Bills Committee on Competition Bill

Summary of views expressed by deputations[1] on major prohibitions, exclusion and exemption of the Bill and the Administration's response
(as at 18 May 2011)

Concerns/Views	Administration's comments
The Conduct Rules (Part 2)	
General comments 1. The appropriate test for intervention of the Commission/Tribunal in all cases should be "substantially lessen competition" as in the Merger Rule, not "prevent, restrict or distort competition" as in the conduct rules, since the former test refers to the effects on the market, which should be the concern of competition law. By contrast, virtually any restraint on commercial freedom has been viewed as anti-competitive under the latter test, which is overly intrusive. Moreover, the former test is better suited to smaller markets where a measureable impact should be a precursor to the application of the law. (HKGCC and PCCW)	It is noted that the test of "prevent, restrict or distort competition" for the conduct rules is the same as that of the EU, Singapore and the UK. When the test is applied, case laws and regulatory guidelines in these jurisdictions suggest that only conduct that has an appreciable adverse effect on competition would be caught under the competition law. Hence, normal commercial behaviour should not be a concern so long as it does not cause an appreciable detrimental effect on competition.

[1] Mark-ups on the draft Bill are attached to the submissions from The Hongkong and Shanghai Banking Corporation Limited (CB(1)1042/10-11(01)), The Hong Kong General Chamber of Commerce (CB(1)516/10-11(03)), The Law Society of Hong Kong (CB(1)1219/10-11(02)) and The Real Estate Developers Association of Hong Kong (CB(1)622/10-11(08)) and the majority of which are not reproduced in this document to enhance legibility. Please refer to the relevant submissions for the details.

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2. Key terms, such as "competition", "substantially lessen competition", "market" must be defined, otherwise the Commission will be given too much discretion to interpret them. (FHKI and HKGCC)	The current draft Competition Bill (the Bill) is premised on a general prohibition approach adopted by most major overseas competition regimes. The approach encompasses common terms such as "market", the meaning of which will depend on the facts of each case and the detailed economic analysis. There are plenty of case law on which Hong Kong can draw reference from when interpreting these common terms. Attempting to define these terms using statutory language would restrain the Competition Commission (Commission) and the Competition Tribunal (Tribunal) from enforcing the law having regard to the actual circumstances of each case and the dynamic changes in the market. It would also encourage undertakings to look for loophole in the limitations imposed by the definitions to escape responsibilities. That said, the Commission will draw up regulatory guidelines on the interpretation and implementation of the general prohibitions to enhance understanding of the law.

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3. Under the Bill as drafted, whether agreements or conduct are prohibited will depend on their future economic effects and efficiencies. These matters are outside the competence of most businesses (not just small and medium enterprises (SMEs)) and therefore businesses will have to engage specialist economists as well as competition lawyers if they wish to minimize the risk of breaching the law inadvertently. It is neither fair nor reasonable in a Hong Kong context that businesses be expected to make such economic assessments and econometric modelling (and hence the compliance costs), or that they are placed in the position of having acted illegally if they make an assessment which differs from that subsequently made by the Commission or the Tribunal. (Dairy Farm, HKGCC, HKRMA, HPH, HTHK, LRI, PARKnSHOP and TMAHK)	We note the importance of educating the public and the businesses about the new law. Apart from public education campaign and providing regulatory guidelines by the Commission to facilitate compliance with the law, the Administration intends to provide a transitional period between the enactment of the Bill and the coming into force of the major prohibitions and enforcement-related provisions to give sufficient time to the community to get familiar with the new law and for the businesses to make any necessary adjustments to their conduct or agreements. Similar to their counterparts in other competition regimes, businessmen in Hong Kong should be able to self-assess whether their normal business conducts would have as their object or effect an appreciable adverse impact on competition. For want of certainty, undertakings may apply to the Commission for a decision on whether an agreement is excluded from the prohibitions under Part 2 of the Bill.

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4. The Bill should only prohibit clearly-defined, specific types of conduct and this could be achieved by making minor amendments to retain the prohibition for hard core conduct (such as price-fixing, market sharing and bid-rigging) from the time it occurs but making it clear that other conduct (which parties might quite legitimately not realize the potential anti-competitive implications of) only be prohibited from the time it is ruled by the Tribunal to be anti-competitive, or that such uncertain conduct be subject to lesser penalties/relief provisions. (Law Soc) 5. If a limited list of specific types of conduct were strictly defined and identified as unlawful, skillful 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. It is impractical and impossible to set out in the Bill all the instances and particular circumstances in which the law would apply. Specifying in finer detail the factual situations in which the law would apply is invariably left to the competition agency. In this way, 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. (Academics) 6. Hardcore conduct can be defined and prohibited if it substantially lessened competition, whereas other types of conduct which cannot be defined should be dealt with through an administrative review process or would be prohibited *only if and when* the Tribunal (on application by the Commission) that it substantially lessened competition and did not	Compared to the proposed general prohibition approach supplemented with a non-exhaustive list of anti-competitive agreements and regulatory guidelines, prohibiting only the clearly-defined, specific types of conduct would hamper the ability of the future Commission to react quickly to changing market circumstances and business behaviour. Moreover, it would encourage undertakings to look for ways to avoid control by adopting anti-competitive practices not described in the law. For less serious infringements, the Bill has already provided for a commitment mechanism as well as an infringement notice mechanism. Under these mechanisms, undertakings will not be subject to pecuniary penalties of up to 10% of their global turnover.

