HKGCC response
to the open letter from academics dated 24 February 2011

The Hong Kong General Chamber of Commerce notes that a letter was circulated by a group of academics on 24 February entitled "Response to Objections to the Hong Kong Competition Bill" ("the Letter"). The Chamber is concerned that the Letter does not accurately reflect the real issues being debated.

The Chamber believes it is important to respond to it. In this submission, we therefore explain why the Bill should not be adopted as currently drafted and without significant amendments. We also take the opportunity to re-state the Chamber's position on the proposal for a competition law in Hong Kong.

Why the Letter on 24 February 2011 does not strengthen the case for the Bill, as currently drafted

The Letter does not provide support for the Bill, as currently drafted, for the following reasons:

- It does not engage in the real issue, which is not whether Hong Kong should have a competition law, but *what kind of competition law* Hong Kong should have. Instead, the first part of the Letter is devoted to defending the idea that Hong Kong should have a competition law, something which the Chamber, as the main representative association of Hong Kong businesses, is not even challenging, and indeed supports.

- Most of the rest of the Letter defends, uncritically, the Bill as currently drafted. It does not address at all the various constructive proposals for improvement which numerous stakeholders (including this Chamber) have put forward to the Bills Committee. In other words, it depicts the policy choice as either to have no competition law at all, or to have a competition law in the form of the Bill as currently drafted. This "all or nothing", "take it or leave it" approach is not helpful to the exercise of coming up with a competition law which is suitable for Hong Kong.

- It makes no proposal to alleviate the burden of the law for SMEs in the Bill itself. On the contrary, it supports leaving this matter to the discretion of the future Commission. By contrast, this Chamber has made a constructive proposal to change the Bill in a way which, with minimal amendment to the text, would significantly alleviate the unnecessary burden which the current draft would impose on all businesses, including SMEs, whilst at the same time meeting the Government's objective of stopping genuinely harmful conduct. The Chamber provided a mark-up of the Bill to the Bills Committee along with its submission in November 2010, showing the relevant changes. This proposal has not even been addressed, either in the Letter, or thus far by the Government.

- It contains various misstatements regarding both overseas competition law and the Hong Kong Competition Bill. In a number of aspects it exaggerates the alleged objections to the Bill in a way which makes them easier to refute (the "straw man" approach). Given the importance of the matter, we have set out these flaws in more detail in the table in the latter part of this letter.

The Chamber's position on the Proposal for a Competition Law

The Chamber has always supported the introduction of a good competition law for Hong Kong, on the premise that the approach is minimalist, and that the regime will ensure fairness, transparency and certainty.

Overseas experience shows such significant changes in competition policy are complex. There are considerable differences in both competition policy and the way that competition laws have been drafted, interpreted and applied around the world. This reflects, among other things, different political environments, levels of economic development, market conditions, and degrees of market liberalisation around the world.

Recognising this, the question, then, is what form of competition policy and competition law will best serve the interests of Hong Kong. Stakeholders have raised very legitimate concerns as to whether the Administration's current proposal has been properly tailored to meet Hong Kong's needs. The Chamber would emphasise that ultimately one needs to step back and look at the Hong Kong Competition Bill in the round. If one does this, it is apparent the current draft of the Bill seeks to impose the broadest possible conduct rules, without definition of key terms, without appropriate carve outs for pro-competitive conduct or SMEs with low market share, without clarification as to the position regarding mergers, giving maximum discretion to the Commission and Tribunal to then write the rules as to what is and is not prohibited.

It is also proposed that the current sectoral regulators will be retained, increasing cost, risking divergence in approach which may increase uncertainty and diluting any competent competition law expertise across the various regulators. The uncertainty is further increased by the proposal that the Tribunal, when deciding cases, will not be bound by the normal rules of evidence and procedure that normally apply to protect parties' rights in litigation before the courts. With that uncertainty and cost, the law then seeks to impose penalties that are far in excess of most jurisdictions in the world, including the EU.

