中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會LEGISLATIVE COUNCIL
林健鋒 議員 Hon. Jeffrey Kin-fung Lam, SBS, JP

8 April 2011

Ms Linda Lai
Deputy Secretary for Commerce and Economic Development
Level 29, One Pacific Place
88 Queensway, Hong Kong

Dear Linda,

I refer to your answer to the questions I put to you in the Legco Bills Committee meeting on 29 March 2010, namely whether there are any aspects of the Canadian competition law which the Government thinks might be a suitable approach in Hong Kong, and if not, why not.

The reason I raised these questions was because the Administration was quoted in an article in the ***South China Morning Post*** dated 23 March 2011 as saying "we do not consider the Canadians' approach suitable for Hong Kong". I asked you at the Bills Committee meeting on 29 March 2010 why this was the case. Your answer was that Canada has introduced criminal offences for "hardcore" arrangements between businesses (e.g. price-fixing, bid-rigging and market-sharing), and it was not thought appropriate to criminalize such conduct in Hong Kong at the outset of a new law (albeit it would still be subject to potentially severe administrative sanctions in appropriate cases).

While the Chamber fully agrees with your point on criminalization, this is ***not*** the aspect of the Canadian approach which the Chamber has suggested is suitable for Hong Kong. (I am sure the Administration would agree that, while competition laws in overseas jurisdictions can be instructive in formulating a competition law for Hong Kong, wholesale importation of foreign laws, without regard to Hong Kong's specific circumstances, is not appropriate). As the Chamber's initial submission to the Bills Committee in November 2010 made clear, it is Canada's "case-by-case prohibition" approach to ***non-hardcore*** arrangements (such as joint ventures, joint buying

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agreements, and distribution agreements), and unilateral conduct by "dominant" companies, which the Chamber believes is more appropriate for Hong Kong than the "upfront jeopardy" approach currently taken in the Bill.

As well as re-iterating this point, to make sure there is no misunderstanding of the Chamber's position, I thought it might also be useful to summarize briefly why the Chamber believes that a different approach to non-hardcore arrangements and unilateral conduct is appropriate.

Under the Bill as it currently stands, even non-hardcore arrangements, as well as unilateral conduct, would be prohibited in principle (unless covered by an exclusion). This means that if a business takes the view that its proposed course of action complies with the law, and the Tribunal decides six years later that its economic assessment was incorrect, they will be in the position of having acted illegally, and exposed to penalties and damages claims (as well as other potential sanctions) for the ***whole of the period***. The Chamber believes that this is inherently unfair, and that it is also inefficient since it risks deterring pro-competitive conduct which might benefit consumers. Under the Chamber's proposal, by contrast, illegality and exposure to sanctions would only arise for the ***future***, and only if the Tribunal ruled against the conduct, and the business failed to comply with the Tribunal's ruling. The diagram in the Annex to this letter illustrates the difference between the two approaches. The Chamber believes its proposal is a fairer and more efficient way to treat these sorts of arrangements and conduct for the following reasons:

- Non-hardcore arrangements in many cases, including numerous arrangements of this nature entered into by SMEs, actually increase competition, or produce efficiencies which outweigh any harm to competition. They also benefit consumers in many cases. Prohibiting such agreements in principle from the outset, alongside hardcore conduct, as the First Conduct rule does (as currently drafted) does not reflect the radical difference between hardcore and non-hardcore arrangements. Nor does it reflect the real practical difficulties businesses face trying to assess upfront whether non-hardcore conduct will one day be determined by the

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regulator or Tribunal to be highly pro-competitive, or anticompetitive, where the chances of finding one way or the other often turn on the toss of a coin, driven by disputed economic evidence and other information that was not available to the business at the time the decision was made.

- The Government has said that non-hardcore arrangements (at least) may be excluded from the prohibition if they produce efficiencies which outweigh the harm to competition. However, placing the burden on businesses to assess whether their proposed arrangements will affect competition to the relevant extent (and if they do, whether there are efficiencies which will outweigh the harm to competition), and placing businesses in the position of having acted illegally and being subject to potential sanctions if they get the assessment wrong, seems to the Chamber to be unduly onerous and intrusive in the Hong Kong context, and to place excessive risks and compliance costs on businesses. To minimize these risks, businesses would have to engage specialist legal and economic expertise to advise them on matters such as market definition, market power, quantifying a restriction of competition, identifying and quantifying efficiencies, whether the efficiencies outweigh the harm to competition, etc. Even then, there would be no certainty as to how the regulator or Tribunal might ultimately assess the situation with the benefit it would have of access to broader information about the market that is usually obtained in competition cases and with the benefit of hindsight. This would be a particularly onerous burden for SMEs.

- The proposed mechanism in the Bill for the Commission to issue clearance decisions is likely to be unworkable, going by the EU experience. A wide-sweeping prohibition on conduct which 'prevents, restricts or distorts' competition, together with complex economic assessments to determine whether arrangements are permitted or prohibited will result in a large volume of applications for clearance decisions, distracting the Commission from tackling more serious anti-competitive conduct. This was the experience in the EU, where the clearance system was abandoned

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for these reasons in 2003. Guidelines are similarly of little use in practice, given the very fact-specific nature of each compliance assessment, and the fact that Commission guidelines would not be binding on the Tribunal, or even the Commission itself.