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have any countervailing economic benefits. The law must state with as much certainty as possible what conduct is prohibited. The courts are competent to consider substance over form when interpreting the law. Unless there is clarity in the legislation as to what key concepts mean, Commission guidelines will be meaningless and unreliable, and it is not the commission but the courts which will decide cases under the Bill. (HKGCC)	
Prohibition of anti-competitive agreements, concerted practices and decisions (Clause 6) 7. A materiality threshold should be stipulated in clauses 6(1), 7, 8, 21(1), 22 and 23 to reduce the compliance burden for companies and allow the proposed Competition Commission (the Commission) and the proposed Competition Tribunal (the Tribunal) to concentrate on more problematic agreements. This will also ensure that conduct which exerts an insignificant impact on a market will not be subject to unnecessary regulatory intervention. (HSBC and REDA)	According to case laws and regulatory guidelines in major competition jurisdictions which adopt a general prohibition approach similar to that in the Bill, only conduct that has an appreciable adverse effect on competition would be caught under the competition law. The Commission will draw up regulatory guidelines to set out the factors to be considered when assessing the impact on a market.
8. Clause 6(2) should be amended as follows to enhance certainty: "Subsection (1) applies ~~in particular~~ without limitation to agreements, concerted practices and decisions that …" (Law Soc)	While clause 6(1) contains a general provision on the prohibition (the first conduct rule) in relation to certain agreements, concerted practice and decisions, clause 6(2) is intended

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	to set out specific examples of such agreements, concerted practices and decisions. We consider that the use of "in particular" in clause 6(2) achieves the intended purposes.
9. The illustrative examples of anti-competitive agreements under the first conduct rule in clause 6(2) are too vague to give any guidance, and are capable of covering normal business activities such as discussions at trade associations' regular meetings involving views on product prices, and pro-competitive conduct such as joint purchase practices and agreements which seek to negotiate better terms from suppliers or acting a collective representation role to produce lower priced tenders. To dispel uncertainties, the Bill should only prohibit clearly-defined, specific types of conduct such as price fixing, bid rigging and market sharing. (BCCHK, Dairy Farm, ES, HKCA, HKGCC, HKRMA and TMAHK)	The non-exhaustive list of examples of anti-competitive agreements in clause 6(2) is meant to supplement the first conduct rule set out in subsection (1). The wording is almost identical to that adopted in the competition laws in the UK and Singapore. It is also the international best practice to elaborate on what constitutes, as well as what usually not constitute (such as joint purchase agreements by small and medium-sized enterprises), an infringement under the competition law through regulatory guidelines and case laws.
10. The first conduct rule should only apply to horizontal agreements as previously proposed by the Government in May 2008. There are however concerns that the first conduct rule as currently drafted is broad enough to cover vertical agreements. The Government should clearly state its policy intent and improve the drafting. (BCCHK, Dairy Farm and HKRMA) 11. Given the size and nature of the Hong Kong market, vertical agreements may not have as great an effect on restricting competition	Vertical agreements concern the relationship between undertakings at different levels of the market (e.g. upstream supplier and downstream distributor or retailer). While vertical agreements may often generate positive effects on the distribution chain and enhance efficiency, competition concerns may arise when the parties to the agreement possess a substantial degree of market power.

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as may otherwise be the case in other parts of the world. If the general prohibition in the Bill is to be retained as currently drafted, there should also be the inclusion of exemptions for particular vertical agreements or conduct which meet certain criteria together with a non-exhaustive list of exemptions in guidelines. (Law Soc)	Moreover, sometimes vertical agreements may disguise what are, in effect, agreements between direct competitors about how they compete with each other. Hence, the first conduct rule as currently drafted applies to all types of agreements. Some jurisdictions grant block exemption for certain types of vertical agreements. If necessary, the Commission may grant similar block exemptions having regard to the circumstances of Hong Kong.
12. The Administration should clarify, in relation to trade associations, whether member organizations who enter into an anti-competitive agreement or engage in concerted practices through the association concerned would render the association liable for prosecution. (HKFFA)	Trade association is an undertaking for the purpose of the Bill. It will be a question of fact in each case whether the association is itself a party to an anti-competitive conduct. If the association acts as a vehicle for anti-competitive activity by aiding or abetting its members to enter into an anti-competitive agreement, or makes a decision on concerted practices, it may constitute a contravention of the law.
13. It is undesirable to classify network-sharing agreements alongside with price-fixing cartels because the parties to such beneficial arrangements arising from technical development and investment would inevitably carry the burden of proof in demonstrating, if challenged, that the	Schedule 1 of the Bill provides that the first conduct rule does not apply to certain agreements that contribute to improving production or distribution, or promoting

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criteria for exclusion were satisfied, which is not an easy task. (HTHK)	technical or economic progress, as they enhance overall economic efficiency and generate economic benefit that outweighs potential anti-competitive harm. The exclusion is similar to those in the competition laws of the EU, Singapore and the UK. According to jurisprudence in other jurisdictions, such exceptions apply to different categories of research & development agreements, specialization agreements, vertical agreements (including those with provisions on intellectual property rights), etc. The undertakings concerned can self-assess their agreement on such grounds or apply to the Commission for a decision as to whether their agreements are excluded by virtue of Schedule 1.
14. Concerns are raised whether joint venture involving in technological innovation and hence obtaining patent may be considered in breach of the first conduct by limiting or controlling production, markets, technical development or investment. In fact, such joint ventures help lower the market risk and transaction cost, and prohibiting such would only limit the development of new products, new standards and new markets. (HKEIA and SPIL)	
15. The term "prevent, restrict or distort competition" is not defined in the Bill. There is a major concern, since many, if not most, commercial arrangements restrict the commercial freedom of the parties to the agreements in some respect. The effect of the Bill in its current form would therefore be that most contractual arrangements would be prohibited which would stifle rather than enhance Hong Kong's competitiveness. (A.S. Watson)	Please see responses to item 1.