Various economies may have adopted aspects of the bits that go to making up the whole of Hong Kong's Bill. However, the cumulative effect of the Bill is an extreme change in policy for Hong Kong, introducing unnecessarily high levels of uncertainty, devolving power from the legislature to the Commission and Tribunal to effectively write Hong Kong's economic policy, and significantly increasing business risk in Hong Kong (with a commensurate increase in the attractiveness of neighbouring jurisdictions in Asia with whom Hong Kong competes to be the preferred place of business).

A poorly drafted law could have serious negative effects on Hong Kong's economy. The competition law, when looked at in the round, must be a law that is not overly intrusive or impose unnecessary costs to companies, consumers or the overall economy. It must also be consistent with Hong Kong's faith in the market system and legal certainty. Ultimately, it must enhance Hong Kong's attractiveness as a vibrant business hub for the well-being of all of those who live and work in Hong Kong

Chamber's detailed response

The numbering in the following table follows the order in the joint letter entitled "Responses to the Hong Kong Competition Bill" issued on 24 February 2011 by 22 academics. The contents in the academics' letter is organised under the headings of Objections 1-12.

Objection	Academics' Comment	Chamber's Response
3	"The suggestion that a competition law would undermine the international competitiveness of Hong Kong industries is illogical."	Incorrect. Misconceived competition policy or a poorly drafted and implemented competition law could be enormously damaging to the competitiveness of Hong Kong. The quote from Professor Porter that is relied on in the letter, itself, emphasises the need for "an appropriate competition law". This begs the question what is the appropriate competition policy and law for Hong Kong. Professor Michal Gal, one of the signatories of the Letter, has herself said in her book, *Competition Policy for Small Market Economies*:[1] "For the most part, the literature on competition policy focuses on large economies, such as the United States and the European Community. This is not surprising, as their competition policies have been a major tool for achieving economic and other social goals for several decades, and given the size of the markets regulated by these policies. Yet the economic paradigms on which such competition policies are based do not necessarily apply to the many small market economies that exist around the world and that have adopted or are contemplating the adoption of a competition policy. As I argue in this book, **the size of a market necessarily affects the competition policy it should adopt."** This was echoed in a presentation by Mr Derek Ridyard, a prominent competition economist, at a competition conference in December 2010 organised by Professor Mark Williams, one of the authors of the Letter. The economist succinctly stated, having reviewed some of the complexities and failings in the EU and US models: "[d]espite the breadth of EU, US enforcement experience, there is no "plug and play" model for emerging regimes to adopt." (see extracts in the Annex)

[1] Harvard University Press 2003, p. 1.

		At the level of technical drafting and implementation, Professor Thomas Cheng, another signatory to the Letter, has recently published an article that is highly critical of the way the broadcasting competition law is being implemented in Hong Kong. Professor Mark Williams has also observed previously that:[2] "[t]here is a particularly acute problem in relation to the competition provisions of the existing Ordinances. The BO and TO have different substantive coverage, different definitions, different substantive rules, different procedures, and different appeal routes; this is obviously grossly unsatisfactory, both from a theoretical and practical perspective." Those who have had to deal with competition cases in the telecommunications industry are well aware of the difficulties caused by the poor wording of the competition provisions in the Telecommunications Ordinance. This is imposing unnecessary cost and uncertainty on those sectors to the detriment of the economy, which could be reduced or avoided with a properly worded and implemented law. The cost imposed by regulation can be very significant indeed. For example, the UK Government's Better Regulation Task Force estimated in 2005 that regulation of the economy was costing a staggering 10 to 12 percent of the UK's GDP. It is essential for Hong Kong to ensure it gets such a major change in its regulatory framework right.
4	"The two conduct prohibitions are not exclusive to the EU system but generally accepted as the core anti-trust provisions essential to any well-functioning competition law. Both large and small economies prohibit these behaviours, as they are universally seen as inimical to the effective functioning of the competitive process."	It is incorrect to say both large and small economies prohibit these behaviours. Canada, for example, does not prohibit non-hardcore agreements, or abuse of dominance, but subjects them to an administrative review procedure (a system which the Chamber advocates is appropriate for Hong Kong). The OECD report 'A Framework for the Design and Implementation of Competition Law and Policy' ("OECD Report") observes,[3] consistent with the Canadian view, why different behaviours call for different treatment:

[2] *Establishment of a Competition Authority for Hong Kong: Comments on the Competition Provisions*, Dr Mark Williams, 7 June 2006.
[3] Page 69 of the report.

	See also the academics' following comments: Objection 5 "The conduct rules are <u>not broader in ambit than</u> the principal conduct restrictions in <u>any established competition law</u>." And Objection 6 "These provisions are <u>entirely congruent</u> with competition regimes in overseas jurisdictions including the Mainland and Singapore." But contrast this with: Objection 5 "It should be noted that the primary prohibitions and structure of the Hong Kong Bill is <u>similar (but not identical)</u> to the Singapore Competition Act..."	"In cases involving abuse of dominance or monopolization it is essential to ensure that application of the law does not inadvertently curb efficient business practices. It is important to recognize that firms may achieve legitimately a dominant position in the market. Moreover, many practices that appear anticompetitive (such vertical market restraints as tying or exclusive dealing requirements) can serve legitimate pro-competitive purposes in some circumstances. ... Competition law provisions regarding abuse of dominance typically include several common elements. ... **The specific content and application of these elements can vary significantly among countries."** The academics themselves note in the Letter (see objection 4) that although the prohibition of anti-competitive agreements is common globally, "**there are variations as regards whether only horizontal agreements (price-fixing, bid-rigging, or market allocation) or some types of vertical agreements (distribution agreements, resale price maintenance) are caught**." They are therefore incorrect to say the conduct rules in Hong Kong's Bill (which attack both horizontal and vertical arrangements without limitation) are *no broader* than any established competition law or that they are *entirely congruent* with competition regimes in overseas jurisdictions including Singapore. The academics will be aware that Singapore in fact has exemptions for vertical arrangements in Schedule 3 of the Singapore Act. The rationale for this is the general consensus amongst economists that the majority of vertical agreements have net pro-competitive effect. It is also incorrect to say "these behaviours are universally seen as inimical to the effective functioning of the competitive process". The only type of conduct which comes anywhere close to being universally condemned is hardcore cartel conduct- but even here, as Professor Whish, one of the signatories to the Letter, has observed, the restriction of competition must still be "appreciable" for such conduct to be prohibited under EU law[4], and the conduct could still qualify for exclusion if the relevant criteria are satisfied.[5] There is also a big difference between hardcore cartel conduct, and potentially pro-competitive arrangements such as distribution agreements and joint ventures, many of which would also fall within the broad prohibitions in the

[4] Richard Whish, *Competition Law*, Oxford University Press (6th ed.) p 117.
[5] Richard Whish, *Competition Law*, Oxford University Press (6th ed.), p150.
[6] Richard Whish, *Competition Law*, Oxford University Press (5th ed.), p454.

