

Bills Committee on Competition Bill

Summary of views expressed by deputations on the object, commencement and interpretation of the Bill (as at 13 January 2011)

Concerns/Views	Administration's comments
<u>Object of the Bill</u>	
<p>1. "Enhance economic efficiency for the benefit of consumers" should be included as an object of the Bill to tally with the purpose of the proposed legislation stated in the public consultation document issued in May 2008 as well as that in the relevant Legislative Council Brief. The object will determine how the conduct rules are drafted, and interpreted by the future Competition Commission (the Commission) and the courts. The Government should only be seeking to regulate conduct which has an adverse effect on consumers. (HKGCC, HKRMA, HTHK, LSD and NF)</p>	<p>➤ The long title of a Bill is required by Rule 50 of the Rules of Procedures of the Legislative Council to set out the purpose of the Ordinance in general terms and to define the scope of the Ordinance. We consider that the current long title of the Bill already completely and adequately describes the objects or purposes of the Bill contained in the substantive clauses. Apart from the long title, the Explanatory Memorandum of the Bill and the relevant Legislative Council Brief are useful instruments of statutory interpretation of the Bill.</p>
<p>2. The Bill should contain a concise object as suggested below to guide and assist the Commission and the proposed Competition Tribunal (the Tribunal) in giving effect to the law –</p> <p>"The object of this law is to promote economic efficiency in Hong Kong in the medium to long term in markets within Hong Kong and independent rivalry between competitors for the benefit of Hong Kong</p>	<p>➤ Furthermore, we note that Rule 58(9) of the Rules of Procedure of the Legislative Council stipulates that "<i>if any amendment to the title of a bill is made necessary by an amendment to the bill, it shall be made at the conclusion of the proceedings detailed above, but no question shall be put that the title (as amended) stand part of the bill; nor shall any question be put upon the enacting formula</i>". Having considered Rule 58(9) and our legal advice, we consider that the proposed augmentation and amendment to the long title are not</p>

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society by prohibiting conduct and mergers that substantially lessen competition." (Law Soc)	necessary unless there is a change in the scope of the Bill arising from amendments to the substantive clauses.
3. To ensure that conduct which exerts an insignificant impact on a market will not be subject to unnecessary regulatory intervention, the object of the Bill should be revised as below – "A Bill to prohibit conduct that substantially prevents, restricts or distorts competition in Hong Kong: [...]" (HSBC)	
<u>Commencement (Clause 1)</u>	
1. There should be a grace/transitional period between the enactment of the legislation and commencement of the key prohibitions to allow businesses to prepare for compliances. (CGCC, HAFFA and HKST)	➤ This is indeed our policy intention. Clause 1 of the Bill has provided for the flexibility of staggered commencement of different parts of the Ordinance so as to allow a transitional period between the enactment of the law and the coming into force of the major prohibitions. This will not only allow the business community to get familiar with the new law and to make any necessary adjustments on one hand, but also provide sufficient time for the future Commission to prepare the regulatory guidelines and strengthen public education.

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<u>Interpretation (Clause 2)</u>	
<p>1. "Competition" - a definition should be provided (LRI) –</p> <p>a. The focus should be on a workable competition (rather than the unrealistic notion of perfect or textbook competition), which would need to be assessed in the context of any given industry being scrutinized by the Commission/Tribunal. (Law Soc)</p> <p>b. "Competition" means workable (as opposed to perfect) competition and is a process of rivalry or potential for rivalry whereby undertakings seek to discover new and more efficient ways of offering goods and services. (HKGCC)</p>	<p>➤ We note that the notion of “perfect competition” is based upon a set of assumptions that are unlikely to be observed in reality. This is widely recognized by the competition authorities around the globe, and indeed we have not found any evidence indicating adherence to the theory of perfect competition in other overseas jurisdictions while enforcing their competition laws. We trust that the future Commission and Tribunal will follow the international best practice while performing their functions.</p> <p>➤ On the other hand, “workable competition” is a jargon adopted by some economists, who recognize the limitations of the theory of perfect competition but nonetheless consider it worthwhile to seek the best competitive arrangement that is practically attainable. “Workable competition” is however not a widely recognized concept and its meaning is subject to debate.</p> <p>➤ Having regard to the international best practices, we do not consider it necessary to define “competition” in the Bill. There are plenty of case laws available in the other major overseas jurisdictions to demonstrate how the term “competition” is interpreted in general for the purpose of competition law enforcement.</p>