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16. The Bill does not define "market" which could be delineated by geographical size or by product. It was worrying to the businesses, in particular SMEs as they will not know how will the reduction of competition as a result of their agreement, concerted practice or decision be measured. (ES and TMAHK)	Defining the market consists of identifying the relevant product and geographical dimensions of a particular conduct/ agreement so as to assess the impact of such conduct/ agreement on competition. However, market definition will depend on facts of each case, and there is no single formula by which market definition analysis will be conducted. Competition laws in other major competition jurisdictions do not have a legal definition on "market". The Commission will, after consultation, issue guidelines on how market will be interpreted for the purpose of the competition law.
17. The first conduct rule should not apply to intra-group relationships. In most competition law regimes, the prohibition against restrictive agreements does not apply to intra-group dealings. Legal certainty would be increased if it is expressly provided that the first conduct rule does not apply to internal group measures. (HSBC)	The first conduct rule prohibits anti-competitive agreements between two or more undertakings. Two economic entities which enjoy operational and economic independence to determine its own course of action on a market are different undertakings. The first conduct rule does not regulate intra-group agreements or practices if the entities concerned form one single economic unit.

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The "de minimis" threshold 18. A certain level of "de minimis" threshold should be stipulated in the Bill to automatically exclude from challenge under the first conduct rule agreements of minor importance, unless hard-core anti-competitive conduct is involved. Apart from modeling on the practice of EU and Singapore which have adopted different market share thresholds for agreements made between competing undertakings and non-competing undertakings, the Government should also consider granting exemption for agreements made between SMEs which should not possess substantial degree of market power. (CGCC, ES, FHKI, HKAB, and HKMMA) 19. The UK Competition Act provides limited immunity for "small agreements" and consideration should be given to introducing similar immunity in Hong Kong which will benefit undertakings of smaller scale which have less resource in dealing with any anti-competition investigation and issues. (HKCA) *20.* Some jurisdictions do exempt some types of anti-competitive agreements between small firms which collectively have very low market share. Where a competition agency discovers a restrictive agreement between two small firms with a minimal aggregate market share, the agency would be very unlikely to prosecute such a case but deal with it by the issuance of a warning. (Academics)	We note the views relating to the “de minimis” arrangements and the various proposals put forward by the stakeholders. We will brief the Bills Committee on the way forward in due course.

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"Object" of agreement (Clause 7) 21. Clause 7(1) should be amended as follows: "If an agreement, concerted practice or decision has more than one object, ~~it has the object of preventing, restricting or distorting competition under this Ordinance~~ one of which is to prevent, restrict or distort competition under this Ordinance ~~if one of its objects is~~, it is deemed to have the object to prevent, restrict or distort competition for the purposes of section 6 unless the object which is to prevent, restrict or distort competition is shown to be immaterial in all respects." (Law Soc)	The revised version has changed the effect of clause 7(1) and is not a standard formulation commonly adopted in other competition jurisdictions. We consider that clause 7(1) as currently drafted reflects our policy intent.
22. It should also address situations in which an agreement, concerted practice or decision may have more than one effect. (Law Soc)	To avoid doubt, we would introduce amendment to add provision similar to clause 7(1) that if an agreement, concerted practice or decision has more than one effect, it has the effect of preventing, restricting or distorting competition under the Bill if one of its effect is preventing, restricting or distorting competition.
23. Clause 7(2) should be amended as follows: "An undertaking may be taken to have made or given effect to an agreement or decision or to have engaged in a concerted practice that has as its object the prevention, restriction or distortion of competition	Case laws in jurisdictions such as the UK and the EU have suggested that "object" in this context means not the subjective intention of the parties when entering into the agreement,

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even if that object can be ascertained only by inference, provided that the inference is reached objectively. (Law Soc)	but the objective meaning and purpose of the agreement considered in the economic context. Subjective intent may be relevant but not a condition for determining whether the object of the agreement is to prevent, restrict or distort competition.
Territorial application of first conduct rule (Clause 8) 24. While an extraterritorial application seems to be consistent with the competition laws of other jurisdictions, guidelines should be provided to explain how the provision applies in practice. (Law Soc)	Clause 8 has clearly specified the circumstances under which the first conduct rule will be applied to agreements / undertakings outside Hong Kong, i.e. if the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong. This provides a clear basis for undertakings engaging into economic activities that may have an impact on the competition in Hong Kong to self-assess their actions. The Commission will also issue guidelines on the interpretation of the first conduct rule and the market definition, covering relevant considerations for determining the effect of an agreement (whether made in or outside Hong Kong) on competition in Hong Kong.
25. The clause does not appear to address notification to parties that may have an interest in such applications. A suitable notice provision will be necessary. (Law Soc)	

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Application for decision (Clause 9) 26. Clause 9(2)(c) should be amended as follows to avoid putting too high an onus on an undertaking when first applying for a decision: "it is possible to make a decision on the ~~basis of the information provided~~ available information on the record." (Law Soc)	In most cases, undertakings should be able to self-assess their agreements or conducts in accordance with the general exclusions from conduct rules provided in Schedule 1 to the Bill, as they possess the facts and could access the relevant sources of information which allow them to make an informed decision on whether to proceed with an agreement or conduct. For cases involving novel issues or for which there is no clarification in case law or Commission's decisions, clause 9 of the Bill provides that the Commission may consider an application from an undertaking for a decision as to whether an agreement or a conduct is excluded or exempt from the Bill. If the Commission decides that the agreement or conduct is excluded or exempt, such agreement or conduct will be immune from both public enforcement and private actions. Under clause 35, the Commission is required to issue guidelines regarding the manner and form in which it will receive applications for a decision. According to overseas experience, apart from the information provided by the
27. Given the potentially broad sweep of the prohibition, and the uncertainty as to whether it, and/or an exclusion applies to a particular agreement, it is likely that business would grind to a halt in Hong Kong while parties to most commercial agreements sought to obtain a decision from the Commission. In fact, businesses should generally be able to carry on their affairs freely on the assumption that what they are doing is lawful, unless the law itself clearly states otherwise. Administrative approval should be the exception rather than the rule. (HTHK and TMAHK)	
28. The criteria in clause 9(2) which must be satisfied before the Commission is obliged to issue a decision confirming whether an exemption or exclusion applies have been drafted tightly, so that the Commission is only required to consider applications in limited circumstances. In the early years of the new regime, when businesses are still becoming accustomed to it, it is more appropriate that the Commission be obliged to issue such a decision. (A.S. Watson, HKGCC and TMAHK)	