		Bill, and have to satisfy the vague criteria for exclusion to be permitted. In the previous version of Professor Whish's book, he had gone so far as to observe:[6] "There have been and continue to be fierce debates about many issues in competition policy: for example the appropriate treatment of vertical agreements, 'abusive' pricing by dominant firms, refusals to supply, the inter-relationship of competition law and intellectual property rights and the standards for intervention against mergers. However **if competition policy is about one thing, it is surely about the condemnation of horizontal price fixing, market sharing and analogous practices**. … Investigation of and argumentation about the other issues mentioned above may afford greater intellectual stimulation to inhabitants of the world of competition policy, but **pursuit of the hum-drum cartel ought to lie at the heart of any competition authority's agenda**." The amendments to the Conduct Rules put forward by the Chamber make a clearer distinction between these two categories of arrangements, and tackle potentially pro-competitive arrangements and conduct in a way which is fairer, less intrusive, and economically more sensible, particularly in the Hong Kong context. There is a clear economic case for adopting in Hong Kong the form of Conduct Rules put forward by the Chamber.
4	"Many small nations, such as Malta, Slovenia, Latvia, Lithuania and Estonia, have adopted systems similar to the EU model, without ill effect."	No empirical evidence is provided to support this assertion. On the contrary, the "ill effects' of the abuse of dominance provisions in EU law (and the equivalent "monopolization" provisions in US law), for example, are well-documented. See for example in the Annex extracts from a presentation by Mr Derek Ridyard, a prominent competition economist, at a conference organised by Professor Mark Williams in December 2010. As noted in relation to objection 3 above, a poorly worded or implemented competition law could have enormous "ill effects" on Hong Kong's economy. It is worth noting Alan Greenspan, a highly regarded economist and former Governor of the US Federal Reserve, who went so far as to say, in a highly critical comment on the ill effects of the US antitrust law, that "[n]o one will ever know what new products, processes, machines, and cost-saving mergers failed to come into existence, killed by the Sherman Act before they were born. No one can ever compute the price

		that all of us have paid for that Act which, by inducing less effective use of capital, has kept our standard of living lower than would otherwise have been possible."[7] The complexities and degree of debate in relation to these issues is not acknowledged in the Letter.
4	"Thus, neither the legal rules nor the enforcement machinery of the Hong Kong Bill should be categorized as a copy of the EU competition regime."	This is a "straw man" argument. No one, as far as the Chamber is aware, has argued it is an exact copy. What is certainly the case is that the First Conduct Rule, certain examples in the Bill of conduct which might be caught, and the Schedule 1 paragraph 1 exclusion, are worded in almost identical terms to the equivalent provisions in EU law. The Administration clearly stated to Legco that it was the UK Competition Act (modelled on the EU law) from which they had "drawn the majority of … reference in drafting the Bill"[8] and, when addressing the penalty provisions, that "the regime adopted in the Competition Bill is very similar to the EC".[9] Further, the Administration has on several occasions sought to re-assure business by saying that EU case law can be referred to for guidance. If the academics are right that the Hong Kong Bill is not based on EU law, then (even putting aside for a moment the complexities of using civil law precedent from a large economy that has had numerous influences, including EU integration, running through its competition law and policy) how can the EU cases be used for guidance?
5	"The fact that mergers are not included makes the Bill unusually narrow by international standards."	This comment contradicts statements which Under-Secretary Greg So has made in briefings to businesses, where he indicated that mergers *could* fall within the scope of the Conduct Rules as currently drafted. However, the comment is consistent with policy statements which the Administration has made to Legco, namely that the Law would focus on anti-competitive conduct, and that mergers (except for the telecommunications sector) would not be covered.[10] The fact is that mergers may be caught by the Conduct Rules, as currently drafted, in spite of the

[7] Alan Greenspan, *Antitrust*.
[8] CB(1)637/10-11(02), para 12.
[9] CB(1)637/10-11(02), para 10.
[10] See, for example, the Administration's *Overview of Major Components of the Competition Bill*: CB(1)320/10-11(02).

