



10 November 2011

The Hon Andrew Leung Kwan-yuen SBS JP
Chairman
Bills Committee
The Legislative Council
Tamar
Hong Kong

Dear Mr. Leung

RE: Competition Bill

We refer to the paper *Responses to Concerns on the Competition Bill*, which the Administration submitted for discussion at the Bills Committee meeting of 25 October 2011.

The purpose of this letter is to provide the Chamber's views on certain aspects of the Administration's paper, and the Competition Bill more generally.

In general, the Chamber supports the Administration's paper. Particularly encouraging are the Administration's proposals to amend the Competition Bill to:

- remove the right of persons to bring "stand-alone" private actions;
- reduce the maximum pecuniary penalty that can be imposed in respect of an infringement of a competition rule to 10% of Hong Kong turnover for a maximum of three years; and
- Exclude mergers from the scope of review under the Conduct Rules.

Each of these proposals largely reflects changes to the Bill that the Chamber called for in its submission to the Bills Committee dated 14 December 2010, and are thus very much welcomed by the Chamber.

The Chamber also has a favourable view of other key proposals in the Administration's paper, such as introduction of a distinction (for enforcement purposes) between so-called "hardcore" and "non-hardcore" infringements of the First Conduct Rule, introduction of "de minimis" exemptions for smaller enterprises, and removal of the right of the Competition Commission to

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require business operators to pay an amount to it as part of the Bill's "infringement notice" mechanism. Each of these proposals either more closely aligns the Bill with the competition law regimes of other mature competition law systems, or lessens the risk of unduly onerous enforcement action during the initial enforcement phase - when business operators will still be adjusting to the new regime and being educated on the obligations it imposes upon them.

However, the Chamber considers that further amendments to the Bill are prudent. In particular, the Chamber is concerned that the Administration has not yet proposed to address the following issues, which were also raised in the Chamber's previous submission:

- Vertical agreements

To supplement the proposed introduction of a distinction between "hardcore" and "non-hardcore" infringements in the context of enforcement of the First Conduct Rule, the Chamber believes the Bill should also be amended to distinguish between horizontal agreements (i.e. between competitors) and vertical agreements (i.e. between business operators at different levels of the supply chain) - with the latter exempted from challenge. As noted in the previous Chamber submission, this would more closely align the Bill with the position the Government set out in its May 2008 consultation paper *Detailed Proposals for a Competition Law*, and would reflect the fact that most competition authorities now consider that competition law need not be concerned with vertical agreements unless at least one of the parties to the agreement has significant market power.

- Government and statutory bodies

The Chamber continues to be of the view that the Bill should apply to the commercial activities of Government and statutory bodies. In relation to the latter, the Chamber believes the Bills Committee should urge the Administration to provide, as soon as possible, a list of those statutory bodies proposed to be exempt - as the composition of this list will rightly impact public views on the extent to which the proposed law will facilitate a more level playing field for business operators and provide a mechanism to address the most pressing anti-competitive conduct concerns in Hong Kong.

- Threshold level of market power for application of the Second Conduct Rule

Despite widespread criticism on this issue, the Administration has so far been unwilling to amend the Second Conduct Rule so that it applies only to business operators with a dominant market position. The Chamber believes the existing "substantial market power" threshold is out-of-step with prevailing international norms for prohibitions analogous to the Second Conduct Rule. It also considers that the existing threshold will generate considerable uncertainty for the many business operators in Hong Kong whose success in local markets is as much due to a level of pricing discipline imposed by the constant threat of new market entry and the growing efficiency or innovation of rivals, as it is reflective of market power. For those business operators, the always imprecise definitions of "substantial market power"

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will make it difficult for them to know with certainty whether the Second Conduct Rule applies to them.

Additionally, the Chamber repeats its earlier calls for the Bills Committee to push for assurances from the Administration that all major guidelines relating to the proposed law will be the subject of broad public consultation. The Chamber is not convinced that the current wording in section 35 of the Bill is adequate on this issue, as it would give the Competition Commission very wide discretion regarding with whom and to what extent it engaged in such consultation.

The Chamber strongly encourages the Bills Committee to focus on these issues in the remaining meetings with the Administration, and to continue to work to ensure the Bill reflects international best practice and is tailored to reflect and support Hong Kong's successful economic model.

Yours Sincerely,

Brigadier Christopher Hammerbeck CB.CBE.
Executive Director
The British Chamber of Commerce in Hong Kong

Cc: Kevin Taylor – Chairman
Paul Brough – Vice Chairman
Nick Sallnow-Smith – Vice Chairman

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