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29. The Commission should be more open to requests for "comfort letters", a process in which undertakings ask the Commission if certain conduct or agreements would be lawful under the future Ordinance. (PCCW)	undertaking, the competition authorities may also use other information at its disposal from public sources and may seek supplementary points from the applicant.
30. The Commission might be over-burdened with applications and might only be able to deal with a small fraction of the applications received. This means that parties to a large number of potential transactions might be left without guidance. Even if a decision from the Commission can be obtained, it is not binding on the Tribunal, and so is of limited reliability. (HTHK)	To minimize the risk of over-burdening the Commission with a floodgate of applications for decisions on agreements well covered by guidelines issued by the Commission or precedents so that the Commission could focus its resources on its core function of combating anti-competitive conduct, we have stipulated conditions in clause 9(2) of the Bill which must be satisfied before the Commission is required to consider an application.
Consideration of application (Clause 10) 31. Before making a decision on an application for decision, the Commission must publish notice of the application for the attention of those it considers likely to be affected by its decision. Such notice should also be published to the public generally. (Law Soc)	Clause 10(1) as currently drafted has required the Commission to publish notice of the application in a manner it considers appropriate for bringing the matter to the attention of those the Commission considers likely to be affected by its decision.
Decision by Commission (Clause 11) 32. If the Commission makes a decision, it should publish its decision to	Clause 34 of the Bill provides that the Commission must establish and maintain a

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the public as well as bring it to the attention of other affected persons, including the reasons for its decision. However, any information which is confidential information under clause 122 should be kept confidential. (Law Soc)	register of all decisions made in respect of applications made under clause 9 and the register would be made available for inspection by the public and in any other manner as the Commission considers appropriate. The Commission may also omit confidential information from any entry made in the register.
Effect of decision (Clause 12) 33. The provision should clarify when the exemption will take effect. Alternatively, a provision should be drafted to empower the Commission with the right to set the date as to when the exemption takes effect when it makes its decision. (Law Soc)	Clause 11(2) provides that a decision by the Commission may include conditions or limitations subject to which it is to have effect. These may include the date from which the decision is to take effect.
34. Clause 12(1) provides that once a decision is made by the Commission that a certain agreement is excluded or exempt from the application of the first conduct rule or Part 2 of the Bill, then the relevant undertakings specified in the decision will be immune from any action under the future Ordinance. Such immunity may be too broad and may have unintended consequences. Unless the exclusion provision for the merger rules is amended to be the same as for the conduct rules, the effect of a decision on a conduct rule should be confined to the application of the conduct rules. Clauses 14(7) and 29(7) regarding rescission of decision should be amended accordingly. (Law Soc)	Clause 12(1) concerns the immunity to the undertaking specified in a decision from any actions under the Ordinance concerning an agreement which is excluded or exempt from the application of the first conduct rule, not the merger rule. The immunity is applicable with regard to that agreement insofar as the conduct rule is concerned. To avoid doubt that the undertaking will also be immune from any action under the

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	Ordinance that is applicable to the merger rule, we will amend clause 12(1) to the effect that the immunity referred therein applies only to the extent of the first conduct rule or Part 2 of the Bill.
Non-compliance with condition or limitation (Clause 13) 35. The Commission may consider including a procedure on issuing a formal order or type of notice which will enable an undertaking to confirm whether it is in compliance with a condition or limitation subject to which a decision of the Commission has effect. If an undertaking starts to comply with the condition or limitation, it should formally notify the Commission that it is now in compliance with the relevant decision and thereby exempt from the first conduct rule before proceeding to engage into any conduct which may otherwise be deemed anti-competitive and be in breach of the competition rules. (Law Soc)	We consider it more appropriate for the Commission to determine the manner in which it monitors the undertaking's compliance with the terms of the decision on a case-by-case basis. The exemption should be linked to the moment the undertaking starts complying with the decision and not to when it says it is in compliance.
Rescission of decision (Clause 14) 36. The Commission should have discretion on (i) whether or not to revoke a decision and (ii) whether such revocation should take effect retroactively. This discretion would allow the Commission to take into account and balance the interests of all affected persons and the circumstances in which the original decision was given. (Law Soc)	We consider that clause 14 as currently drafted has provided flexibility to the Commission to decide whether to revoke a decision or when the revocation takes effect, taking account of all relevant circumstances and any representations received.

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Block exemption orders (Clause 15) 37. It is suggested that clause 15(4) be redrafted to clarify that the "review of the block exemption order" mentioned therein must be conducted in accordance with clause 19. (Law Soc)	Clause15(4) requires the Commission to specify a date in a block exemption order on which it will commence a review of the order and clause 19(1) requires the Commission to commence the review on the specified date. While the requirements are related, clause 19(1) does not set out how the review is to be conducted and it is not correct to add in clause 15(4) that the review must be conducted "in accordance with" clause 19(1). Clauses 19(2) and (3) do not relate to clause 15(4).
38. It is important to introduce block exemption orders or other exemptions and exclusions relating to relevant aspects of banking and financial sector practice, and for the Commission to consult foreign competition regimes and liaise with Hong Kong's banking sector representatives in order to achieve this end. (HKAB)	Clause 15 has already provided that the Commission may, either of its own volition or on application by an undertaking or an association of undertakings, issue a block exemption order for a particular category of agreements that enhance overall economic efficiency. It will also publish notice of the proposed block exemption order for bringing it to the attention of those the Commission considers likely to be affected and consider any representations before issuing the order. Under clause 35, the Commission is required to issue guidelines indicating how it expects to exercise its power to grant block exemptions.
Procedures regarding block exemptions orders (Clause 16) 39. Block exemptions should be subject to a public consultation process to ensure that all interested and affected parties have an opportunity to express their views. The Bill stipulates that the notice needs to be published for no less than 30 days to bring the application to the attention of those that are likely to be affected by a decision, yet guidelines should be drafted as no details have been provided in respect	

