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Dear Miss CHUNG,

Competition Bill

I am scrutinizing the legal and drafting aspects of the above Bill. I would be most grateful if you could clarify the following matters:-

Clause 2

(a) According to section 2(1) of the Companies Ordinance (Cap. 32), "shadow director", in relation to a company, means a person in accordance with whose directions or instructions *the directors or a majority of the directors of the company* are accustomed to act. However, it is noted that in the definition of "shadow director" under clause 2 of the Bill, the phrase "or a majority of the directors" is not included. Please explain the rationale for using a different definition of "shadow director" in the Bill.

(b) Under clause 2 of the Bill, an "undertaking" is defined to mean any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity. What is meant by "economic activity"? Does it include any kind of economic activities of any extent or is it intended that the economic activity is one that is conducted for the purpose of gain or profit? For the sake of clarity, is it necessary to provide for a definition of the term in the Bill? It is noted that in the Competition Act 2004 of Singapore, "undertaking" is defined to mean any person,

being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. Will the Administration consider adopting this approach by specifying the nature of economic activity in the Bill?

Clause 5

Under clause 5(1)(b) of the Bill, the Chief Executive in Council may, by regulation, disapply the provisions referred to in clause 3(1) to any person, or any person to the extent that the person is engaged in an activity specified in the regulation. What are the criteria for making this kind of regulation? What kinds of situations are contemplated for invoking this power?

Clauses 6 and 21

(a) What is meant by "object"[1] in clauses 6(1) and 21(1) of the Bill? Should it be interpreted to mean objective purpose or subjective intent? How is it going to be proved?

(b) Under the existing section 7K(1) of the Telecommunications Ordinance (Cap. 106) and section 13(1) of the Broadcasting Ordinance (Cap. 562), a licensee shall not engage in conduct which, in the opinion of the Telecommunications/Broadcasting Authority, has the purpose or effect of preventing or *substantially* restricting competition in a telecommunications/television programme service market. However, it is noted that the word "substantially" is not included in clauses 6(1) and 21(1) of the Bill. Does it mean that the restriction of competition need not be substantial under these clauses? What is the required degree of prevention, restriction or distortion of competition for an agreement, concerted practice, decision or conduct to be caught by the proposed first and second conduct rules?

(c) Under clause 21(1) of the Bill, an undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. It is noted that this test of "substantial degree of market power" is similar to that provided in the Trade Practices Act 1974 of Australia. In that Act, there are provisions which set out the factors for determining the degree of market power. Should the same approach be adopted in the Bill by stating some of the relevant matters to be taken into account in considering whether an undertaking has a substantial degree of market power?

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[1] It is noted that the concept of object of restricting competition has been interpreted to function as a *per se* rule in the European Union.

(d) It is noted that the test of "dominant position" is currently used in section 7L of the Telecommunications Ordinance (Cap. 106) and section 14 of the Broadcasting Ordinance (Cap. 562). It is also noted that this test of "dominant position" is commonly used in the competition law of some jurisdictions, e.g. the United Kingdom, the European Union, and Singapore. Please explain the rationale for adopting a different test in the Bill.

Clauses 9 and 24

Under clauses 9(1) and 24(1) of the Bill, an undertaking may apply to the Competition Commission for a decision as to whether or not the relevant agreement or conduct is excluded or exempt from the application of the relevant conduct rule. Under clauses 9(2)(c) and 24(2)(c), the Commission is only required to consider the application if it is possible to make a decision on the basis of the information provided. Is it necessary to state the types of information that are required to be provided by an undertaking in the Bill? Further, should the Commission be empowered to request any further information from the undertaking? If so, should provisions be included to cover these matters?

Clauses 11, 26 and 83

Under clauses 11(3) and 26(3) of the Bill, after the Competition Commission has made its decision as to whether or not the relevant agreement or conduct in question is excluded or exempt from the application of the relevant conduct rule, it must inform the applicant in writing of the decision. Under clause 83(2) of the Bill, any person who has a sufficient interest in a reviewable determination (including a decision made by the Commission under clauses 11 and 26) may apply to the Competition Tribunal for a review of the determination within 30 days after the day on which the determination was made. Apart from informing the applicant, would the decisions of the Commission made under clauses 11 and 26 be made public so that persons with sufficient interest in the decisions would be in a position to decide whether to apply for a review?

Clause 33

It is noted that the phrase "by resolution passed" in the English text of clause 33(2) of the Bill is not reflected in the Chinese text. Please consider amending the Chinese text of this clause with reference to the Chinese text of section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) and section 10(2) of Schedule 7 to the Bill.

