Submission to Legislative Council

Bills Committee on Competition Bill

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by

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Honourable Chairman and Members,

1. My comments in this submission address four matters arising from recent debate on the Competition Bill:

   - ***Canada's criminal-plus model for competition law is very much a product of that regime's unique history*** – When seen in the round and in its context, it is apparent that the approach under the current Canadian *Competition Act*– which involves a combination of criminal sanctions for conduct prohibited *per se*, plus a second tier of civil remedies – has little to offer Hong Kong.

   - ***Legislatures around the world that have enacted competition laws have virtually all found it convenient for their competition agencies to issue guidelines*** **–** which articulate those agencies' analytic methods, procedures and priorities. In light of the sensitivity regarding the scope of authority to be delegated to the proposed Competition Commission, the circulation of draft guidelines on a provisional basis should be considered a pragmatic response.

   - ***The Competition Commission's accountability to the public could be enhanced, without unduly diminishing its autonomy, by requiring it to publish an annual Corporate Plan setting out objectives for the coming year and metrics to measure achievement of those objectives*** – The Competition Bill currently requires the Competition Commission to submit to the Chief Executive annual "estimates of its income and expenditure for the next financial year" and an annual report on its activities in the preceding year (Schedule 5, paras 19 and 25) but those could usefully be supplemented by a Corporate Plan detailing forward-looking commitments by the Commission as to the work it proposes to undertake and the outcomes it will seek to achieve. The Commission should periodically report on its performance relative to planned outcomes.

   - ***Concurrent jurisdiction between the Competition Commission and sectoral regulators is unnecessary*** – Although concurrent jurisdiction has been made to work in other jurisdictions, it would entail administrative complications and overhead that Hong Kong need not incur at this stage in its experience with market liberalization and competition law.

The Canadian Criminal-plus Model

2. The Hong Kong General Chamber of Commerce (HKGCC) has proposed an approach to competition law enforcement that is said to be based on Canadian precedent:

> [A]greements and conduct should not be automatically prohibited: they should be prohibited only in specific cases, if and when the Tribunal decides, after examination by the Commission, that they should be prohibited; and the prohibition will only take effect from the date of the Tribunal's ruling, thereby only outlawing relevant future conduct after the ruling. There is recent precedent for such an approach in Canada.[1]

3. It would be erroneous to consider that Canadian law only prohibits anti-competitive agreements and conduct in specific cases, if and when the Tribunal so decides. Since 1889 anti-competitive "conspiracies" have been prohibited in Canada as criminal offences, for which heavy criminal penalties can be imposed (currently including fines of up to CAD 25 million and imprisonment for up to 14 years). Civil remedies have also been introduced as one of the responses to the difficulty of proving anti-competitive effects and intent to the criminal standard (i.e. beyond reasonable doubt).

4. Relevant milestones in the evolution of Canadian competition law include:

- 1889 – Canadian *Act for the Prevention and Suppression of Combinations formed in Restraint of Trade* made it a criminal offence, punishable by two years in gaol, to conspire to restrict the supply or raise the price of a commodity.

- 1910 – The *Combines Investigation Act* expanded the scope of Canadian competition law to encompass mergers and monopolization activities.

- 1919 and 1923 – Successive *Combines Investigation Acts* established administrative enforcement bodies (the Board of Commerce and Registrar, respectively).

- 1960 – "The need for new, more relevant and effective competition legislation became apparent in 1960 when the courts acquitted the accused in the *Canadian Breweries* and *B.C. Sugar* merger cases and the Crown did not appeal."[2]

- 1976 - Amendments to the *Combines Investigation Act* established the Restrictive Trade Practices Commission as a quasi-judicial tribunal and gave it civil law powers to review and rule on certain practices including refusals to deal, consignment sales, exclusive dealing, market restriction and tied selling.

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1 Hong Kong General Chamber of Commerce *Submission to Bills Committee on Competition Bill* 19 November 2010 (Bills Committee paper CB(1)516/10-11(03)) para 5.

2 Stanbury, W.T. "The New Competition Act and Competition Tribunal Act: 'Not with a Bang, but a Whimper'" 12 Can. Bus. L.J. 2 (1986-1987) at 4.

