中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會 LEGISLATIVE COUNCIL
林健鋒 議員 **Hon. Jeffrey Kin-fung Lam,** SBS, JP

31 May 2011

The Hon Andrew Leung Kwan-yuen, GBS, JP
Chairman for the Bills Committee on Competition Bill
Legislative Council Secretariat

Dear Chairman and Members,

FAQs on Conduct Rules and other Key Issues of the Competition Bill

As the Bills Committee begins examination of the key provisions on Conduct Rules, I would like to circulate a document summarizing the Hong Kong General Chamber of Commerce's key concerns about the Competition Bill and the Chamber's recommendations for addressing those issues. I hope that this document, in FAQ format, will be a useful reference for Members.

To facilitate public discussion on how Hong Kong may find a right competition law for its economy, the Chamber has invited several international experts to Hong Kong to address a Chamber conference, to be held on 23 June 2011. The Chamber is sending invitations to all Bills Committee Members. I have the pleasure to attach herewith a conference programme with speakers' biographies for Members' information. We sincerely hope that the conference will shed light on our discussion and help to build consensus.

Thank you very much.

Sincerely yours,

Jeffrey Lam

Encl.

香港柴灣寧富街三號誠興大廈四樓 4/F., Eltee Building, 3 Ning Foo Street, Chai Wan, Hong Kong
電話Tel : 2896 8101 傳真Fax : 2897 0254 電子郵件Email : jefflam@fowind.com.hk

中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會 LEGISLATIVE COUNCIL
林健鋒 議員 **Hon. Jeffrey Kin-fung Lam,** SBS, JP

HONG KONG GENERAL CHAMBER OF COMMERCE
FAQs on Key Issues of the Competition Bill

1. **Why is the Hong Kong General Chamber of Commerce (the "Chamber") recommending certain amendments to the Bill?**

The Chamber believes it is essential that the Bill is **clear enough** for businesses to comply, and **proportionate** (i.e. does not impose a more onerous burden on businesses than is necessary to achieve its objective). Otherwise the new law will stifle competition rather than encourage it, which would be the opposite of the Bill's objective. The Chamber believes that the Bill in its current form does not meet these criteria. It has proposed certain amendments, which would ensure that the Bill does meet these criteria.

2. **In what respects is the Bill not clear enough?**

The core parts of the Bill are the First and Second Conduct Rules, since these will determine what businesses can and cannot do on a daily business. Yet it is impossible to determine from a reading of the Conduct Rules what conduct is or is not permitted.

For example, key concepts such as "prevent, restrict or distort competition"; "substantial degree of market power", and "abuse" are not defined. The so-called illustrative examples of anti-competitive agreements and "abuse" are equally vague, and capable of being applied to innocuous everyday commercial behaviour. For example, agreements to "share sources of supply" would seem to cover joint purchasing agreements to negotiate better terms from suppliers, but these are perfectly normal and efficient, and particularly common amongst SMEs. And when does vigorous price competition which lowers prices for the benefit of consumers become "predatory behaviour towards competitors" under the Second Conduct Rule?

Other jurisdictions have struggled with this issue and have not yet found a clear answer. But there is a more fundamental problem. To the extent that the legality or otherwise of conduct under the Bill depends on the future effects of such conduct on the market, save in the most extreme cases these effects are almost impossible to predict. A business could engage in conduct or commercial arrangements thinking it is acting legally, and then be told five years later that it has been acting illegally because of a change in market circumstances. This is simply not acceptable under the rule of law principle, which is enshrined in Hong Kong's Bill of Rights Ordinance.

香港柴灣寧富街三號誠興大廈四樓 4/F., Eltee Building, 3 Ning Foo Street, Chai Wan, Hong Kong
電話Tel : 2896 8101　傳真Fax : 2897 0254　電子郵件Email : efflam@fowind.com.hk

林健鋒 議員 **Hon. Jeffrey Kin-fung Lam,** SBS, JP

3. **So why have other jurisdictions used similar types of law without any problems?**

The fact is that other jurisdictions are having problems. For example, there is a general consensus amongst experts in the EU and the US that the lack of clarity as to what "abuse" (or in the US "monopolization") means is unacceptable and needs to be addressed. It is also recognized that competition law enforcement in the US, the EU and many other places around the world has intervened against conduct that it was later realized was highly competitive and that general prohibitions have a chilling effect on competition as businesses pull their competitive punches for fear of breaching unclear rules. By adopting similar vague prohibitions in Hong Kong, we would be importing the same problems. Hong Kong has an opportunity to learn from these problems, and solutions that have been introduced in developed competition law jurisdictions, and find solutions which will work in Hong Kong. We should take advantage of this opportunity.

