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10 February 2012

The Honorable Andrew Leung, GBS, JP
Chairman, Bills Committee on Competition Bill
Legislative Council
1 Legislative Council Road, Hong Kong

Dear Mr. Leung,

RE: AmCham Memorandum on the Proposed Competition Law in Hong Kong

The American Chamber of Commerce in Hong Kong (AmCham) appreciates the opportunity to convey our views and support to the Government regarding the implementation of a competition regulatory regime in Hong Kong. After consultation with our members through the Law Committee, AmCham is pleased to submit the enclosed Memorandum on the Proposed Competition Law in Hong Kong.

The Memorandum acknowledges factors and circumstances relevant to Hong Kong and at the same time recognizes the value of adopting global best practices and promoting consistency across jurisdictions. We sincerely hope that our observations and ideas based on the American 'anti-trust' law experience and experiences of AmCham Hong Kong member firms operating in multiple markets with competition laws will add value to the consultation process.

AmCham would welcome opportunities to further discuss with the Bills Committee on Competition Bill the implementation development and provide more substantive comments on specific provisions. Please kindly liaise with Ms. Ming-Lai Cheung, AmCham Government Relations and Public Affairs Manager at mcheung@amcham.org.hk or by phone: 2530-6927.

We look forward to continuing our constructive dialogue in the near future.

Yours sincerely,

Richard R. Vuylsteke

Enclosure

CC: Mr. Gregory So, JP
Secretary for Commerce and Economic Development
Commerce and Economic Development Bureau
22/F, West Wing, Central Government Offices
2 Tim Mei Avenue, Tamar
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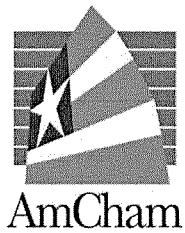

THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG

MEMORANDUM ON THE PROPOSED COMPETITION LAW IN HONG KONG

I. GENERAL COMMENTS

We appreciate the Government's solicitation of views from AmCham, and are pleased to support the Government's decision to implement a competition regulatory regime in Hong Kong. While many comments have been made by various groups and individuals, we hope that we can add value to the consultation process by adding a few observations and ideas based on the American 'anti-trust' law experience as well as the experiences of AmCham Hong Kong member firms operating in multiple markets having competition laws. In this paper, we attempt to identify experiences that may be particularly relevant to Hong Kong, recognizing that any regime implemented here should be tailored to the specific needs and circumstances of the Hong Kong market, but should be as consistent as possible with global best practices. Promoting consistency across jurisdictions should also be seen as a value.

A. AmCham Supports Implementation Of A Workable Competition Law In Hong Kong

The 2011 Survey of the AmCham membership revealed a strong concern over the cost of doing business in Hong Kong. It is hoped that competition legislation can serve as a useful tool for the Government to promote economic efficiency and competition in order to reduce costs to businesses operating in Hong Kong and improve consumer welfare. This is an opportunity to make Hong Kong a more competitive environment.

B. With Over One Hundred Years Of Experience In Competition Law, American Jurisprudence Can Be Useful To Developing A Regulatory Regime That Promotes Competition And Innovation While Also Seeking To Limit Regulatory Costs And Other Burdens

The USA has over 100 years of experience in competition law (*i.e.*, statutory law, case law and guidelines). After many decades of trial and error, it is generally regarded that the USA has a core set of instructive rules that limit uncertainty. This lessens regulatory burdens and costs while at the same time promoting competition and innovation to the benefit of consumers. The USA approach is characterized by vigorous enforcement against cartel and monopoly behaviour, while more carefully assessing and regulating other conduct that may offer substantial benefits to society. The USA approach has the value of focusing on the most significant anti-competitive conduct in society and yielding more certain rules, thereby limiting governmental and societal compliance costs and risks. This approach may be well suited to Hong Kong, particularly at this time as Hong Kong inaugurates its first competition legislation. The recently amended Canadian Competition Act (which was amended to bring it more in line with the approach in the USA) should likewise have substantial appeal to Hong Kong policy makers in its approach. If there is any concern that the Canadian legislation is still too new to be evaluated, then the American jurisprudence can be evaluated.

While having great respect for the European Union ("EU") Competition Law and policy, we believe that the bill overly utilizes some elements of EU law that are not suitable for Hong Kong (just as some elements in the American law would not be ideal for Hong Kong). EU competition law is a mix of pure competition, single market and industrial policy objectives, all of which emerged in a historical context of significant state-owned enterprises. Only the first component seems relevant in Hong Kong.