- 1978 and 1980 – the Supreme Court's decisions in the *Aetna Insurance* and *Altantic Sugar* cases required proof of intent to lessen competition unduly as an element of conspiracy, making it extremely difficult for the Crown to succeed in competition cases.

- 1986 – *Competition Act* and *Competition Tribunal Act* passed, maintaining the competition crime of "conspiracy" while moving monopolization and mergers to a civil enforcement regime. The Competition Tribunal was given jurisdiction to make orders to dissolve mergers or requiring disposition of assets or shares, without criminal standard of proof having to be satisfied.

- 2009 – amendments to the *Competition Act* made the crime of "conspiracy" much more easily proved, by removing the requirement to prove an undue lessening of competition (i.e. by making agreements between competitors to fix prices, allocate customers or markets, or fix production or supply of a product illegal *per se*). On the expanded civil track, *any* agreement between competitors may be prohibited by the Tribunal (i.e. not just an agreement to fix prices or allocate markets), if the agreement substantially lessens or prevents competition.

5. Canada's present competition law and institutions must therefore be understood as the result of successive adjustments made over the last forty years to a regime that has focused on criminal liability since its inception, in response to problems with enforcing the criminal conspiracy prohibitions.

6. There are three fundamental objections to adapting Canada's criminal-plus regime to Hong Kong. These relate, first, to regime credibility; secondly, to Hong Kong not being encumbered with any historically problematic enforcement track; and, thirdly, to the costs associated with implementing two or more tiers of enforcement.

7. It seems highly unlikely that the HKGCC would wish to endorse criminal liability for anti-competitive conduct in Hong Kong. Equally, I do not understand the HKGCC to advocate *per se* liability. If *per se* liability and criminal sanctions are excluded from consideration, then a "two track" approach to enforcement would necessarily signal a very substantial reduction in the seriousness with which anti-competitive conduct is treated. An approach to enforcement which fails to prohibit anti-competitive conduct but merely imposes forward-looking remedies in particular cases is not appropriate in a jurisdiction of Hong Kong's sophistication, legal and economic development, and standing, I submit.

8. The consequence of adapting a criminal-plus regime to the non-criminal framework in Hong Kong (i.e. a civil-minus regime) would be to reduce greatly the international credibility of the Hong Kong regime. Hong Kong could not expect its competition law to be regarded as credible or "best practice" if abuses of market power and 'non-hardcore' forms of anti-competitive conduct continue to be tolerated except in the particular cases that the Tribunal rules against. Nor would the regime have domestic credibility

within Hong Kong: if "the prohibition will only take effect from the date of the Tribunal's ruling," as the HKGCC proposes, then its deterrent effect is neutralized. If it is profitable to engage in anti-competitive conduct, then undertakings will have every incentive to do so until such time as the Tribunal rules against them.

9. Secondly, Hong Kong today is in a position that is markedly different from that of Canada, in that Hong Kong is now building a new regime from the ground up, rather than amending a century-old regime. For Canada, the advantage of introducing a second track additional to criminal liability was that the new "civilly reviewable" matters were designed to overcome serious obstacles to enforcement on the criminal track, as Prof. Stanbury explains:

> The abuse of dominant position and merger provisions replaced what were all-but-unenforceable criminal law provisions, which had been in place since 1910.[3]

10. Elsewhere, Prof. Stanbury characterizes the criminal merger and monopoly provisions as "essentially unenforceable."[4] Hong Kong simply does not face the need to create a second enforcement track in order to overcome a problem created by a pre-existing set of "all-but-unenforceable" provisions.

11. Thirdly, Hong Kong has already made the policy decision not to impose criminal liability for anti-competitive conduct. For Hong Kong, a two-track approach to enforcement would offer none of the benefits sought by Canada but would impose the same costs associated with complexity and prosecutorial uncertainty. Goldman Q.C. and Joneja summarise these issues as follows:

> Under the new [Canadian] framework, the Commissioner will decide whether the evaluation of an agreement or arrangement between competitors will proceed on a criminal or a civil track, and the Commissioner will decide when to announce the track selected. While the Bureau has attempted to alleviate many of these concerns through the issuance of Draft Enforcement Guidelines on Competitor Collaborations, some concerns still remain. As the CBA points out: 'A delayed election to proceed on a civil track could create the perception that the Bureau is leveraging civil outcomes against criminal risk, particularly where possible resolution discussions take place prior to a determination of whether the matter would proceed as a civil or criminal matter.' Similar concerns have existed in recent years in relation to the dual tracks available for misleading advertising matters; the Bureau and the Commissioner are already sensitized to these issues. The recent amendments extend the potential magnitude of such issues.[5]