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of the analytical framework on how the Commission will assess whether agreements meet the criteria. (Law Soc)	
Effect of block exemption order (Clause 17) 40. A provision should be provided to clarify when the exemption will take effect or to empower the Commission with the right to set the date as to when the exemption takes effect when it makes its decision. (Law Soc)	Clause 15(3) provides that the Commission may impose conditions or limitations subject to which the block exemption order is to have effect. These may include the date from which the exemption is to take effect.
Non-compliance with condition or limitation (Clause 18) 41. The Commission may consider including a procedure on issuing a formal order or type of notice which will enable an undertaking to confirm whether it is in compliance with a condition or limitation subject to which a block exemption order has effect. If an undertaking starts to comply with the condition or limitation, it should formally notify the Commission that it is now in compliance with the relevant order and thereby exempt from the first conduct rule before proceeding to engage into any conduct which may otherwise be deemed anti-competitive and be in breach of the competition rules. (Law Soc)	Please see responses to item 35.
Review of block exemption order (Clause 19) 42. The clause should clarify the review process in relation to clause 15(4). (Law Soc)	Clause 19 provides for the matters relating to the review of block exemption order.

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Variation or revocation of block exemption order (Clause 20) 43. The Commission should have the flexibility to vary or revoke block exemption orders regardless of whether formal review processes are conducted. (Law Soc)	Block exemption order applies to a particular category of agreements and provides exemption from the application of the first conduct rule. Given its general application and wide implications, the block exemption order should be revoked or varied after the Commission has undertaken a formal review, taking account of all relevant considerations, changes in circumstances and representations from any interested parties, before varying or revoking the block exemption order. Clause 19(2) has provided the flexibility for the Commission to review a block exemption order at any time if it considers it appropriate to do so.
Abuse of market power (Clause 21) 44. The concept of "dominant position" is preferable to "substantial market power" as it has a clearer meaning and is widely used in other jurisdictions (such as EU and the Mainland). The substantial market power threshold will likely cause Hong Kong's competition law to be too wide in scope and overly burdensome for the business community and the proposed Commission. A dominance threshold would allow the Commission to have regard to clear guidance in well-established case	High industrial concentration levels and high entry barriers are often the main economic characteristics of a small and geographically concentrated economy like Hong Kong. An oligopolistic situation involving a few big companies is not unusual. The conduct of a firm with a significant market share, albeit short of the 50% presumption for "dominance", could have a major effect on

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law. The opportunity to rely on clear precedent when interpreting the Competition Ordinance would be lost if another test than dominance were to be used. (BCCHK, CX, HKGCC, HSBC, PCCW and REDA) 45. In relation to clause 21(1), "dominance" is a more appropriate threshold given both the small and open nature of Hong Kong's market and its capitalist constitution (i.e. the regulators and the Government should not intervening in the market except in clear cases where the markets are dominated by a particular entity that is seeking to foreclose competition from others). A dominance threshold would also be consistent with other significant jurisdictions, including EU and the Mainland. Having consistency between the tests in Hong Kong and the Mainland China will reduce the complexity of cases considering conduct that might straddle both jurisdictions. (Law Soc)	competition. The Administration therefore considers the appropriate threshold for Hong Kong should be "substantial market power". Moreover, overseas experience shows that the concept on "dominance" or "substantial market power" should not be viewed as a mere description of market share. In fact, market share is only one of the factors in assessing the degree of market power (whether "dominance" or "substantial market power"). Other factors include market shares of the competitors, the ease of entry into the market, the bargaining power of the buyers and suppliers, and the degree of product differentiation. The analysis would focus on market power and how such ability is used profitably to sustain prices above competitive levels or to restrict output or quality below competitive levels by a firm. Each case requires in-depth assessment, involving, above all, the derivation of a market definition on which the market share of the undertaking concerned is compiled. The Commission is required to issue guidelines to set out the guiding principles for assessing
46. Businesses will find it hard to determine whether they have "substantial degree of market power", as "market power" in itself is difficult concept. There are many factors to be taken into account in determining "market power", for example, relative market shares of other players in the market and entry barriers. The "market" of a business or a product or service can vary according to different perspectives, for example, a new product or business standard may dominate the market when it is first introduced. (Dairy Farm, HAFFA, HKEIA and PARKnSHOP) 47. In the absence of an indicative threshold, it is difficult to quantify and qualify "substantial degree of market power" and the current draft	

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leaves much room for uncertainty. Most overseas jurisdictions adopt the "dominance" test to invoke the second conduct rule and have suggested various factors, including different levels of market share, as indicative benchmarks. The introduction of a proper test or guidelines will be helpful for the market's reference. (Law Soc)	market power, similar to the approach adopted in overseas competition regimes.
48. The clause fails to deal with the situation where a number of undertakings, which individually do not have a substantial market power, abuse their collective substantial degree of market power. An amendment to encompass "one or more undertakings" is necessary. (Law Soc)	Clause 21 as currently drafted does not apply to more than one undertaking. The first conduct rule (Clause 6) would catch those anti-competitive agreement, decision or concerted practices by more than one undertaking that has the object or effect of preventing, restricting or distorting competition.
49. The concept of "abuse" has given rise to great difficulty and uncertainty in other jurisdictions. The term should be avoided and the Bill should instead identify the essence of the conduct which most competition experts agree to be targeted, i.e. conduct that forecloses competition by pushing competitors out of a market or blocking entry in the medium to long term. (A.S. Watson and HKGCC)	We adopt a general prohibition against the abuse of substantial market power by an undertaking. Clause 21 of the Bill provides a non-exhaustive list of examples that may be considered as an abuse of market power that has the object or effect of preventing, restricting or distorting competition. In line with international best practices, the Commission will issue guidelines on how it would interpret the concept of “abuse”, having regard to case law and jurisprudence in other jurisdictions and the circumstances of Hong
50. With regard to clause 21(2)(a), there is a highly controversial debate in economic circles as to whether predatory pricing behaviour is rational economic conduct or can be affectively measured and addressed by competition law enforcement. Unlike the first conduct rule in relation to which it is possible to clearly articulate hard-core conduct that	