4. **Can Guidelines from the future Commission or the Government provide the answer?**

No. For at least these reasons:

- it is Legco's function as legislature to determine what the legislation means, not the future Commission;

- even if Guidelines were permissible, they would not be binding on the Tribunal, and there would be no guarantee that the Tribunal would follow them. (They would not even necessarily be binding on the Commission itself: see below). Unlike the EU, it is the Tribunal which is the decision-maker, not the Commission;

- in any event, the future effects of certain conduct cannot be predicted by the Commission in Guidelines, since each case has to be assessed at the time it is being investigated. As the Telecommunications Authority has said in his guidelines on the competition provisions in the Telecommunications Ordinance "... nothing in the Guidelines would pre-empt the TA's subsequent consideration of particular events on their merits".

- even if an attempt were made to try to draft guidelines into a schedule to the Bill, this would take many months or years, and there is simply not enough time to attempt this between now and July 2012.

5. **The Bill provides that businesses can apply to the Commission for a decision as to whether a proposed agreement or conduct is covered by an exclusion. Does this not solve the problem of lack of certainty?**

No, for three reasons:

香港柴灣寧富街三號誠興大廈四樓 4/F., Eltee Building, 3 Ning Foo Street, Chai Wan, Hong Kong
電話Tel : 2896 8101 傳真Fax : 2897 0254 電子郵件Email : jefflam@fowind.com.hk

- the decision only relates to whether an exclusion applies – it does not relate to whether the agreement or conduct is caught by the Conduct Rules in the first place, which is equally unclear;

- the vague nature of the prohibitions means that many applications would be made to the Commission. However, the Bill provides that the Commission is not required to issue a decision, except in limited circumstances. Given the likely strain on Commission resources, many businesses would therefore be left with uncertainty;

- in any event, it is unacceptable in a free society like Hong Kong that many, if not most, business agreements and conduct with effect in Hong Kong have to be notified to an authority for approval.

6. **Apart from whether the First or Second Conduct Rules apply to a given agreement or course of conduct, are there other aspects of the Bill which are unclear?**

Yes. The major ones are as follows:

- the Government has said that agreements and mergers which produce efficiencies which outweigh any harm to competition will be excluded from the First Conduct Rule and the Merger Rule respectively. However, while the Merger Rule clearly states this (Schedule 7 paragraph 8(1)), the exclusion in Schedule 1 paragraph 1 under the First Conduct Rule is expressed in different, unclear terms.

- there is no logical reason why the same exclusion should not apply to conduct under the Second Conduct Rule. Yet the Bill does not currently contain such an exclusion;

- the Government has said that it has made a policy decision that the Bill will not apply to mergers, other than those currently regulated under the Telecommunications Ordinance. Yet the Merger Rule as currently drafted could apply to mergers outside the telecommunications sector if one of the companies involved happened to have a carrier licensee within its group, and the Conduct Rules could also apply to mergers.

7. **So what changes has the Chamber recommended, to improve legal certainty?**

In its submission to the Bills Committee on Competition Bill on 19 November 2010, the Chamber has suggested a number of relatively straightforward amendments to the Bill which would greatly improve legal certainty and limit the excessively broad application of the new law. In particular:

香港柴灣寧富街三號誠興大廈四樓 4/F., Eltee Building, 3 Ning Foo Street, Chai Wan, Hong Kong
電話Tel : 2896 8101 傳真Fax : 2897 0254 電子郵件Email : jefflam@fowind.com.hk

- the vague examples in the First Conduct Rule should be replaced by more specific references to the type of arrangements normally prohibited under competition laws, namely price-fixing, bid-rigging and market-sharing (so called "hardcore conduct");

- for other types of conduct, the Government should recognize that it is not appropriate to subject them to a prohibition, for two reasons. First, businesses should not be subject to a prohibition based on future economic effects, and whether the efficiencies outweigh any harmful effects. Businesses are simply not equipped to conduct such assessments with sufficient certainty that the authorities will agree with their assessments. Secondly, such a sweeping prohibition would capture within its scope many agreements and commercial conduct which are not harmful, and in many cases may be economically efficient and good for consumers. It should not be for businesses to prove that their agreements and conduct are beneficial- it should be for the Commission to prove otherwise.