		statements by the Administration to Legco to the contrary. If the Bill is left as it currently stands, ultimately this issue would have to be clarified by the courts through litigation. The Chamber has submitted instead that this matter should be clarified now, by a simple amendment to the Conduct Rules, excluding mergers from their scope (as in Singapore and Jersey, for example), in line with the Administration's stated policy intention. The Chamber has provided the Bills Committee with draft wording to this effect. However, so far the Chamber's submission has received no response from the Administration. This is not just a matter of providing legal certainty (although this is critically important). Unless the size and public funding of the Commission are to be increased significantly, its ability to tackle anti-competitive conduct may be adversely affected if its remit is extended to include mergers, given the substantial additional workload this would create.
6	"If a limited list of specific types of conduct were strictly defined and identified as unlawful, skilful lawyers and their clients would merely devise a change in the form (but not the substance) of the activity so that it fell outside the prohibition, while the substantive harm to competition would remain and not be addressed."	This is incorrect: hardcore conduct can indeed be defined and prohibited in a way which captures the substance of the offensive activity (see Australia, Canada, and UK competition law, for example). Other types of conduct which cannot be defined in advance, but which cause net economic harm in the future, can be dealt with through an administrative review process, as in Canada. This is the only fair way to address conduct which cannot be predicted with certainty to be anticompetitive in advance of a Competition Commission or Tribunal determination. It would, in any event, be of considerable concern if it was argued (as the Letter seems to suggest) that the law should not be clear so as to make sure people do not seek to find a way around it. The rule of law and human rights dictate that the legal process works quite the other way around. The law must state with as much certainty as possible what conduct is prohibited. People will, of course, then seek to modify their conduct to ensure that they do not do something which has been prohibited by the law. That is not a "device" employed by skilful lawyers – it is a fundamental right that people have guaranteed to them under the Basic Law to know what conduct they can and cannot legitimately engage in and to then plan accordingly. The Courts are competent to consider substance over form as this is something they necessarily have to deal with when interpreting any law.

6.	"As the Bill attempts to uphold the process of competition attempting to set out in the primary legislation all the instances and particular circumstances in which the law would apply is impractical and impossible. No competition law anywhere in the world attempts to do this."	This is another "straw man" argument. The Chamber is not suggesting that all instances where the law would apply be definitively listed. What it is recommending is that "hardcore" conduct only is prohibited, and that others which need to be assessed case-by-case are dealt with through an administrative review process. The Letter does not address this recommendation, or the Chamber's mark-up of the wording of the Conduct Rules which shows the relatively straight-forward drafting changes that would be required to achieve this. In any event, even without such an administrative review process, having a prohibition limited to hardcore conduct, on the basis that other conduct may be economically beneficial depending on the facts, and therefore should not be prohibited in principle in advance, is a perfectly legitimate policy choice- whether or not precedents exist in other jurisdictions.
6	"Specifying in finer detail the factual situations in which the law would apply is invariably left to the competition agency, which will be composed of experts who can draw on experience in other comparable jurisdictions and provide specific guidance and clarity to industry and consumers as to when and how the specific provisions of the law will apply."	Unless there is clarity in the legislation as to what key concepts mean, such Commission guidelines will be meaningless and unreliable. Even under EU law, the courts have disagreed with what the Commission has said in guidelines - see for example the recent *TeliaSonera* margin squeeze case.[11] This is all the more likely where there is no pre-existing Hong Kong case law, no certainty as to which foreign cases (if any) the Hong Kong courts would believe are relevant, and (unlike the EU and UK) it is not the Commission but the courts which will decide cases under the Bill.
6	"Competition law can be both flexible and responsive to changing circumstances and error can always be corrected by the courts, if the agency mistakenly interprets the law."	This emphasizes the large and worrying discretion which the Bill, as currently drafted, would afford to the enforcement authorities through its general, widely-framed prohibitions. It also implicitly recognises that if the agency gets it wrong (with this discretion, the benefit of hindsight, and own in-house legal and economic expertise at its disposal) the chances of a business without these benefits getting it wrong are even greater. Finally, it omits to mention the very substantial costs and risks businesses are faced with in seeking to have competition decisions overturned by the courts.

[11] Case C-52/09, judgment of 17 February 2011.