C. The October 2011 Changes To The Proposed Bill Are Welcomed, Yet More Can Be Done To Better Ensure That The Ultimate Legislation Achieves The Stated Goals Of Promoting Economic Efficiency And Consumer Welfare

As more fully discussed in the following sections, our respectful view is that the bill lacks sufficient clarity and guidance in some critical areas. We feel that there is insufficient guidance for the eventual Commission and for the public. Certain critical terms are not defined and the bill as drafted creates ambiguities as well as certain policy inconsistencies that could drive up compliance costs, and undercut the objectives of the bill. Further, we fear that the lack of clarity will deter individuals and entities from aggressively competing, ultimately to the detriment of consumers. Many have already offered suggestions at better defining terms, concepts and articulating policy decisions; therefore we have limited our comments in this paper to what we see as the most salient points. We also propose what we see as a necessary refinement of appropriate statutory tests and very much question the broad exemption for statutory bodies in the bill. We further note our concern about instituting sector specific regulations including a different merger regime, a different Second Conduct Rule, a different oversight process and a different judicial process.

On the other hand, we note that the October amendments have brought clarity to the issues of private actions and penalties. We support the changes made.

In the following section, we briefly discuss these issues, but do not attempt to comment comprehensively on the subject bill. AmCham would be pleased to provide more substantive comments on various provisions of the bill as the bill is further considered in the Legislative Council.

II. COMMENTS ON SPECIFIC ISSUES AND PROVISIONS

A. With Increased Clarity And Certainty, The Bill Can More Effectively And Efficiently Achieve The Objectives Of Economic Efficiency, Competition And Consumer Welfare

We agree with comments already advanced by the Hong Kong General Chamber of Commerce, the Law Society, and others that the bill could be improved in two major areas. First, the bill needs greater clarity and certainty. We accept that a certain measure of flexibility may enable the subject law to continue to provide a workable framework even when societal and market conditions change. However, critical language or provisions are too vague. Second, and in our view more importantly, there are major policy decisions that need to be made at this stage and reflected in the bill's language to provide effective guidance to the public, the Commission, the Tribunal and the courts.

More specifically, a policy decision must be made now as to which approaches, legal standards and/or tests will be adopted to evaluate conduct under the legislation. We place great value on neither discouraging pro-competitive conduct nor creating undue enforcement compliance costs. The open issues include, but are not limited to whether:

(i) there be an object clause,
(ii) there should be a substantiality test,
(iii) there should be *per se* breaches,

(iv) safe harbors ought to be included,
(v) vertical agreements ought to be included in CR1,
(vi) the market power language is adequate,
(vii) sector specific competition regulations should be imposed,
(viii) a broad approach to exceptions for statutory bodies is necessary and appropriate.

These are policy decisions. Even if the desire is to let the eventual Commission fine tune the specific tests or standards, the government must set the policy via statutory language to guide the Commission and Tribunal. We urge that critical policy decisions be made and reflected in this bill to guide the Commission as it seeks to implement the law, and assist the public as it seeks to comply with the law.

In the United States today, a general consensus has developed that the focal point for assessment of any particular standard or test is whether it is the one most likely to protect consumer welfare. From post World War II through the 1970s, however, American competition law was expansively interpreted and broadly enforced, which resulted in a wide variety of business practices being presumed to be illegal. It is sometimes said that during this period the courts were often more concerned about protecting competitors than consumers. Eventually, a body of research and economic theory developed, critical of prior decisions as likely to deprive consumers of lower prices or other benefits notwithstanding increased concentration or market power of some of the competitors at the expense of other competitors. These theories have now been integrated into competition law analysis. The result has been a shift to a focus on promoting consumer welfare, and not merely seeking to preserve opportunities for various competitors when consumers would not benefit ultimately. This shift in thinking has produced a sea change in the decisions being handled down.

Similarly, the Hong Kong Law Society has stated that "[t]he focus should be on workable competition (rather than the unrealistic motion of perfect or textbook competition)..." when the Competition Commission or Competition Tribunal takes up assessment of cases. More specifically, the Law Society has urged the bill to reflect that in any analysis conducted by the Commission or Tribunal, "efficiency gains" should be factored into the evaluation, and has pointed to Section 90(4) of the Canadian Act as an example of potential language to use in the bill.

B. The Representative Guidelines Need More Detail As To Processes And Priorities And Could Be Greatly Enhanced With The Use Of Examples To Illustrate Acceptable Or Illegal Conduct

Guidelines are an important tool, and indeed the more novel or complex the law, the more important are the guidelines. Further, to a market that is operating under a competition law for the first time, guidelines are invaluable. Given that the Government is leaving much for the guidelines to address, the guidelines will be even more critical to helping Hong Kong businesses guide their conduct. For example, entities in Hong Kong, both large and small need to understand the Government's priorities and enforcement policies in order to make decisions.