Clauses 39 and 117

Under clause 117(1) of the Bill, the Court of First Instance or the Competition Tribunal may refer an alleged contravention of a conduct rule to the Competition Commission for investigation. However, it is noted that clause 39(1)(c) of the Bill only provides that the Commission may conduct an investigation where the

Court of First Instance has referred any conduct to it for investigation. Please consider whether it is necessary to add the Competition Tribunal to clause 39(1)(c).

Clause 79

Under clause 79(1) of the Bill, the Competition Commission may, in exchange for a person's co-operation in an investigation or in proceedings under the Bill, make a leniency agreement with the person. What are the criteria for making this kind of leniency agreement with a person? What is the degree of co-operation required? Is there any difference in treatment between a person who is the first one to come forward and the subsequent ones?

Part 6

It is noted that unlike the situation in some overseas jurisdictions (e.g. the United Kingdom and the United States), contravention of a competition rule is not proposed to be a criminal offence under the Bill. What is the reason for adopting a different approach in the Bill? Does the Administration consider that civil penalties alone would be effective as far as enforcement of the competition rules is concerned?

Clause 143

Under clause 143(3) of the Bill, the Competition Tribunal (which is to be established as a superior court of record by clause 133) is to conduct its proceedings with as much informality as is consistent with attaining justice. It is noted that the proceedings of some tribunals in Hong Kong (e.g. the Lands Tribunal, the Labour Tribunal, and the Small Claims Tribunal[2] which are courts of record) are conducted in an informal manner. However, it appears to be uncommon for a superior court of record to conduct its proceedings with informality. Please explain the rationale for clause 143(3) and the procedures to be adopted to achieve the purpose of that clause.

Part 11 and Schedule 6

Part 11 of the Bill provides that the Competition Commission, the Telecommunications Authority and the Broadcasting Authority have concurrent jurisdiction to perform the functions of the Commission under the Bill. Clause 161 provides that the relevant parties would prepare and sign a Memorandum of Understanding for the purpose of co-ordinating the performance of their functions under the Bill. As Schedule 6 only sets out generally the matters that may be provided in the Memorandum of Understanding, it is not clear how the performance of their functions would be co-ordinated in practice. Will the Administration consult Members on these matters before the Memorandum of Understanding is signed? Will a draft of the Memorandum of Understanding be provided to the Bills Committee for its consideration?

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[2] Section 10(5)(a) of the Lands Tribunal Ordinance (Cap. 17), section 20(1) of the Labour Tribunal Ordinance (Cap. 25), and section 16(1) of the Small Claims Tribunal Ordinance (Cap. 338).

Schedule 1

Section 3 of Schedule 1 to the Bill provides that neither the first conduct rule nor the second conduct rule applies to an undertaking entrusted by the Government with the operation of services of general economic interest in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to it. What is meant by "entrusted"? Does it cover the situation where the Government entered into a contract with an undertaking or where a licence is granted by the Government to an undertaking to operate a service? Further, what are "services of general economic interest"? Is it intended that these services relate to those provided by public utilities companies, e.g. power supply? How would the public know that an undertaking is not subject to the conduct rules by virtue of section 3 of Schedule 1?

Schedule 7

Unlike many overseas jurisdictions (e.g. the United Kingdom, the European Union, and Singapore[3]) which have cross-sector merger provisions, Schedule 7 to the Bill provides for a limited scope of application of the merger rule to mergers in relation to carrier licences issued under the Telecommunications Ordinance (Cap. 106) that have, or are likely to have, the effect of substantially lessening competition in Hong Kong. Since one of the purposes of the Bill, as set out in its long title, is to prohibit mergers that substantially lesson competition in Hong Kong, what is the reason for confining the scope of prohibition to mergers in the telecommunications sector?

I shall be most grateful if you could let me have your response in both Chinese and English on the above queries at your earliest convenience, preferably before the second meeting (tentatively fixed to be held on 9 November 2010) of the Bills Committee. I will let you have my further comments, if any, on the Chinese text of the Bill at a later stage.

Yours sincerely,

(Timothy TSO)
Assistant Legal Adviser

c.c. DoJ (Attn: Mr David John MORRIS, BBS, Consultant
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[3] In Singapore, a phased approach was adopted. The provisions establishing the Competition Commission and the provisions on anti-competitive agreements and the abuse of a dominant position came into operation in January 2005 and January 2006 respectively. The provisions on mergers subsequently came into operation in July 2007.