HONG KONG
RETAIL MANAGEMENT
ASSOCIATION
香港零售管理協會

Hong Kong Retail Management Association
Comments on the Amendments on the Competition Bill

8 November 2011

The Hong Kong Retail Management Association ("HKRMA") is concerned about the development of the Competition Bill and would like to present our views on the proposed amendments.

We welcome the Government's proposed amendments to the Competition Bill, in particular:

- the removal of the payment requirement of infringement notices;
- the principle of the new de minimis arrangements (but subject to further feedback we may receive from our members in relation to the relevant threshold amounts);
- linking the pecuniary penalty cap to local turnover and limiting it to a maximum of three years;
- the removal of the stand-alone right of private action; and
- clarifying that the first and second conduct rules do not apply to mergers.

However, we had been led to believe that one of the proposed amendments would deal with the main concern of our members, particularly our SME members, namely the need for clear rules, so that businesses know what they have to do to comply. We are therefore surprised and disappointed to note that no clarity has been provided as to what the conduct rules mean.

To increase clarity and for the reasons set out in paragraphs 1-4 below, the HKRMA would propose the following additional amendments to the Bill:

- **Now that the Government has at least produced definitions of <u>hardcore</u> conduct, these should replace the vaguely-worded examples currently contained in Clause 6(2) of the Bill.**

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- **Other unclear concepts in the Bill, such as those mentioned above, should be defined, replaced or removed. (For example, "substantially lessen competition" should replace "prevent, restrict or distort competition" and the "object" concept should be removed).**
- **Vertical agreements should be expressly carved out from the ambit of the Bill, as they are in Singapore and other jurisdictions.**

1. Although we welcome the proposed definition of "serious anti-competitive conduct", the conduct rules themselves remain unamended. So there is still no clarity as to what concepts like "competition", "substantial degree of market power" , "abuse" and "predatory behaviour" actually mean.

2. The Government has stated that the "new" Warning Notice concept addresses SMEs' concerns about inadvertently breaching the law, in respect of non-hardcore conduct. On the contrary, the Warning Notice presupposes that there has been an inadvertent breach: it merely offers a way of avoiding prosecution and sanctions. This is of little comfort to businesses, such as our members, who do not want to be in a position of breaching the law inadvertently, with the reputational and other adverse consequences which that entails. They want to comply, but the Government is not, thus far, putting them in a position to do so.

3. As Bills Committee members have already pointed out, it is no comfort to say that the future Commission will provide guidelines on these matters. LegCo, and the public, must be put in a position to know what conduct the Bill is actually prohibiting. Such clarity is also necessary so that the future Commission and Tribunal will be in a position to know how to apply and enforce the rules. Moreover, the future guidelines will not be binding on the Tribunal, which may well take a different view from the Commission, as experience in the EU has shown.

4. We believe that there is no comfort to say (as the Government has done) that EU case law can be relied upon for guidance. EU competition law is unclear in many

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areas, and in any event the Tribunal is not bound to follow EU competition law, which has very different objectives from the Government's stated policy objective.

None of our proposed amendments weaken the Bill in any way, or involve substantial drafting. On the contrary, they strengthen it. The Government can still achieve its objective of preventing genuinely anti-competitive conduct. The amendments mean that it can do so in a way which is fair and transparent to everyone concerned.

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About HKRMA

The Hong Kong Retail Management Association (HKRMA) was founded in 1983 by a group of visionary retailers with a long-term mission to promote Hong Kong's retail industry and to present a unified voice on issues that affect all retailers. Established for 28 years, the Association has been playing a vital role in representing the trade, and raising the status and professionalism of retailing through awards, education and training.

Today, HKRMA is the leading retail association in Hong Kong with membership covering more than 6,000 retail outlets including SME retailers, and employing about half of the local retail workforce. HKRMA is one of the founding members of the Federation of Asia-Pacific Retailers Associations (FAPRA) and is the only representing organization from Hong Kong. FAPRA members cover 17 Asian Pacific countries and regions.

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