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should be the focus, defining the particular unilateral conduct that should be the focus of enforcement activity in the Bill will be difficult. It is recommended that this be left to the guidelines that will be issued in due course. (Law Soc)	Kong.
51. In respect of 21(2)(b), it needs to be clear that the second conduct rule addresses exclusionary, rather than exploitative conduct. (Law Soc)	
52. In relation to the second conduct rule which prohibits the abuse of market power of an undertaking, the Administration should clarify whether such prohibition is applicable to an association where the association is not itself engaged in economic trading in the market, and if so, whether it means that the "market share" or "market power" of individual members would be aggregated and made attributable to the association. (HAFFA)	The conduct of an association of undertakings should fall within the ambit of the first conduct rule that prohibits anti-competitive agreement, concerted practice or decision.
Application for decision (Clause 24) 53. With regard to clause 24(3), it is not clear where the dividing line will be between "hypothetical" conduct and conduct an undertaking is "proposing to engage in" (clause 24(1)). Parties will often contemplate conduct but not propose to engage in it unless they can obtain regulatory certainty that it is not anti-competitive. Undertakings should not be forced to commit to a course of potentially anti-competitive conduct before they can seek a decision. In order to remove the uncertainty that attaches to the word "hypothetical", this could be reworded as follows:	It would be a question of fact to ascertain whether a conduct for which an application under clause 24 is made is hypothetical or one to which the undertaking is taking active steps to give effect. We consider that clause 24 as currently drafted has reflected our policy intent.

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"The Commission is not ~~required to consider an application under this section if the application concerns hypothetical questions or conduct~~ obliged to entertain frivolous or vexatious requests for a decision." (Law Soc)	
Exclusions (Clause 30) 54. The drafting should be revisited as the use of double negatives makes it very difficult to extract the meaning of the provision. (Law Soc)	Schedule 1 to the Bill sets out the cases in which the conduct rules do not apply. In clause 30, when we relate the conduct rules to the cases set out in that Schedule, we consider that it is logical to use the words "do not apply".
55. Exclusion for all conduct rules should make it consistently clear that, in balancing economic efficiencies against the lessening of competition, innovation and dynamic efficiency (such as through the introduction of new or improved products, processes or services) are to be given prominence, given Hong Kong's reputation for creativity, dynamism and entrepreneurship. (HKGCC)	Clause 30 and Schedule 1 of the Bill seek to underline the principle that certain conduct or agreement that yields efficiency gains which outweigh any anti-competitive harm, or achieve other important legal, social or public policy objectives, should be exempted from the law.
Exemptions on public policy grounds (Clause 31) 56. Consultation with the Commission is particularly necessary in the light of the retrospective nature of clause 31(5) and clause 31(1) should be revised as follows:	The orders to be granted by the Chief Executive in Council under clause 31 are based on public policy considerations. The Commission may not be best placed to advise

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"Following consultation with and written advice from the Competition Commission, the Chief Executive in Council may, by order published in the Gazette, exempt -…" (Law Soc)	on the public policy grounds for granting these orders. That notwithstanding, the Government may seek the Commission's advice on a particular competition issue relevant to the consideration under clause 31 as and when appropriate. The order made will be subject to vetting by the Legislative Council (LegCo).
57. There is no express power to challenge orders gazetted by the Chief Executive in Council to grant exemptions on public policy grounds under clause 31. There is also no prima facie provision for public submissions to be made in respect of the orders to be published and placed before Legislative Council under clause 33. (Global Sources)	
Exemption to avoid conflict with international obligations (Clause 32) 58. The exemption to be granted by the Chief Executive in Council under this clause should be automatic and not permissive. "International obligation that directly or indirectly relates to Hong Kong" is also insufficiently defined. (CX)	We consider that clause 32 has provided a transparent and reasonable framework for the grant of an order to exempt certain agreements or conducts in order to avoid a conflict with international obligations (including those relating to air services agreements). We have made reference to similar provisions in the competition laws in Singapore and the UK when drafting the clause.
Orders to be published and placed before Legislative Council (Clause 33) 59. Clause 33(1) is suggested to be redrafted as follow: "~~The Chief Executive is to arrange for every order made under section 31 or 32 to be—~~	We consider that the proposed amendments to clause 33(1) are not necessary as clauses 31 and 32 have already provided clearly the circumstances under which the Chief Executive in Council may grant an order to exempt certain agreements or conducts from

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The Chief Executive shall arrange for every order made under section 31 or 32 together with the advice tendered to the Chief Executive and forming respectively under section 31 the satisfaction that there are exceptional and compelling reasons of public policy and in respect of section 32 that it is appropriate to do so to be—…". (Law Soc)	the application of the conduct rules.
Guidelines (Clauses 35) 60. The guidelines should clarify the scope and manner of the application of the conduct rules. (Law Soc)	Clause 35(1) has already provided that the Commission must issue guidelines indicating the manner in which it expects to interpret and give effect to the conduct rules. The scope of such guideline is sufficiently broad to cover the key elements commonly found in guidelines adopted by the overseas competition authorities, such as market definition, effect of an agreement on competition and examples of anti-competitive behaviour.
61. Clause 35(1)(a) should be amended as follows: "indicating the manner in which it expects to interpret and give effect to the conduct rules, in particular how it expects to define relevant markets, assess agreements of minor importance and assess joint ventures and joint bidding situations". (REDA)	
62. Clause 35(3) is suggested be amended as follows: "Guidelines issued under this section, and any amendments made to them, ~~may be published in any manner the Commission considers appropriate~~ shall be published in the Gazette and on the website maintained by the Commission and may be published in any further manner that the Commission considers appropriate". (Law Soc)	We consider the current draft of clause 35(3) appropriate so as to allow the Commission the flexibility to decide on the most appropriate and effective means of publishing the guidelines (and any subsequent amendments) to bring them to the attention of the stakeholders and the community at large.

