee consider the comments and recommendations set out in this submission by ACEHK, which are provided in the expectation that the Bills Committee will continue to work to ensure the Bill balances the valid objective of addressing anti-competitive practices in Hong Kong with the need to protect the legitimate operations of organisations such as professional associations and the continued promotion of a business-friendly environment in the region.

ACEHK would be pleased to discuss or supplement this submission in any manner that may be useful for the Bills Committee, and any enquiries in this regard may be directed to:

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## ANNEXURE

### Services provided by Consulting Engineers

The consulting engineer provides services which can be divided into five broad categories:

1. **Pre-Investment Studies:** These studies are the investigations which normally precede decisions to invest in specific projects and are to:
  - establish investment policies and sector policies;
  - determine the basic features and the feasibility of individual projects;
  - and define changes in policies, operations and institutions necessary for successful implementation or functioning of projects.

As well as project-orientated studies, comprehensive investigations can be undertaken such as water resource surveys, environmental studies, energy management studies and transportation planning including traffic and transport surveys, traffic engineering and traffic management studies.

2. **Design and Supervision Services for Construction:** These normally consist of three phases:
  - Predesign engineering such as functional designs, feasibility studies, topographical and other surveys, negotiations regarding services and utilities and soils investigations, are needed to establish feasibility and the design criteria. Detailed target cost and time estimates are usually provided as part of a feasibility report.
  - Basic design engineering comprising preliminary design, detailed design and advice on tendering and award of contracts. The consulting engineer produces drawings, specifications and other contract documents, ensures that the client's needs are met in a planned and orderly way and provides general monitoring of construction.
  - Special services including resident supervision of construction; special inspection and testing; purchasing; scheduling; cost control and expediting services; assisting in placing equipment in operation and special record drawings and operation manuals.
3. **Specialised Design and Development Services:** Consulting engineers can be engaged to research and develop new designs, concepts, processes and inventions. For example new processes for manufacture or treatment of raw materials, for applications of automatic controls, design of manufactured buildings or items of machinery or equipment. In many cases this is done in conjunction with the client's own staff.
4. **Project Management:** A firm of consulting engineers can be commissioned to plan and manage a project in its entirety. This service is of particular value to a client who does not have the necessary resources to manage a project or where the project is particularly large or complex. The firm will provide design services, procurement, construction management, commissioning and, if required, feasibility analyses and assistance in arranging finance. Project implementation will involve a greatly increased management effort and use multiple contracts for construction, materials and equipment supply. The firm providing project management services prepares and negotiates contracts with all entities involved in the actual construction process and manages the construction effort.
5. **Advisory Services:** Consulting engineers can be engaged to give professional engineering advice. In addition to these services, they can be engaged for their engineering knowledge, experience and judgement to give a professional opinion on management, valuations, production, inspection, testing and quality control as well as assistance in resolving contractual disputes. They will give engineering evidence to courts, commissions, boards and other judicial bodies.