12. The HKGCC submits that: "[t]he Tribunal could have the power to impose sanctions in the case of 'hardcore' conduct (price-fixing, market-sharing and

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3 Stanbury, W.T. "Expanding Responsibilities and Declining Resources: The Strategic Responses of the Competition Bureau, 1986 – 1996" *Review of Industrial Organization* 13: 205-241 (1998) at 207. See also Ross, T.W. "Introduction: The Evolution of Competition Law in Canada" *Review of Industrial Organization* 13: 1-23 (1998) at 8.

4 Stanbury, W.T. "The New Competition Act and Competition Tribunal Act: 'Not with a Bang, but a Whimper'" 12 Can. Bus. L.J. 2 (1986-1987) at 41.

5 Goldman, C.S. and Joneja, N. "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner" 41 Loy. U. Chi. L.J. 535 (2010) at 560, footnote omitted.

bid-rigging) given the fact that these are more easily defined, and the likelihood that these practices will lessen competition substantially."[6] The expression "hardcore" conduct is deceptive: it connotes particular seriousness or culpability but is unhelpful as a test for identifying any such conduct or distinguishing between enforcement tracks.

13. The difficulty in distinguishing in legislation between degrees of culpability in anti-competitive behaviour has been graphically demonstrated by the problems encountered by English and Australian legislators in their efforts to introduce a criminal cartel offence to their respective competition regimes. Beaton-Wells and Fisse observe that:

> [T]he question of how to distinguish between and respond proportionately to different types of cartel conduct has been a constant and often controversial theme in the regulation of such conduct. The controversy has been no more acute than in the context of deciding where to draw the dividing line between an offence and a civil contravention.[7]

14. Having regard to the difficulties in drawing dividing lines between categories of cartel conduct of different culpability, the problems associated with administering parallel enforcement tracks, and the fact that Hong Kong is not in the position of having to introduce an alternative to a set of unworkable competition "conspiracy" crimes, I submit that the Bills Committee should not give further consideration to the Canadian criminal-plus approach.

15. If what is sought to be achieved by the HKGCC in proposing a bifurcated enforcement model is to ensure that less serious conduct is treated less severely, then that outcome can confidently be expected from the senior judges who will comprise the Competition Tribunal. It can also be made explicit through the Commission's enforcement policy and the Tribunal's sentencing guidelines. If the object is to guard against a perceived risk of possible "type-one" errors resulting in the over-extensive application of cartel penalties to essentially harmless collaborations, then the better approach is to enact orthodox, internationally understood prohibitions such as the proposed conduct rules and for the Commission to consult on detailed, economically principled guidelines. If the object is to protect undertakings who are guilty of unwitting infringements from exposure to penalties, then the Competition Bill already contains the machinery for this, through the Commission's educative and compliance functions (cll. 129(b), (c)) and the "infringement notice" and "commitment" mechanisms under Part 4.

Publication of provisional guidelines

16. For the reasons set out in my earlier submission,[8] the Competition Bill ought not be regarded as providing the Commission with a "blank cheque". In two

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6 Hong Kong General Chamber of Commerce *Submission to Bills Committee on Competition Bill* 19 November 2010 (Bills Committee paper CB(1)516/10-11(03)) para 5.

7 Beaton-Wells, C. and Fisse, B. *Australian Cartel Regulation: Law, policy and practice in an international context* (Cambridge University Press, 2011) at 19.

8 Simpson, A.F. "Submission to Legislative Council Bills Committee" 29 November 2010 (Bills Committee paper CB(1)516/10-11(09)) paras 11 - 14.

particulars, however, certainty in its future operation could be enhanced: by omitting provisions for concurrent jurisdiction between the Competition Commission and the current sectoral regulators (as discussed below); and by publishing draft guidelines on a provisional basis.

