



**CSL Limited's Submission to
the Legislative Council in relation to
the Competition Bill**

November 2010

1 Introduction

- 1.1 CSL Limited (“**CSL**”) is pleased to provide comments to the Legislative Council regarding the Competition Bill.
- 1.2 CSL is willing to expand on any of the issues raised or comment on other issues if requested.

2 Scope of the Competition Bill

- 2.1 CSL supports the introduction of a general competition law that would be advantageous to Hong Kong’s economy. It is imperative to prohibit anti-competitive conduct in the economy so that Hong Kong businesses can compete in a level playing field. Anti-competitive conduct can occur in any sector of the economy and therefore it is of paramount importance that a general competition law is applicable to all sectors without the need of discriminating against certain sectors through sectoral competition regulations.
- 2.2 It is important that the Competition Bill should cover the generally acknowledged anti-competitive conduct that is found in the systems of competition law in other developed economies in order to protect the process of competition in enhancing economic efficiency. Generally, the anti-competitive conduct of concern consists of three areas,

namely, restrictive agreements, abuse of market dominance and mergers.

3 Merger Regulations

- 3.1 The Government proposes in the Competition Bill the First Conduct Rule and Second Conduct Rule to prohibit restrictive agreements and abuse of market dominance respectively which have the object or effect to prevent, restrict or distort competition in Hong Kong. As for merger control in the Competition Bill, the Government does not introduce cross sector merger regulations, but adopts a piecemeal approach whereby the telecommunications industry alone is subject to merger regulations.
- 3.2 Failure to include merger control in the Competition Bill would render the law incomplete and ineffective in combating undesirable anti-competitive conduct. If the Competition Bill is designed in such a way that some forms of anti-competitive conduct are not unlawful, this would undermine the purpose of the competitive law and provide incentive for companies taking advantage of this regulatory loophole by undertaking other forms of anti-competitive conduct. For instance, if merger control is not included in the Competition Bill, it is possible that companies could structure arrangements (such as via a merger) to circumvent the First Conduct Rule or other rules against anti-competitive conduct.

3.3 Merger is not unique to telecommunications industry and those transactions that produce serious anti-competitive effects should not be allowed across all industries of Hong Kong. The imposition of a sector specific merger control as proposed is unfair to the telecommunications industry. CSL urges the Government to introduce the Competition Bill in a more holistic approach whereby provisions should be included to prevent or modify mergers that have the effect of substantially lessening competition. A truncated competition law will undermine the effectiveness in curbing anti-competitive conduct in Hong Kong generally.

4 Section 7Q of the Telecommunications Ordinance

4.1 CSL is surprised to learn that the Government proposes to introduce a new section 7Q in the Telecommunications Ordinance in relation to the prohibition of exploitative conduct engaged by a telecommunications licensee in a dominant position without prior consultation with the telecommunications industry.

4.2 The Government fails to provide any justifiable reasons as to why the telecommunications industry is singled out to be subject to more stringent competition provisions. CSL is of the view that if the Government considers that there is an imminent need to prohibit exploitative conduct as far as anti-competition is concerned, this concept should be introduced in the general competition law rather than the adoption of a sector-specific regulation discriminating against

the telecommunications industry. It is the role of the Government to ensure a level playing field amongst all industries of Hong Kong.

- 4.3 Whilst CSL does not agree with the new section 7Q, if the Government insists to introduce this provision, CSL is concerned with the proposed drafting.
- 4.4 For consistency, it would make sense to take the opportunity to replace the reference to “dominant position” in section 7Q with the concept of “substantial degree of market power” adopted by the Competition Bill.
- 4.5 The Government proposes in the new section 7Q a combination of dominant position and exploitative conduct. Section 7Q provides OFTA with very wide discretion to prohibit any conduct on the grounds that it is exploitative. If the concept of “exploitative” conduct is to be retained, it should be explicitly defined so that it will be clear which conduct will be regarded as being exploitative and with a range of factors to be considered by OFTA in the event that any assessment is required. Specifically, section 7Q(4) should add a final subclause (c) requiring Guidelines to be issued in accordance with the Telecommunications Ordinance. It is not enough that Guidelines only assist in explaining when a licensee is “dominant” (s.7Q(3)(e)); Guidelines need to further clarify when conduct by a dominant licensee will be considered to be “exploitative”. Further, as a transitional measure Guidelines should explain to what extent OFTA will continue

to regard conduct to be an abuse of position under the current regime to be exploitative conduct under the new regime.