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63. The guidelines to be promulgated by the Commission will not be legally-binding on the Commission or the Tribunal and will not provide sufficient legal certainty. The definition of the underlying prohibitions should be determined by the Legislative Council to facilitate compliance and to restrain the future competition authorities from interpreting the law in a way that is not intended. The details of the guidelines should also be provided as soon as possible before the passage of the Bill. (CGCC, PARKnSHOP and TMAHK)	It is the international best practices to leave the competition authorities the flexibility to issue guidelines to elaborate on the key elements of the general prohibitions adopted in the principal legislation to ensure the most effective enforcement of competition law. Guidelines have the clear advantage of providing practical, user-friendly and up-to-date guidance on how the principle-based competition law would be interpreted and implemented, in order to facilitate compliance with the law amid changing market landscapes. To this end, we have undertaken to provide discussion papers on the draft regulatory guidelines on the conduct rules for Members' reference.
64. 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 to give more certainty and to deal with major technical issues.. (SIMPSON)	
65. Competition-oriented guidelines relating to relevant banking practices should be developed by the Commission as a priority upon consultation with relevant sector representatives, and published well prior to the commencement of the conduct rules provisions. (HKAB)	We consider it appropriate to leave the flexibility to the Commission to decide on the most effective arrangements, whether by issuing sector-specific guidance or organizing sector-focused workshops, to facilitate compliance with the new law.
66. Clause 35 should be amended to require that when the Commission is drafting or amending relevant guidelines in relation to the Bill it must,	Clause 35 has already obliged the Commission to consult relevant persons before issuing the

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at a minimum, consult with any body or association in Hong Kong that, under a Hong Kong Ordinance, is provided with regulatory, supervisory or representative functions or responsibilities in relation to an industry sector to which the relevant guidelines wholly or substantially relate. (HKAB)	guidelines, without limiting to a particular organization or body. The consultation process would be open and interactive. Interested parties could also put forward their views on the draft guidelines to the Commission.
Amendment to Schedule 1 (Clauses 36) 67. The Chief Executive in Council should only be able to amend the provisions of Schedule 1 after consultation with the Commission. The following addition at the beginning of clause 36(1) is suggested: "Following consultation with and written advice from the Competition Commission—…" (Law Soc)	As part of the legislative process, we envisage that any proposed amendment to Schedule 1 would require prior consultation with all relevant stakeholders, including but not limited to the Commission. The orders to be made for amending Schedule 1 are also subject to the approval of LegCo. Clause 36 as currently drafted is adequate in ensuring that the power would be exercised in a reasonable and transparent manner.
General exclusions from conduct rules (Schedule 1)	
Agreements enhancing overall economic efficiency (Proposed section 1) 1. It is not clear what has to be done to show that exclusion for agreements which enhance overall economic efficiency applies, which appear to be matters of subjective or arbitrary judgment. (A.S. Watson and TMAHK)	The exclusion in section 1 of Schedule 1 is similar to those in the competition laws of the EU, Singapore and the UK. There are abundant case law and guidelines in overseas jurisdictions clarifying the scope of

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	application of these exclusions, covering different categories of research & development agreements, and specialization agreements (including those with provisions on intellectual property rights), etc.
2. The Administration should state its position towards the common practice for associations to set out business standards for their member organizations to follow, which is arguably conducive to the contribution to economic efficiency but at the same time might pose an impact on competition. The Administration should consider granting exemption to collective industry associations whose mandate is to advance the performance of their respective sectors, or be clear on the type of agreements and standards which may be exempted and the criteria for granting such exemption. (AAP, HKBCJC, HKEIA and HKIPA)	While industry-based standards may fall within the ambit of the competition law, they are not necessarily anti-competitive given the benefits that may be accrued to consumers in the form of quality assurances and lower search costs. Whether a business standard would appreciably affect competition depends on a host of factors, including whether the structure of the market itself is competitive; whether members of the association remain free to adopt different conditions; whether the standard relates to price; whether the restriction is proportional and necessary to achieve a legitimate and clear public interest objective, etc.
Compliance with legal requirements (Proposed section 2) 3. Amendment should be made to the definition of "legal requirements" so that conduct engaged in or agreements made in compliance with any requirements applicable under codes of practice, circulars, guidelines	Broadening the definition of "legal requirement" might cast the net too wide, rendering the exclusion a norm rather than an exception. In addition, according to case

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or other directions or guidance in any form issued or endorsed by a Government-approved regulatory or supervisory authority in Hong Kong (or a relevant supranational body) are excluded from challenge under the conduct rules. (HKAB and HSBC)	laws in overseas jurisdictions, the exclusion for compliance with legal requirements applies only where the regulated undertaking is required to act in a certain way; it does not apply to the discretionary behavior of that undertaking (e.g. making reference to a guidance or circulars of no particular legal effect).
Services of general economic interest etc. (Proposed section 3) 4. There is no definition of "services of general economic interest" although there is case law and guidelines on this issue in other jurisdictions. It is suggested that guidance should be provided to identify the scope of the exclusion. (Law Soc)	Section 3 of Schedule 1 provides that the conduct rules do not apply to an undertaking entrusted by the Government with the services of general economic interest (SGEI) insofar as the conduct rule(s) would obstruct the performance, in law or in fact, of the particular tasks assigned to it. Case laws and competition guidelines in overseas jurisdictions have developed some guiding principles to interpret SGEI, which should normally be services that the authorities consider should be provided in all cases, whether or not there is incentive for the private sector to do so. Moreover, such services must be widely available and not restricted to a class, or classes of customers. The Commission will cover the key considerations