17. Some legislators have expressed a concern that requiring the Competition Commission to publish guidelines as to market definition, assessment of market power and other matters involves an undesirable delegation of power to the Commission. In a recent meeting of the Bills Committee, more than one member proposed or supported the publication of draft guidelines in advance of commencement of the Competition Bill. This is a suggestion I also have previously advanced.[9] In my view this proposal is workable, provided that certain constraints are recognized and respected.

18. First, there appears no obstacle in principle to the Government publishing draft guidelines on a provisional basis, provided that the Government takes precautions to ensure that such draft guidelines are expressly provisional and the Commission retains in fact the authority to alter, consult on, publish and revise its guidelines as and when it considers appropriate. This is necessary to protect both the autonomy of the Commission and the status of its guidelines.

19. Since guidelines obviously do not have legislative status, they depend for their effectiveness on the public placing reliance on them. Such reliance depends on the public having confidence that the Commission will act consistently with its stated views, unless there are compelling reasons for it not to do so. I submit that such confidence is most likely to be earned when the public perceives the guidelines as speaking with the voice of the Commissioners who have responsibility for administering the law. If the guidelines were perceived as being in some sense imposed on the Commission, their effectiveness may be seriously jeopardized.

20. Secondly, if draft guidelines were to be published in advance of the Competition Bill being passed, then that should be done on the basis that they are provided for the early information of the public rather than for consultation and comment – though consultation should be timetabled to occur as soon as practicable after commencement of the Ordinance.

21. Thirdly, until the Competition Bill is finally enacted, it represents (to some degree) a "moving target" for the authors of draft guidelines. Some largely technical matters might be addressed by provisional guidelines despite the statutory language not being finally settled: for example, the Commission's approach to defining relevant markets or assessing the effect of conduct on competition. Other matters, such as the handling of confidential information, procedure on commitments and infringement notices, or grounds for exemption, are likely to be affected significantly by the ultimate wording of the Ordinance.

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9 Simpson, A.F. "Submission to Legislative Council Bills Committee" 29 November 2010 (Bills Committee paper CB(1)516/10-11(09)), para 15.

22. Finally, there is a practical constraint in terms of the availability of resources for the task of preparing provisional drafts of guidelines. The development of appropriate guidelines will require advanced legal and economic expertise regarding current best practice as to the economic data, methods and tests that the Commission should apply in fulfilling its mission; and up-to-date knowledge of market structure, industrial organization and prevailing competitive conditions.

23. Assuming that suitable expert resources are available or can be arranged, there seems no compelling objection in principle to draft guidelines being published in advance of commencement of the competition law, provided that: the Commission retains ultimate responsibility for guidelines' content; consultation on the content of guidelines is deferred until the Commission has been established; and provisional guidelines are limited to the key substantive subject areas such as market definition and assessment of effect on competition.

24. As an alternative to drafting and publishing provisional guidelines, the Bills Committee might consider whether it would assist the public to make available a database containing a representative sample of guidelines currently issued by competition authorities in a range of jurisdictions. I would anticipate this could be done at very low cost and would assist members of the public to ascertain the kind of issues guidelines can be expected to address and the methods adopted by leading overseas authorities.

Competition Commission's public accountability

25. The Competition Bill as currently drafted requires the Competition Commission to submit to the Chief Executive annual "estimates of its income and expenditure for the next financial year" and an annual report on its activities in the preceding year (Schedule 5, paras 19 and 25). These requirements could usefully be supplemented by a requirement for the Commission also to submit a Corporate Plan detailing the Commission's commitments as to the work it proposes to undertake and the outcomes it will seek to achieve in the coming year or several years. The Commission should periodically report on its performance relative to proposed outcomes.

26. New Zealand's competition agency, the Commerce Commission, summarises its accountability measures as follows:

> The Commission's performance is measured against a very detailed set of Output Measures, which are agreed with our monitoring agency, the Ministry of Economic Development (MED). We produce a Statement of Intent annually setting out our future work programme and report against this quarterly to the government via MED, and annually to the government and taxpayers of New Zealand via the Annual Report.[10]

10 Commerce Commission "Accountability" available at: < http://www.comcom.govt.nz/accountability/>, and see Commerce Commission "2010-2013 Statement of Intent".

27. Similar measures are employed by some Hong Kong agencies (for example, the Hong Kong Housing Authority publishes an annual Corporate Plan which includes key performance indicators[11]).