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<p>2. "Undertakings" –</p> <p>a. Given the "catch all" definition of "undertaking", it should be made clear how far the first conduct rule is meant to apply to all businesses regardless of structure or size, such as small and medium enterprises, sole practitioners, employees or other staff and the many small family businesses in Hong Kong. It is also necessary to clarify whether separate businesses and companies (e.g. parent and subsidiary) under common control will be deemed as a single undertaking under the Bill. (Law Soc)</p> <p>b. Whether general association work (such as collecting and disseminating information and making recommendations to members) would fall within the meaning of "economic activity" under the interpretation of "undertaking". (HAFFA)</p> <p>c. The key term "economic activity" in the interpretation of "undertaking" is the lynchpin of application of the Bill but it is not defined. (CX)</p>	<p>➤ The definition of ‘undertaking’ in the Bill is based on the one held by the European Court of Justice. Each conduct of an entity has to be considered on its own merits, to decide whether it amounts to an ‘economic activity’ and thus falls within the scope of the Bill. However, the term “economic activity” is not defined in the competition law of other major jurisdictions. Case laws in Europe have developed some guiding principles to elaborate on “economic activity”, which includes offering goods or services in a given market. There is no need for a profit-making motive or economic purpose. The legal status of the entity and the way it is financed are also irrelevant.</p> <p>➤ On relationship between parent company and its subsidiary, whether or not separate entities will be deemed as one single undertaking for the purpose of competition law will depend on the facts of each case. If the subsidiary, despite its separate legal status, exercises no real control over its course of action on the market and enjoys no economic independence from its parent company, then the two entities might be regarded by competition authorities as forming a single undertaking.</p> <p>➤ Whether general association work would be regarded as “economic activity” again has to be considered based on</p>

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	<p>the facts of the case. The key consideration is whether the object or effect of the general association work in question, whatever form it takes, is to limit the commercial freedom of action of its members in some respect.</p>
<p>3. "Market" –</p> <p>a. In relation to the second conduct rule that prohibits the abuse of a substantial degree of market power, a definition should be provided for "market" to enhance clarity of the legal requirements. (HAFFA)</p> <p>b. A definition for "market" should be provided to 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 Special Administrative Region and would commonly encompass mainland China and beyond. (HKAB)</p>	<p>➤ A market definition is important for competition analysis but it is essentially an economic test. In overseas jurisdictions, the market definition primarily focuses on the product (including goods or services) and geographical substitutability. For product substitutability, the competition authorities need to determine whether a sufficient number of buyers would switch to other products when the seller raises the price of the product in question by a “small but significant amount” for a “non-transitory” continuous period. From the geographical angle, the question is whether a sufficient number of buyers would switch to a source at another location in response to a small but significant and non-transitory price increase.</p> <p>➤ Since market definition has to be dealt with specifically on a case-by-case basis, we do not consider it appropriate to include in the Bill a market definition. The future Commission will set out in the guidelines the general principles and consideration for defining a market. This approach has an added advantage of</p>