We also believe guidelines will be greatly improved if examples of conduct are included. For example, clear examples of anti-competitive conduct of primary concern to the Government should be prominently addressed in the guidelines. We also suggest that careful attention be paid in the guidelines to industry-specific circumstances. For example, in industries with rapid innovation, intellectual property development, and technological change, the economic characteristics are different and may require attention to the particular dynamics.

C. The First Conduct Rule (CR1, Section 6) On Anti-Competitive Agreements Could Be Further Improved

AmCham welcomes the recent amendments to CR1. However, several particular issues still arise under CR1 as follows.

1. *The Word "Object" Set Forth In The First Conduct Rule Should Be Removed Because Competition Law Should Look Only At Conduct That Adversely Effects Competition*

This "object" language sets in motion an overly broad regulatory regime, which is not necessary. In the USA, a consensus has arisen that the best way to judge anti-competitive conduct is to evaluate the actual effect in the market on consumers. As such, an agreement's "object" (a concept which has proven problematic in the EU legislation) should not be a concern. What is important is the effect that certain conduct can have on competition and consumers. Thus deleting the "object" limb of the contravention test would be appropriate. It would also better enable undertakings to understand the law and would streamline enforcement. This proposal applies to both the First and Second Conduct Rules.

2. *It Should Be Made Clear In The First Conduct Rule That Any Alleged Violation Will Be Subject To A Substantiality Test*

It is unclear whether *per se* or theoretical violations may occur under the current draft bill. Some Government statements have suggested that *per se* violations would be unlawful while other Government statements have suggested that they would be lawful. AmCham supports the latter view. Today, there is widespread consensus in the USA that *per se* rules can all too often condemn business conduct that actually benefits, not harms consumers, and therefore *per se* rules should be not be used. Accordingly, we believe that any alleged breach should have to be shown to have substantial adverse effect on competition or consumers before a violation occurs. This proposal applies to both the First and Second Conduct Rules and would align Hong Kong with international standards.

3. *The Competition Test Should Be Amended As Follows:* 'Prevent, Substantially Restrict Or Substantially Distort Competition,' *Or, In The Alternative* 'Substantially Lessen Competition,' *Rather Than The Proposed* 'Prevent, Restrict Or Distort Competition' *Language*

The wording of the bill's competition test of "prevent, restrict or distort" creates the risk that trivial, theoretical or *de minimis* conduct may become the focus of enforcement activity and Commission resources. This policy uncertainty and hence risk of expansive enforcement activity can be eliminated by including in the test the word 'substantial' as now exists in the Telecommunications Ordinance as well as in many overseas competition regimes. This amendment would clearly place the substantiality test in the actual bill and help focus enforcement activity on issues that truly impact Hong Kong consumers. It would also better address the legal uncertainty and compliance cost concerns raised by SMEs, without reducing the burden on large businesses to comply in full with the law.

4. *Safe Harbors (i.e., De Minimis Thresholds) For SMEs Should Be Included In The Bill In Terms Of Turnover Amounts*

AmCham welcomes the establishment of safe harbor thresholds (although takes no view on the specific amounts proposed). Threshold amounts, coupled with the language changes suggested above, create a full set of safeguards for SMEs and others, as well enhancing the law's certainty. Further, the turnover thresholds (*i.e.*, exclusions) for SMEs should apply to both hardcore and non-hardcore conduct. These modest changes to both the First and Second Conduct Rules would best protect SMEs and others and better focus the Commission in its enforcement activities.

5. *Vertical Agreements Should Be Subject Only To The Second Conduct Rule*

In the USA, it is generally accepted that vertical agreements are pro-competitive and that where such agreements raise concerns they are typically caught by the Second Conduct Rule. In a jurisdiction which adopts a competition law for the first time, it would be appropriate to place vertical agreements outside of the First Conduct Rule, so as to increase legal certainty.

D. The Second Conduct Rule (CR2, Section 21) On Abuse Of A Substantial Degree Of Market Power Could Also Be Improved

With respect to the Second Conduct, we respectfully offer the following suggestions.

1. *The Substantial Degree Of Market Power Approach Is A Problematic Test And Is Not Well Suited To A Market Such As Hong Kong*

A test based on the concept of dominance or abuse of monopoly position, as can be seen in the Telecommunications Ordinance and Broadcasting Ordinance as well as in American jurisprudence, is suggested as preferable. A dominance test may well be better suited to smaller markets where slightly higher concentration levels may be desired to produce higher levels of efficiency. A dominance standard also is consistent with a *de minimus* approach, which can be particularly important to SMEs, and is supported by substantial international case law.