8. **So does this mean that the Bill can only tackle "hardcore" conduct?**

No. If the Government wishes to tackle other conduct which may adversely affect competition without any countervailing economic benefits, this should be done not through an "upfront" general prohibition, but by giving the Commission the power to intervene and investigate such conduct, and if necessary apply to the Tribunal for a cease-and-desist order: illegality should only arise if a Tribunal order to cease to engage in specifically-defined conduct is breached. Such a cease and desist process is, for example, used in US antitrust law and enshrined in the recent amendments to the Canadian competition statute, because both jurisdictions realize the vital need to ensure that businesses do not stop competing for fear of breaching uncertain competition laws.

9. Is the Chamber suggesting that Canada's Competition Act should be used as the basis for drafting Hong Kong's Bill?

No. The Chamber has merely pointed out that Canada follows a similar approach to tackling non-hardcore conduct in its competition statute, in an effort to reassure the Government that such an approach would not be unique to Hong Kong. Regrettably this has been misinterpreted in some quarters as a request by the Chamber that Hong Kong copies Canada's competition law, in whole or in part, including criminality of hardcore conduct. This is certainly not the case (as should be obvious from reading the Chamber's submissions). Taking the Chamber's recommended approach to non-hardcore conduct would require relatively straightforward amendments to the Bill, and would not involve copying Canada's Act, in whole or in part.

10. Are there any other changes to the Bill which should be made to improve legal certainty?

香港柴灣寧富街三號誠興大廈四樓 4/F., Eltee Building, 3 Ning Foo Street, Chai Wan, Hong Kong
電話Tel : 2896 8101 傳真Fax : 2897 0254 電子郵件Email : jefflam@fowind.com.hk

Yes, a number of other amendments should be made:

- The term "prevent, restrict or distort" competition should be replaced by the term "substantially lessen competition" (as used in e.g. Australia, New Zealand and Canada, and as originally proposed by the Government). This would make it clear that the concern is about conduct which substantially reduces competition in the market place, not conduct which merely restricts commercial freedom (as any contract does).

- The wording of the exclusion under the First Conduct Rule for agreements enhancing overall economic efficiency (Schedule 1 paragraph 1) should align with the wording of the equivalent exclusion in the Merger Rule (Schedule 7 paragraph 8(1)), and the same exclusion should be inserted under the Second Conduct Rule;

- The term "substantial degree of market power" should be replaced by "dominant position", which is more objective and easier to understand;

- "abuse" should either be defined, or replaced by a clearer description of the type of conduct which is prohibited. The Chamber recommended the latter approach in the mark-up of the Bill which it submitted to the Bills Committee in November 2010,[1] given that other jurisdictions such as the EU have tried, and failed thus far, to formulate a sufficiently-clear definition of "abuse".
- In line with the Government's stated policy objective, the Merger Rule should be amended to restrict it to mergers of carrier licensees, and the Conduct Rules should expressly exclude mergers from their scope, as in Singapore and Jersey.

11. **The Chamber has said that the Bill, as currently drafted, is not only unclear, but also disproportionate. Why is it disproportionate?**

The reasons are as follows:

Penalty

- the penalty cap of 10% of total worldwide turnover for each year of the infringement is grossly excessive and disproportionate. It is a cap that is multiples even of the EU, a jurisdiction with a population about **71 times bigger** than that of Hong Kong and which is already regarded by the international community as having very steep fines. In the EU there is an absolute cap of 10% of worldwide turnover for *one year*, not *each year* of the infringement. In practice, however, the

[1] The Chamber's suggestion is to amend S21(1) of the Competition Bill to: "An undertaking that has dominant position in a market must not engage in conduct if its effect or likely effect is to substantially lessen competition in Hong Kong by foreclosing competition where there is no other economic rationale for this conduct." See HKGCC Submission to Legco Bills Committee on Competition Law, 19 November 2010

香港柴灣寧富街三號誠興大廈四樓 4/F., Eltee Building, 3 Ning Foo Street, Chai Wan, Hong Kong
電話 Tel : 2896 8101 傳真 Fax : 2897 0254 電子郵件 Email : jefflam@fowind.com.hk

EU takes turnover in the relevant product or service market as the basis for calculation, which is similar to the approach in Singapore. Moreover, in the EU a fine can only be imposed if the infringement is intentional or negligent – there is no such limitation in the Hong Kong Bill.

- the Government has argued on the one hand that this is "only a cap"- but on the other has argued that it is a "necessary deterrent", which implies that there is a real prospect that the penalty may reach that level in certain cases. The fact of the matter is that the Government would not introduce such a cap unless it contemplated it could be invoked at some stage and, if a cap of this amount is allowed to stand, there will be ever-increasing pressure on the Tribunal to move up towards the cap, otherwise it will be accused of being weak.