- Similar considerations apply to unilateral conduct under the Second Conduct Rule. Commercial initiatives such as discount schemes and product bundling can be pro-competitive in many cases, and EU case law on such practices has been generally criticized as over-restrictive and over-intrusive. The Bill's blanket prohibition of an (undefined) concept of "abuse", accompanied by the prospect of severe sanctions, can easily stifle competition rather than encourage it, contrary to the objective of competition policy.

The advantage of a "case-by-case prohibition" approach to non-hardcore arrangements and unilateral conduct is that it allows the authorities to intervene and prevent such practices where they are ***genuinely producing harmful effects in the market.*** The same investigative and injunctive powers would exist, enabling the Commission to intervene quickly in appropriate cases. In the meantime, businesses can get on with pro-competitive, efficient arrangements and conduct without fear that, at some point in the future, they may be held to have been acting illegally in the past, rendering them liable to sanctions and private damages claims if the authorities subsequently decide that they got a complex economic assessment wrong. Self-assessment will be encouraged, because the consequences of getting the economic assessment wrong in these cases (illegality, penalties, damages claims, etc.) would not exist. This would drastically reduce the burden on the Commission in issuing clearance decisions, releasing resources to tackle any serious anti-competitive conduct. It would eliminate the substantial compliance costs which the Bill would currently impose on businesses, which would be a particular comfort to SMEs (more comfort, the Chamber would submit, than the Administration's ***de minimis*** proposal currently provides). This is both fairer for businesses, since they have greater legal certainty, and more efficient, since it not only reduces compliance costs, but also encourages,

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rather then discourages, pro-competitive behaviour for the benefit of the Hong Kong economy.

This approach was driven in Canada, ***inter alia***, by a desire to ensure consumers and the economy at large were not deprived of the benefits that flow from healthy and energetic competition. This stemmed from a recognition that the "upfront jeopardy" approach to non-hardcore conduct adopted in many jurisdictions can have the unintended effect of causing businesses to self-censure their competitive conduct for fear of breaching unclear rules. Drawing on the lessons of other jurisdictions and the Canadian approach, the "case-by-case prohibition" approach to non-hardcore conduct would give Hong Kong one of the most modern and sophisticated competition laws in the world (even more advanced than laws introduced in jurisdictions such as Singapore prior to the recent Canadian reforms). It would protect and foster vibrant competition, alleviating a potentially heavy and unnecessary burden for businesses, including the SMEs, while ensuring that harmful anticompetitive conduct is tackled.

Some people might be concerned that considering any material amendment to the current Bill might jeopardize the possibility of the Bill being passed by the end of the next Legco session in July 2012. In the Chamber's view, such a concern would be unjustified. None of the proposed amendments the Chamber has put forward would require a material amount of drafting to achieve – see for example the mark-up of the Bill provided with the Chamber's submission to the Bills Committee last November. They should therefore involve no delay in the Bills Committee's timetable. For the proposal referred to in this letter, it would require in essence (apart from some consequential amendments) a simple sub-clause in the Conduct Rules stating that, other than hardcore arrangements, the prohibitions would only take effect when the Tribunal makes a determination to that effect.

If any significant delay to the timetable were to occur, it would be more likely to arise from a refusal or failure to consider proposed amendments which enhance, rather than diminish, the quality of the Bill. In this respect, we are pleased to note that the Administration has consistently re-assured the Bills Committee that it has an open mind to considering constructive suggestions for amendments to the Bill. I therefore

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look forward to receiving the Administration's written response to my questions at the meeting, and the points in this letter, in time for the next Bills' Committee meeting on 14 April 2010.

Finally, we note that recent discussion in the press seems to have suggested that any criticism of the Bill in its current form equates to a criticism of the idea of a competition law in Hong Kong itself. Such suggestions are counter-productive, and unhelpful to Legco's task of passing a Competition Bill which is suitable for Hong Kong. It should be entirely clear from the Chamber's submissions to the Bills Committee (and this letter) that the Chamber is ***not*** opposed to the introduction of a competition law in Hong Kong. On the contrary, the Chamber has consistently supported, and continues to support, the introduction of a competition law, provided it is crafted to suit Hong Kong's particular circumstances, and takes proper account of overseas experiences. The importance of taking account of local circumstances as well as overseas experiences was recently echoed in a letter to the ***South China Morning Post*** by the EU's representative for Hong Kong and Macau (see "EU welcomes competition law in Hong Kong", 23 March 2011). It is these factors, together with a conviction that a law which does not meet these criteria is likely to do considerable harm to the Hong Kong economy rather than good, which has motivated the Chamber's proposed amendments to the Bill.

I hope that the above would serve as a useful reference for you and the Government to consider our proposal. I look forward to hearing from you the government's responses to our proposal, and having further discussion with you.

Thank you very much.

Yours sincerely,

Jeffrey Lam

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ANNEX: TREATMENT OF NON-HARDCORE ARRANGEMENTS AND CONDUCT[1] UNDER COMPETITION BILL

Example – Joint Buying Agreement Between 6 SMEs with Combined Market Share of 30%				
	Year 1	Year 5	Year 6	
	Agreement entered into (parties take the view it may restrict competition, but satisfies efficiency exclusion)	Complaint received by Commission from supplier. Commission investigates and initiates proceedings before Tribunal.	Tribunal disagrees with parties' view and decides agreement breaches First Conduct Rule. Orders termination of agreement.	
Current Draft	**Parties have acted illegally: exposed to penalties, damages etc. for the whole period** ⟵			
Chamber Position				Illegality, exposure to penalties, damages etc **BUT ONLY** if Tribunal order breached ⟶

[1] e.g. joint ventures, joint buying agreements, distribution agreements, discount schemes.

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