2. *Selected Observations Made As To CR1, Apply Also To CR2*

As with the CR1, the law should look at the actual effect of specified conduct on competition and consumers. The 'object' of the questioned conduct is not relevant and we submit that reference to it should be deleted from the bill. As with CR1, there should be no per se violations. Every alleged breach should be subject to a rule of reason substantiality test. As with CR1, the contravention test should be reflected in the drafting via "prevention, *substantial* restriction or *substantial* distortion of competition" or "*substantially* lessening of competition". A substantiality test best protects SMEs and ensures appropriate use of limited resources, directed at core competition issues in the economy to ensure workable competition (rather than regulating the minutiae of market conduct). The *de minimis* thresholds and approaches now proposed for CR1 should also apply to CR2.

3. *Sector-Specific Anti-Trust Law is Inadequate*

A sector-specific antitrust law is not global best practices. It should not be adopted in Hong Kong. A sector-specific approach creates a risk of inconsistent decisions, higher compliance costs, litigation over jurisdiction as markets blur, poor execution, and the scattering of limited expertise between enforcement bodies.

For example, there should be just one Second Conduct Rule in the statute. The existence of Section 7Q of Schedule 8, which creates a different Second Conduct Rule for the telecommunications industry, does not seem to be justified. This Section increases the risks of inconsistent decisions, procedural confusion between the Tribunal and the existing telecoms Appeal Board, and higher compliance costs. This and other sector-specific provisions ought be deleted.

E. The Treatment Of Mergers And Acquisitions Needs To Be Prudent And Consistent With Global Best Practices

AmCham welcomes the recent amendments which have brought clarity to this issue.

AmCham supports the Government's statement that merger activity is outside of CR1. AmCham also supports delaying the implementation of merger regulation until a future date. AmCham, however, would caution against any sector-specific merger regulation as such approach to merger control is not consistent with global best practices.

F. The Exemption Proposal For All Statutory Bodies Undermines Competition

As a matter of principle, AmCham believes that exemptions to a competition law should be highly restricted and clearly specified, to limit market distortions that may otherwise result.[1] Criteria for granting exemptions should be objective and economics-based, carefully balancing the grounds for exemption against the benefits to consumers of the practices in question.

The Administration has made the proposal to exempt all statutory bodies from the conduct rules under the bill, unless otherwise specified by the Chief Executive in Council. The rationale provided by the Administration is that the activities of the public sector are almost invariably non-economic in nature and therefore falling outside the scope of the Bill.[2]

AmCham believes that this exemption approach is neither necessary nor appropriate. For those statutory bodies that are not engaged in an "economic activity", they would already be exempt from the Bill by virtue of not being an "undertaking". On the other hand, there are a significant number of statutory bodies in Hong Kong that conduct economic activities. Indeed, there may be statutory bodies that have a substantial degree of power in their markets. Where there are exceptional and compelling reasons based on public policy grounds, such statutory bodies may seek exemption under section 31. AmCham therefore disagrees that all statutory bodies should enjoy the *prima facie* exemption.

Where statutory bodies are engaged in economic activities, they should be expected to compete and be subject to the same law and regulatory process as their competitors, whether or not they are ultimately created or controlled by the Administration. It would therefore be more reasonable for all statutory bodies to come under the conduct rules, and exemptions be granted on a case-by-case basis with reference to clearly stated criteria. Neither the North American systems nor the EU provide for any broad-based exemptions to its competition laws. A broad exemption approach would more likely than not be distortive and counter-productive. The proposed amendments should address this topic.

G. The Proposed Amendments Address The Very Valid Concerns That The Penalty Provision Was Excessive And Confiscatory

The experience in the USA is that effective deterrence exists at a level much lower than the bill's previous proposal of penalties of up to 10% of global turnover for all the years of unlawful conduct. AmCham therefore welcomes the proposed amendment as to penalties which are still substantial and should act to deter unlawful conduct.

H. The Removal Of The Private Rights Of Action Is A Good Decision At This Time

AmCham supports the general view that private rights of action can be an effective tool to complement public enforcement of competition laws, as well as to provide compensation to the victims. Moreover, the American experience is that the adjudication of court cases has, over time, brought clarity to applicable standards because the courts have before them a fixed set of facts to evaluate from case to case.

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1 See Antitrust Modernization Commission Report and Recommendations, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

2 See Legislative Council Brief on Competition Bill (File Ref.: CITB CR 05/62/43) at http://www.legco.gov.hk/yr09-10/english/bills/brief/b35_brf.pdf.

However, it would be sensible to give the Commission and the Tribunal some time to ramp up and build a sound decision practice, before allowing stand-alone actions. In the minimum, this would ensure in the early days that enforcement priorities are driven by the Commission and Tribunal. We agree with the Consumer Council that at the appropriate stage, it would be beneficial to provide for private rights of action.

III. CLOSING

We hope that our perspectives and input are helpful in the dialogue surrounding this important bill. We note that portions of this commentary have been drawn from the Antitrust Modernization Commission's Report and Recommendations, April 2007[3].

Law Committee

10 February 2012

[3] See Note 1 above.