- the effect of the excessive penalty cap currently proposed, especially when combined with the vague and broad nature of the prohibitions, will be that businesses will be afraid to compete vigorously if there is any risk whatsoever that their conduct may infringe the law. This would be bad for business, bad for consumers and bad for the Hong Kong economy as a whole. The dynamism which has traditionally been the hallmark of Hong Kong's economy would certainly suffer.

- the Chamber submits that the penalty should be set at a level no higher than the equivalent level in Singapore, namely 10% of annual turnover in the relevant market in Hong Kong, for the duration of the infringement up to a maximum of three years. This would provide a more than sufficient deterrent, especially when combined with the other potentially severe sanctions available.

Private Actions:

This chilling effect on competition would be further exacerbated by the proposal for standalone private actions. Private litigants would not be bound by the Commission's Guidelines or enforcement policies/priorities. They would also be able to circumvent forbearance by the Commission or commitments that it might have negotiated in any particular case. This will further undermine certainty for businesses. They will be a further deterrent to vigorous competition as businesses seek to minimize their exposure to private actions, which, even if unmeritorious, will be notoriously difficult to strike out (as over-seas experience shows) because of the fact and economic evidence heavy nature of competition cases. It would also foster a litigation culture in Hong Kong: vague prohibitions of the type proposed would provide ample opportunity for strategic disputes and litigation, and risk overburdening the Tribunal and prevent it from dealing expeditiously with its own priority tasks under the law. To avoid these problems, only follow on actions should be permitted, especially in the early years of a new regime, as in other jurisdictions such as the UK.

香港柴灣寧富街三號誠興大廈四樓 4/F., Eltee Building, 3 Ning Foo Street, Chai Wan, Hong Kong
電話Tel : 2896 8101 傳真Fax : 2897 0254 電子郵件Email : jefflam@fowind.com.hk

12. **Would adopting the Chamber's proposed amendments jeopardize the July 2012 target date for passing the Bill?**

No. The amendments would require relatively few and straightforward drafting changes - in fact the Chamber provided a mark-up of the Bill showing its suggested amendments with its submission to the Bills Committee in November 2010. The Chamber would be happy to work with the Government and Bills Committee in drafting the necessary amendments.

-END-

香港柴灣寧富街三號誠興大廈四樓 4/F., Eltee Building, 3 Ning Foo Street, Chai Wan, Hong Kong
電話Tel : 2896 8101 傳真Fax : 2897 0254 電子郵件Email : jefflam@fowind.com.hk

HKGCC
Hong Kong General Chamber of Commerce
香港總商會 1861

Designing the Right Competition Law for Hong Kong
HKGCC International Conference

Date: 23 June 2011 (Thursday)
Venue: Cliftons, Level 33, 9 Queens Road, Central

9:00-9:05	Welcome Remarks *Representative of the Hong Kong General Chamber of Commerce*
9:05-9:20	Introduction by Conference Chair *Conference Chair: Sir Christopher Bellamy QC* *Senior Consultant, Linklaters, London, UK* *Former President, Competition Appeal Tribunal, UK* *Former Judge at the European Court of First Instance, Luxembourg*
9:20-9:30	Setting the Scene - Hong Kong's Competition Bill and its Key Issues *The Hon Jeffrey Lam, Kin-fung, SBS, JP* *Member, Legislative Council Bills Committee on Competition Bill, HK*
9:30-10:00	Maximizing Legal Certainty in Conduct Rules – the European Union Experience *Gavin Robert, Partner, Linklaters, London, UK*
10:00-10:30	The Canadian Experience *Keynote Speaker: Melanie Aitken, The Commissioner of Competition, Canada*
10:30-10:45	Q&As
10:45-11:00	Coffee Break
11:00-11:30	Maximizing Economic Benefit – a European Perspective *Dr William Bishop* *Professor of the Economics of Competition Law, College of Europe, Bruges, Belgium* *Vice President, Charles River Associates, London, UK*
11:30-12:00	Maximizing Economic Benefit – a U.S. Perspective *Professor Janusz Ordover* *Professor of Economics, New York University, USA* *Senior Consultant, Compass Lexecon*
12:00-12:30	Implications of Overseas Experience for the Drafting of Hong Kong's Competition Bill *Stephen Crosswell, Member of the HKGCC Expert Group on Competition Law*
12:30-12:45	Q&As
12:55-1:00	Closing remarks and Conference Ends

Overseas Speakers' Biographies

Conference Chair: **Sir Christopher Bellamy QC**

Sir Christopher is considered to be one of the most influential and well respected competition lawyers in Europe. As senior consultant with the Linklaters competition team, he specialises in high level strategic advice in multi-jurisdictional cases involving antitrust, regulatory or EU issues.