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	<p>allowing the Commission flexibility to cater for changes in market circumstances.</p>
<p>4. The definition of "director" is too broad. It should be consistent with that in existing legislation, such as the Companies Ordinance (Cap. 32) and the Securities and Futures Ordinance (Cap. 571). The present drafting may also create confusion with the notion of "officer" as defined in clause 78 of the Bill. The following change is thus suggested –</p> <p>"director" (董事) includes any person occupying the position of director or involved in the management of a company, by whatever name called, and includes a shadow director. (REDA)</p>	<ul style="list-style-type: none"> ➤ Clauses 99 to 103 of the Bill empowers the Tribunal, on application of the Commission, to make a disqualification order prohibiting a person from being a director of a company or from otherwise participating in the affairs of a company. As one of the required conditions for applying disqualification order is whether the person's conduct as a director makes the person unfit to be concerned in the management of a company, we consider the presently proposed definition of "director" in the Bill as appropriate. ➤ We note that the proposed definition of "director" appears to overlap with the definition of "officer" in clause 78. We will review clause 78 and consider rectifying the issue through Committee Stage Amendment.
<p>5. Other comments –</p> <p>a. The lack of legal certainty arising from vague general meaning of some of the key concepts, such as "prevent, restrict or distort competition" and "abuse of substantial market power", may make it very difficult for businesses to predict whether their</p>	<ul style="list-style-type: none"> ➤ We note the stakeholders' views about legal certainty of some key concepts pertinent to the major prohibitions of the Bill. However, statutory language provides limited room for explaining practical applications of these key concepts, which often involve detailed economic analyses on a case-by-case basis. Including the proposed definitions in the Bill may therefore hamper

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<p>agreements or conducts would breach the proposed legislation. (HPH and PARKnSHOP)</p> <p>b. Need to define "decisions", "concerted practices", "market" and "prevent, restrict or distort competition". (CGCC)</p> <p>c. The following definitions are proposed by HKGCC –</p> <p>"dominant position" means an ability to conduct business in a way which is over the medium to long term to a large degree unconstrained by the actions or reactions of competitors and/or customers;</p> <p>"foreclosing" means pushing competition out of a market or blocking entry in the medium to long term;</p> <p>"substantially lessen competition" means lessen the degree or intensity of competition to the extent that most consumers as a result of such lessening are, or are likely to be, adversely affected; and</p> <p>"workable" means reasonable in the circumstances of the particular industry under consideration.</p>	<p>the ability of the future competition authorities to react quickly to changing business practices and market circumstances. This is obviously not a desirable outcome from the perspective of competition law enforcement.</p> <p>➤ To enhance clarity of the law and to facilitate compliance by the business sector, the Bill has made it a statutory requirement for the future Commission to draw up regulatory guidelines on interpretation and implementation of the law in consultation with any persons it considers appropriate. We have also built in the Bill provisions and mechanisms to ensure appropriate and sufficient promotion and educational work. Besides, clause 1 of the Bill has provided for the flexibility of staggered commencement of different parts of the Ordinance so as to allow a transitional period between the enactment of the law and the coming into force of the major prohibitions to allow the business community to get familiar with the new law and to make any necessary adjustments.</p>

Abbreviations (in alphabetical order)

		LC Paper No.
CGCC	- The Chinese General Chamber of Commerce	CB(1)622/10-11(04)
CX	- Cathay Pacific Airways Limited	CB(1)516/10-11(18)
HAFFA	- Hongkong Association of Freight Forwarding and Logistics Ltd.	CB(1)516/10-11(13)
HKAB	- The Hong Kong Association of Banks	CB(1)516/10-11(22)
HKGCC	- The Hong Kong General Chamber of Commerce	CB(1)516/10-11(03)
HKRMA	- Hong Kong Retail Management Association	CB(1)592/10-11(04)
HKST	- Hongkong Salvage & Towage	CB(1)516/10-11(15)
HPH	- Hutchison Port Holdings Limited	CB(1)516/10-11(19)
HSBC	- The Hongkong and Shanghai Banking Corporation Limited	CB(1)1042/10-11(01)
HTHK	- Hutchison Telecommunications (Hong Kong) Limited	CB(1)516/10-11(16)
Law Soc	- The Law Society of Hong Kong	CB(1)516/10-11(06)
LRI	- The Lion Rock Institute	CB(1)516/10-11(11)
LSD	- League of Social Democrats	--
NF	- New Forum	CB(1)622/10-11(06)
PARKnSHOP	- PARKnSHOP Supermarket	CB(1)516/10-11(20)
REDA	- The Real Estate Developers Association of Hong Kong	CB(1)622/10-11(08)

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