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By email: hysiu@legco.gov.hk

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

Dear Ms. Siu

COMPETITION BILL

The Hong Kong Association of Banks (HKAB) is pleased to present this submission to the Bills Committee regarding the Competition Bill presently before Hong Kong's Legislative Council. HKAB hopes this submission will assist the Bills Committee to work to secure appropriate refinements to the Bill, so that if enacted the Bill will support the continued growth of the Hong Kong economy and provide maximum benefit to the community.

In particular, the submission includes recommendations that are aimed at ensuring that any new competition law in Hong Kong is implemented in a manner that balances the interests of safeguarding competition in Hong Kong with the benefits of facilitating the free play of market forces and continuing to promote a business-friendly environment in the region.

Reflecting the sectoral focus of HKAB, the submission also includes recommendations intended to ensure any new competition law aligns with, and appropriately complements, the existing regulatory framework applicable to Hong Kong's banking sector.

In addition to the detailed content of the submission, an Executive Summary focussing on the primary recommendations of HKAB is included in Annex A. Please note that this submission is confidential and not for publication. However, the Executive Summary in Annex A is not confidential and may be published for public review.

HKAB trusts the Bills Committee will give due consideration to the issues and recommendations set out in the submission, and would be pleased to discuss the submission further with Bills Committee representatives.

Chairman Standard Chartered Bank (Hong Kong) Ltd
Vice Chairmen Bank of China (Hong Kong) Ltd
The Hongkong and Shanghai Banking Corporation Ltd
Secretary Rita Liu

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秘書 廖碧瑩



HKAB looks forward to working with the Government and relevant parties to progress consideration and refinement of the Competition Bill.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Rita Liu
Secretary

Enc.

ANNEX A

EXECUTIVE SUMMARY (RECOMMENDATIONS)

For the reasons set out in the attached submission, HKAB makes the following recommendations to the Bills Committee regarding the Competition Bill:

- **Recommendation 1:** HKAB recommends that the Bills Committee seek an amendment to the definition of "legal requirements" in section 2 of Schedule 1 of the Bill, so that conduct engaged in or agreements made in compliance with any requirements applicable under codes of practice, circulars, guidelines or other directions or guidance in any form issued or endorsed by a Government-approved regulatory or supervisory authority in Hong Kong (or a relevant supranational body) are excluded from challenge under the Conduct Rules. Additionally, HKAB recommends that the Bills Committee highlight to the Government the importance of ensuring that the Competition Commission takes appropriate steps (in consultation with the banking sector) to effectively exempt from the Conduct Rules conduct in compliance with directives or guidance issued by relevant supranational bodies or any other foreign regulatory or supervisory bodies outside Hong Kong having jurisdiction over the undertaking concerned.
- **Recommendation 2:** HKAB recommends that the Bills Committee highlight to the Government the importance of ensuring competition-orientated guidelines relating to relevant banking practices are developed by the Competition Commission as a priority, in consultation with relevant sector representatives, and published well prior to commencement of the Conduct Rules. This could be done by amending section 35 of the Bill to include references to the banking and other sectors in the text that requires the Competition Commission to issue guidelines on its interpretation and enforcement approach, or by the Government liaising with the Competition Commission after it is established to emphasize the benefit of developing and prioritising such guidance.
- **Recommendation 3:** HKAB recommends that the Bills Committee seek an amendment to the Bill to introduce a definition of the term 'market', and that this definition expressly reflect the fact that the geographic scope of many product and service markets contested by undertakings in Hong Kong extends beyond the territorial boundaries of the Hong Kong S.A.R. and will commonly encompass mainland China and beyond.
- **Recommendation 4:** HKAB recommends that the Bills Committee seek an amendment to the Bill to expressly exempt vertical agreements and M&A agreements from the scope

of the First Conduct Rule. In the alternative, if M&A agreements are to be subject to challenge, then HKAB submits that this should be in accordance with specific merger review provisions that will ensure there are appropriate procedural safeguards and review thresholds.

- **Recommendation 5:** HKAB believes that the Bills Committee should highlight to the Government the importance of ensuring the Competition Commission consults with banking regulators and other key banking sector representatives before conducting investigations and enforcement actions in relation to the sector or when developing guidelines specifically relating to the sector. More particularly, HKAB recommends the Bills Committee:
 - (a) seek an amendment to section 35 of the Bill (Guidelines) to require that when the Competition Commission is drafting or amending relevant guidelines in relation to the bill it must, at a minimum, consult with any body or association in Hong Kong that, under a Hong Kong Ordinance, is provided with regulatory, supervisory or representative functions or responsibilities in relation to an industry sector to which the relevant guidelines wholly or substantially relate; and
 - (b) seek an amendment to section 129 of the Bill (Functions of Commission) so that the Competition Commission is required to consult with any body or association in Hong Kong that, under a Hong Kong Ordinance, is provided with regulatory, supervisory or representative functions or responsibilities in relation to an industry sector before commencing any investigation or enforcement action in fulfilment of its function under paragraph (a) of that section ("to investigate conduct that may contravene the competition rules and enforce the provisions of this Ordinance").
- **Recommendation 6:** HKAB recommends that the Bills Committee seek an amendment to section 129 of the Bill (Functions of Commission) so that the Commission will be precluded from conducting market studies in respect of industry sectors that are already supervised by a sectoral regulator empowered to review and respond to instances of market failure.
- **Recommendation 7:** HKAB recommends that the Bills Committee highlight to the Government the importance of the Competition Commission introducing Block Exemption Orders or other exemptions and exclusions relating to relevant aspects of banking and financial sector practice, and for the Competition Commission to consult

foreign competition regimes and liaise with Hong Kong's banking sector representatives in order to achieve this end.

- **Recommendation 8:** HKAB recommends that the Bills Committee seek amendments to the Bill to remove any specific form of exemption for statutory bodies. Alternatively, if this recommendation is not adopted, or the Government continues to resist this form of amendment to the proposed competition law regime, then HKAB recommends that the Bills Committee:
 - (a) request that, as soon as possible, the Government should publish a preliminary list of those statutory bodies (and the scope of their activities) that the Government favours making subject to the Conduct Rules in accordance with section 3 of the Bill, and should then allow submissions to be made by interested parties regarding the list before it is finalised; and
 - (b) highlight to the Government the importance of ensuring that any statutory body which provides goods or services in competition with private sector entities should be required to comply with the Conduct Rules when providing those goods or services (subject to the application of other relevant exemptions and exclusions), including the Hong Kong Export Credit Insurance Corporation.
- **Recommendation 9:** HKAB recommends that the Bills Committee consider seeking removal of some of the restrictions on the process set out in Subdivision 2 of Part 2 of the Bill pursuant to which undertakings may apply to the Competition Commission for a decision as to whether or not an agreement that they have entered in to (or propose to enter into) would benefit from a relevant exemption or exclusion from the Conduct Rules.
- **Recommendation 10:** HKAB recommends that the Bills Committee consider seeking the introduction of a substantiality requirement into the Conduct Rules so as to ensure that conduct which exerts an insignificant or unappreciable effect on a market will not be subject to unnecessary regulatory intervention.
- **Recommendation 11:** HKAB recommends that the Bills Committee consider seeking the introduction of certain 'de minimus' thresholds into the Bill to automatically exclude from challenge under the First Conduct Rule agreements of minor importance.