Before joining Linklaters, Sir Christopher set up what is now the Competition Appeal Tribunal (CAT), and held the post of President from 1999 to 2007. As President, he was responsible for case management, interlocutory and interim applications, chairing the main hearings and preparing and delivering the judgments. Prior to joining the CAT, from 1992 to 1999 Sir Christopher was one of 15 judges of the European Court of First Instance (CFI) in Luxembourg. He was President of a five-judge chamber from 1996 to 1999. Before becoming a judge at the CFI, he was one of the leading QCs at the competition and EU law Bar in London. He was awarded a "Lifetime Achievement Award" by GCR in 2011.

Keynote Speaker: **Melanie L. Aitken,** The Commissioner of Competition, Canada

The Commissioner is responsible for the administration and enforcement of Canada's *Competition Act*. Under the *Competition Act*, the Commissioner can launch inquiries, challenge civil and merger matters before the Competition Tribunal, make recommendations on criminal matters to the Director of Public Prosecutions of Canada (DPP), and intervene as a competition advocate before federal and provincial bodies.

The Commissioner leads the Competition Bureau's participation in international fora such as the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), to develop and promote coordinated competition laws and policies in an increasingly globalized marketplace.

Ms. Aitken joined the Competition Bureau in 2005 and became Interim Commissioner in January 2009. On August 4, 2009, she was appointed as Commissioner for a full five-year term. Prior to joining the Competition Bureau, from 2003 to 2005, Ms. Aitken was a partner at the law firm Bennett Jones LLP, practising commercial and competition litigation. Between 2001 and 2003, she was seconded to the Department of Justice (Canada) as Senior Counsel, where she was involved in major competition and trade litigation before the Competition Tribunal and the Federal Courts.

Ms. Aitken has appeared as counsel in the Supreme Court of Canada and on numerous appeals and hearings. She has been listed as a leading Competition/Antitrust lawyer in Chambers Global, The World's Leading Lawyers and as top '40 under 40' by Lexpert (2005).

Janusz A. Ordover

Janusz A. Ordover is a Professor of Economics and a former Director of the Masters in Economics Program at New York University. He served as the Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice under President George W. Bush. Professor Ordover also served as an advisor to the Organization for Economic Cooperation and Development in Paris, the World Bank, and the Inter-American Bank for Development on matters of privatization, regulation, international trade policy, and competition policy.

He has published many articles in economics and law journals on various competition law issues, including predation, access to bottleneck facilities, vertical integration, as well as overlap between intellectual property rights and competition policy. He is a frequent lecturer on competition policy in the U.S., the EU and a wide range of other jurisdictions.

Professor Ordover has acted as a consultant to the Department of Justice, Federal Trade Commission, State Attorneys General, as well as corporations and law firms in the U.S., Australia, New Zealand, South Africa, Poland, and Hong Kong. He has been voted "The Economist of the Year, 2010" in the poll organized by the Global Competition Review.

William Bishop

Dr. William Bishop has 26 years of experience as an adviser to companies on competition matters. He has held academic posts at the London School of Economics, Oxford University, and at universities in Canada, Australia, and the US. He is currently professor of the economics of competition law at the College of Europe in Bruges. He is also a (non-practising) member of the English bar.

Dr. Bishop has conducted research and written economic analyses on more than 100 industries in the course of advising on litigation and on investigations by the UK Office of Fair Trading and Monopolies and Mergers Commission, the European Commission, and national competition authorities. He has been an adviser to the Competition Directorate of the European Commission on its Market Definition Guidelines, on Quantitative Techniques and on Remedies, and to the Department of Trade and Industry on the UK Competition Act.

Gavin Robert

Gavin Robert is a senior competition partner at Linklaters LLP, based in London. He advises clients across the full range of competition law issues, including mergers, joint ventures, cartels and abuse of dominance at a global, European and national level.

Gavin leads the development of Linklaters' Asia competition practice and over the last few years has taken an increasing interest in the development of competition law in Asia, and especially China. Gavin travels on a regular basis to Asia where he represents a number of multinational clients. He works closely with Linklaters competition lawyers on the ground in Hong Kong, Beijing, Shanghai, Bangkok, Tokyo and Singapore and with other law firms in the region.