7	"Where small firms collectively agree to rig-bids, fix prices or allocate markets, however, the law should apply because this conduct is the most blatant and harmful type of anti-competitive behaviour, harms consumers by increasing prices, and benefits no-one except the colluding firms."	This contradicts the Government's publicly stated position, and position under the Bill itself, which is that there will be no such *per se* prohibitions, and that agreements should only be prohibited if they have an appreciable adverse effect on competition, and have no countervailing economic efficiencies.
7	"Small firms have little to worry about from a competition law."	This is clearly not correct, as demonstrated by the above quote from the Letter, which makes it clear that SMEs could be attacked for collective (horizontal) agreements. It is common for SMEs to enter into a range of horizontal (and vertical) agreements, which have perfectly legitimate and pro-competitive objectives. The suggestion that SMEs will need to defend these arrangements against possible attack by the Commission (even if only a warning in the first instance) at market shares as low as 10% is very concerning. With such a low market share, it is most unlikely there could be a legitimate competition concern, as the Letter itself recognises. However, it cannot be imagined that the Commission would take the trouble of issuing a warning and then ignore or fail to take further action on the issue if the SMEs continued the conduct because they considered it was not anti-competitive. SMEs will usually not have the resources to defend competition cases, which can cost hundreds or thousands of millions of dollars to run. Even the work for SMEs in seeking to understand and take professional advice on compliance will be a significant cost burden for them. The Letter notes that some jurisdictions do exempt small firms which collectively have low market shares. However, the Letter does not address the obvious fact that the Hong Kong Bill fails to provide any such exemption.
8	"The incremental compliance costs to MNCs of complying with a Hong Kong competition law will be very small."	This misses the point, which is that MNCs will have little incentive to do business in Hong Kong, given the small size of the market, if an infringement of Hong Kong competition law exposes 10% of their global total turnover to a possible penalty, let alone the Administration's current proposal that the penalty be up to 10% of worldwide turnover for every year of the infringement. It could take many years to run competition cases through the Tribunal and appeal process and MNCs will obviously pay serious attention to risks of such magnitude.

9	"The maximum financial penalty that can be imposed is 10% of global turnover. The high maximum penalty is required to adequately deter large companies who engage in serious breaches of the law and damage the interests of Hong Kong consumers – including SMEs – who inevitably suffer when serious breaches of the law are committed by large companies. For example, Hong Kong SMEs probably suffered damage from the international air cargo cartel operated by various airlines, when those SMEs used air freight services. The high penalty ceiling is designed to deter big business from committing egregious breaches of the law that cause significant economic harm to Hong Kong businesses and consumers."	There is no evidence that such a high cap is required in Hong Kong to provide deterrence, and that a substantially lower cap- combined with the extensive additional sanctions- would not provide a sufficient deterrent. The example in the Letter does not make sense. If the prospect of severe sanctions in other jurisdictions did not stop this international cartel, the prospect of an additional penalty in Hong Kong would not do so. The Letter omits to mention that the penalty provisions are even more stringent than the EU- this has not been explained. In the EU, penalties may only be imposed if the infringement is committed intentionally or negligently. No such limitation is imposed in the Hong Kong Bill. The absolute cap in the EU is also limited to 10% of one year's total turnover. The Hong Kong Bill imposes 10% of total turnover for each year that the infringement exists. Moreover, in practice the penalty in the EU is actually calculated as a percentage of turnover in the goods or services concerned (adjusted upwards/downwards to take account of aggravating/mitigating factors). The letter also fails to draw attention to smaller jurisdictions of relevance to Hong Kong, such as Singapore. Singapore requires it to be shown the conduct was intentional or negligent and caps the penalty at 10% of turnover in Singapore for the relevant product and geographic markets for each year of the infringement to a maximum of 3 years.
10	"It is most unlikely that large volumes of private litigation will result in Hong Kong from the passage of the Bill, Private rights of action in most other jurisdiction have not led to high private litigation rates."	This has not been the experience of other jurisdictions. Both New Zealand and Australia have seen significant volumes of private litigation. Those jurisdictions' court systems share many features in common with Hong Kong. The cost of private competition litigation can be enormous. Even a High Court Judge observed in relation to the "C7" competition case in Australia that: "The case is an example of what is best described as '*mega-litigation*'. … An invariable characteristic of mega-litigation is that it imposes a very large burden, not only on the parties, but on the court system and, through that system, the community. …The trial lasted for 120 hearing days…The outcome of the processes of discovery and production of documents … was an electronic database containing 85,653 documents, comprising 589,392 pages. Ultimately, 12,849 '*documents*', comprising 115,586 pages were admitted into evidence. … Quite apart from the evidence, the volume of written submissions