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	for application of SGEI exemption in future guidelines.
Mergers (Schedule 7)	
Application of Merger Rule (Proposed section 4) 1. The Bill should expressly state that both the first conduct rule and second conduct rule do not apply to mergers in order to reflect accurately the Government's legislative intent, ensure legal certainty and eliminate serious unintended consequences. As currently drafted, the first conduct rule would be applied to mergers in all sectors, which is in stark contrast to the Government's indication that merger regulation will be restricted to telecommunications carrier licensees only. If this is not clarified, it would impose unnecessary and unjustified costs to businesses and the regulatory authorities who may need to determine one way or the other, hence inviting expensive and entirely unproductive satellite litigation. (A.S. Watson, BCCHK, Dairy Farm, HKGCC, HKRMA, HSBC and PCCW)	We do not consider it appropriate to carve out from the first conduct rule agreements to merge in non-telecommunications sectors, as this could result in distortion in market behaviour, particularly in the absence of a cross-sector merger rule. With such a carve-out, competitors might have the incentive – instead of forming cartel (which would be caught by the first conduct rule) – to merge so that they could engage in anti-competitive behaviour.
2. There is no proper explanation as to why the Government believes that merger control is appropriate for the telecommunications sector but not for other sectors. Merger is not unique to telecommunications industry and those transactions that produce serious anti-competitive effects should not be allowed across all industries of Hong Kong. As such, the merger rule should be withdrawn from the Bill, or at least provision made that it shall not take effect in respect of any mergers	In the two public consultation exercises conducted in 2006 and 2008, respondents' views on merger regulation were diverse. We have also kept in mind the view of the Competition Policy Review Commission in June 2006 that the focus of competition law in Hong Kong should be on prohibiting conducts,

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until the commencement date which should be later than that on which the other parts of the Bill take effect, (CSL, HTHK and PCCW)	rather than targeting market structure through the regulation of monopolies and mergers, and that mergers may be an efficient way to achieve economies of scale in a small economy in Hong Kong. We therefore consider it pragmatic and sensible not to regulate merger activities under the Bill, except for carrier licenses granted by the Telecommunications Authority which is already subject to merger regulation under section 7P of the Telecommunications Ordinance (Cap. 106).
3. The Bill includes no merger control regime except in relation to the telecommunications sector. Consequently, the proposed Hong Kong law is not overbroad. (Academics) 4. Mergers may be caught by the first and second conduct rules of the Bill as currently drafted. Although the issue would have to be ultimately clarified by the courts through litigation, the Administration should clarify the matter now by a simple amendment to the conduct rules, excluding mergers from the scope of application. (HKGCC)	Please see responses to items 1 and 2 under Schedule 7 above.
Exclusions from Merger Rule (Proposed section 8) 5. The merger rule states that a merger will be permitted if "the economic efficiencies that arise or may arise from the merger outweigh the	The context in which the conduct rules and the merger rule are applied are different, hence the exclusions on economic efficiency grounds in

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adverse effects caused by any lessening of competition in Hong Kong", while economic efficiency exclusion for other agreements is framed in entirely different terms, requiring three separate criteria to be satisfied as stipulated in Schedule 1 of the Bill. There is no valid justification for this difference and thus it should be amended to be more consistent with the Government's stated policy objective. (HKGCC and HTHK)	section 1 of Schedule 1 and section 8 of Schedule 7 are formulated differently. Nonetheless, the test of exclusions for both rules is essentially the same, i.e. balancing the overall economic efficiency gains and the potential harm on competition.

Abbreviations (in alphabetical order)

			LC Paper No.
AAP	-	The Association of Architectural Practices Ltd.	CB(1)814/10-11(02)
Academics	-	Open Letter from 22 Academics in Hong Kong and other places	CB(1)1506/10-11(01)
A.S. Watson	-	A.S. Watson & Co., Limited	CB(1)516/10-11(17)
BCCHK	-	The British Chamber of Commerce in Hong Kong	CB(1)814/10-11(01)
CGCC	-	The Chinese General Chamber of Commerce	CB(1)622/10-11(04)
CSL	-	CSL Limited	CB(1)592/10-11(05)
CX	-	Cathay Pacific Airways Limited	CB(1)516/10-11(18)/CB(1)690/10-11(02)
Dairy Farm	-	The Dairy Farm Company Ltd.	CB(1)516/10-11(14)
ES	-	Economic Synergy	CB(1)516/10-11(01)
FHKI	-	Federation of Hong Kong Industries	CB(1)592/10-11(01)/CB(1)1684/10-11(03)
Global Sources	-	Global Sources Limited	CB(1)516/10-11(04)
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)
HKBCJC	-	Hong Kong Business Community Joint Conference	CB(1)779/10-11(01)
HKCA	-	Hong Kong Construction Association	CB(1)516/10-11(23)
HKEIA	-	The Hong Kong Electronic Industries Association	CB(1)690/10-11(01)

HKGCC	-	The Hong Kong General Chamber of Commerce	CB(1)516/10-11(03)/CB(1)1523/10-11(05)/ CB(1)2056/10-11(02)
HKIPA	-	Hong Kong Institute of Patent Attorneys	CB(1)516/10-11(25)
HKMMA	-	Hong Kong Metal Merchants Association	CB(1)516/10-11(07)
HKRMA	-	Hong Kong Retail Management Association	CB(1)592/10-11(04)
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)/CB(1)1219/10-11(02)
LRI	-	The Lion Rock Institute	CB(1)516/10-11(11)
PCCW	-	PCCW Limited	CB(1)592/10-11(02)
PARKnSHOP	-	PARKnSHOP Supermarket	CB(1)516/10-11(20)
REDA	-	The Real Estate Developers Association of Hong Kong	CB(1)622/10-11(08)
SIMPSON	-	Dr Andrew SIMPSON, Assistant Professor, The Hong Kong Polytechnic University	CB(1)2018/10-11(03)
SPIL	-	Savantas Policy Institute Limited	CB(1)633/10-11(03)
TMAHK	-	The Toys Manufacturers Association of Hong Kong	CB(1)516/10-11(02)

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