4.6 The examples of exploitative conduct in section 7Q(4) are inadequate in that they do not have any link between the market(s) in which the licensee is dominant and the conduct deemed to be exploitative. A solution to this problem would be to amend section 7Q(1) so that it reads, “A licensee in a dominant position in a telecommunications market must not take advantage of that position of dominance to engage in conduct that in the opinion of the Authority is exploitative” (addition underlined). The effect of this amendment is to re-introduce the effects of the words “abuse of dominant position” which creates a linkage. The “taking advantage” wording is derived from the Australian approach in the context of applying the competition law, but equally the wording “abuse of dominant position” from section 7L of the Telecommunications Ordinance would be preferable to the complete absence of the linkage between the conduct and the market in which the dominance exists which is a problem in the proposed drafting.

4.7 It would also be preferable for section 7Q(1) to be amended so that it clarifies how OFTA must make determinations in relation to particular conduct that is already taking place.

5 Concurrent Jurisdictions

- 5.1 The Government proposes that the Telecommunications Authority and the Broadcasting Authority be given concurrent jurisdiction with the Competition Commission under the general competition law.
- 5.2 The Government must ensure that anti-competitive conduct in all sectors of the economy be treated equally and the law be applied consistently. This fair and consistent objective can best be achieved by conferring powers to the Competition Commission to oversee the competition issues for all sectors rather than the Government's proposal that the existing sector specific regulators having the same powers as the Competition Commission to enforce the new competition law. CSL submits that the existing sector specific regulators should not continue to have a competition law function following the implementation of a general competition law. The existing powers vested by the sector specific regulators should be abolished and transferred to the new Competition Commission.
- 5.3 It should be noted that competition issues might cross different sectors. For instance, anti-competitive conduct in the content sector might have an impact on the telecommunications sector in the upstream market for the supply of content to telecommunications operators. In the circumstances, jurisdictional overlap between the Competition Commission and the sector specific regulator can be eliminated if the power of enforcing the new competition law is only vested with the Competition Commission.

6 Exemptions

- 6.1 The Government proposes that the conduct rule should not apply to the Government or statutory bodies. Some might argue that the exemption should help ensure that the operation of the Government or statutory bodies would not be affected by unfounded and misconceived complaints. CSL submits that the Government should not be unduly concerned on this matter as the Competition Commission is vested with powers not to investigate a complaint if (a) it is trivial, frivolous or vexatious; or (b) it is misconceived or lacking in substance in accordance with section 37 of the Competition Bill.
- 6.2 The definition of statutory bodies is very broad. If the Government intends to exempt all statutory bodies from the ambit of the general competition law, it runs the risk that the law could not be able to prohibit statutory bodies from engaging possible anti-competitive conduct like abuse of significant market power which has the purpose or effect of substantially lessening competition.
- 6.3 A general competition is new to Hong Kong save for the telecommunications and broadcasting sectors. In order to send a clear and strong signal to the community that the Government is determined to enact a general competition law to curb against anti-competitive conduct in Hong Kong, the Government or statutory bodies should not engage or be perceived to engage in anti-competitive conduct. CSL does not see any compelling reason as to why the Government or

statutory bodies should be exempted from the realm of the general competition law.

7 Confidentiality

7.1 CSL does not regard any part of this submission as confidential and has no objection to it being published or disclosed to third parties,

-END-