		filed by the parties was truly astonishing. … In addition, the pleadings amounted to 1,028 pages. The statements of lay witnesses that were admitted into evidence run to 1,613 pages. The expert reports in evidence totalled 2,041 pages of text, plus many hundred pages of appendices, calculations and the like. … My estimate is that the parties have spent in the order of $200 million on legal costs …" [approx HK$1,600 million at prevailing exchange rates]. [12] In any event, one must ask what the point would be in standalone actions if the Administration had not intended them to be used? The Letter contradicts the Government's position that private actions are necessary to alleviate the enforcement burden on the Commission. The New Zealand Government made similar comment about private actions alleviating burden on the competition regulator when introducing the Commerce Act 1986 (New Zealand's competition law), leading to a significant volume of private litigation in New Zealand.
10	"The Commission can intervene in private cases it thinks have no merit and the Tribunal has power to strike out unmeritorious claims."	This is unrealistic. Competition cases typically involve complex economic arguments on both sides, which cannot usually be dismissed as unmeritorious without detailed, lengthy and costly inquiry. Whilst perhaps not evident to academics, this is a point that competition law practitioners and those who have had to defend themselves against unmeritorious competition cases are acutely aware of (see for example the C7 case above).
11	"The exercise of those IPRs, on occasion, be abused to the detriment of the competitive process where, for example, the patent holder attempts to exclude competing products by use of its market power. In such circumstances, the illegitimate exercise of market power could breach the law. But cases such as this are rare."	This comment lacks balance and downplays the enormous complexity of the relationship between competition law and IP rights. The whole purpose and nature of IPRs is to grant the IPR holder a monopoly, i.e. to exclude. As noted in the quote from Professor Whish set out above, this is a highly complex and controversial area of competition law and economics overseas.

[12] *Seven Network Limited v News Limited* [2007] FCA 1062, Summary at paras 2 to 8.

Annex

Extracts from:

Building Capacity: Some Economic Issues in Laws Against Dominant Firm Abuse
Asian Competition Law Forum, 6-7 December 2010
Derek Ridyard, RBB Economics, London

2.1 THE EU ARTICLE 102 DEBATE

- Series of form-based case law precedents, many dating from 1970s, 1980s, that don't reflect modern antitrust enforcement or economic effects-based principles
- EU Commission "enforcement priority guidelines" issued in December 2008 after a long debate and consultation. These set out an effects-based approach to enforcement against exclusionary conduct
- But EU reform process obstructed by recent EU court Judgments, e.g. In *Tomra*, where old form-based approach re-asserted

Problems:

- Not much "convergence" between Brussels and Luxembourg, so using the EU as a model for global convergence is problematic
- Even within the effects-based guidelines, many unresolved debates that have big implications for practical policy enforcement

2.2 THE US SHERMAN ACT SECTION 2 DEBATE

- US Section 2 enforcement has its own complicated history of mixed legal precedents
- Section 2 debate led to September 2008 DOJ Report on single firm conduct – set out a starkly non-interventionist stance and rejected some of case law
- But DOJ report immediately disowned by the FTC. DOJ belief that monopoly power is self-destructive "*does not adequately consider the harm consumers will suffer while waiting for the correction to occur.*"
- DOJ then withdrew its own report in May 2009
- FTC has since threatened to explore even broader Section 5 intervention powers

Problems:

- Even the world's most sophisticated antitrust regime has not reached steady state consensus
- US agencies have now agreed with what they don't like, but remain silent on how they think enforcement should be implemented