Concurrent jurisdiction

28. Provisions for the Telecommunications Authority and Broadcasting Authority to share "concurrent jurisdiction" with the Competition Commission should be omitted. Although concurrent jurisdiction has been made to work in other jurisdictions, it is likely to involve a degree of administrative complication and overhead that it would not be productive for Hong Kong to incur at this stage in its experience with market liberalization and competition law.

29. Where a single industry is subject to regulation by two separate bodies, there arises a perceptible risk of inconsistency in the application of rules by each of them or of "forum-shopping" by regulated firms. Such risks can be mitigated by ensuring open channels of communication exist between each agency. Temporary secondments of staff from one agency to the other and cross-memberships of the agencies at the decision-making level are likely to assist in ensuring consistency of approach. For example, in New Zealand the Chair of the Electricity Commission has been an Associate Commissioner of the Commerce Commission and the Telecommunications Commissioner is a member of the Commerce Commission. Similar arrangements have been implemented in other jurisdictions.

30. The "memorandum of understanding" arrangement proposed under cl 161 of the Bill resembles the approach in the United Kingdom, whereby the telecommunications regulator and the competition authority have entered a formal agreement which establishes a process for determining the responsibility of each agency to investigate and deal with complaints when their jurisdiction overlaps. Such arrangements are workable but will entail complexities that ought not to be underestimated, including in relation to the handling of appeals and matters involving competition issues that are mixed between telecommunications (or broadcasting) and other competition issues.

31. A deeper question arises, however, as to whether the Telecommunications Authority (TA) and Broadcasting Authority (BA) will continue to be well situated "to perform the functions of the Commission under this [Competition] Ordinance" (cl 157). While the TA and BA each have some experience in administering competition safeguards, I submit that it is important to recognize that pro-competitive industry regulation starts from fundamentally different premises, and therefore has a different orientation, to competition law.

32. While pro-competitive industry regulation and competition law both aim, broadly, to promote competition in markets, they start from different assumptions. Regulators typically start from the position that the industry for

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11 Housing Authority "Corporate Plan 2011/12" available at: <http://www.housingauthority.gov.hk/hdw/en/aboutus/publications/corporateplan1112/content.html>.

which they are responsible is not as competitive as it should be and their role is to intervene in such a manner as to help make the industry more competitive or to help make outcomes in the industry more closely approximate those that would result in a competitive industry. Competition authorities do not "regulate" in this sense. Competition authorities start from the position that markets are presumptively competitive and should not be intervened in unless the competitive process is being undermined by an agreement between competitors, a merger of competitors, or the misuse of market power by a participant that is dominant in the market.

33. In the case of the telecommunications industry in Hong Kong, the process of market liberalization is very well advanced and markets for telecommunications services generally are highly competitive. Since Hong Kong's telecommunications markets are highly competitive, it is no longer necessary for jurisdiction in respect of competition issues arising in that sector to remain with the industry-specific regulator. Any conduct or transaction that appears to undermine the process of competition between carriers or services-based operators can appropriately be investigated by the Competition Commission.

34. The broadcasting industry in Hong Kong is significantly less liberalized, at present, so an argument could be made for a more "regulatory" posture in that sector in the near term. Nevertheless, the growing pressures of media convergence and technology convergence strongly suggest that a consistent approach to broadcasting and telecommunications regulation is highly desirable. Consistent interpretation and application of conduct rules in both sectors can best be assured by vesting jurisdiction in competition matters in the Competition Commission and Competition Tribunal.

Concluding Remarks

35. By way of summary of the foregoing remarks:

- Canada's 'criminal-plus' model for competition law is very much a product of that regime's unique history and has little to offer Hong Kong.

- In light of sensitivity regarding the scope of authority to be delegated to the proposed Competition Commission, the circulation of draft guidelines on a provisional basis should be considered a pragmatic response.

- The Competition Commission's accountability to the public could be enhanced, without unduly diminishing its autonomy, by requiring it to publish a periodic Corporate Plan setting out the Commission's objectives for the coming year(s) and metrics to measure its achievement of those objectives.

- Concurrent jurisdiction between the Competition Commission and the existing sectoral regulators could be made to work but would entail administrative complications and overhead that Hong Kong need not

incur at this stage in its experience with market liberalization and competition law.

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