



Date: 19th November 2010

Chairman of the Bills Committee  
Legislative Council  
Legislative Council Building  
8 Jackson Road  
Central, Hong Kong

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Dear Sirs,

### Submission to Bills Committee on Competition Bill

We are writing in response to the invitation from the Bills Committee to give our views on the Competition Bill ("the Bill"). We welcome the opportunity to submit our further views on this matter, having responded to the two previous rounds of public consultation.

### Executive Summary

- Our main concern is the continuing lack of clarity surrounding the fundamental concepts, such as 'preventing, restricting and distorting competition', 'substantial market power' and 'abuse'.
- The Bill should instead focus on specific, clearly defined types of conduct which have an adverse effect on competition.
- Prohibited agreements and practices should be clearly defined in the Bill, rather than being left to guidance to be issued by the future Competition Commission.
- If private actions are to be permitted, they should be limited to claims based on a finding by the authorities of proven anti-competitive conduct.
- Proper safeguards are required to protect against unmeritorious and vexatious claims, leading to excessive burdens on businesses, the competition authorities and the courts.

Our key concerns are set out in more detail below.


### 1. Lack of Certainty

We have previously raised concerns about the lack of clarity surrounding the key concepts underpinning the proposed law. The Bill unfortunately does nothing to alleviate these concerns. The key concepts such as 'prevent, restrict or distort competition' and 'abuse of substantial market power' are not defined.

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Given the lack of certainty, it will be very difficult for businesses to predict whether their agreements or conduct will breach the proposed law. Complex economic analysis of whether the conduct ‘prevents, restricts or distorts competition’ would be required, which would inevitably entail specialist legal and/or economic advice, thereby increasing the costs of doing business in Hong Kong.

Additionally, there is no established body of expertise in Hong Kong for the type of complicated economic analysis and econometric modelling that would be required. Experts from other jurisdictions would undoubtedly have to be brought in, who are not familiar with the dynamics of the Hong Kong market, thereby causing additional uncertainties.

Accordingly, instead of relying on vague, general concepts of ‘prevent, restrict or distort competition’ and ‘abuse of substantial market power’, the Bill should clearly specify the types of conduct which are prohibited. This should be limited to defined agreements / practices which are widely recognised as generally the most harmful practices in economic terms, such as are expressly prohibited in many jurisdictions (for example in the EU and Mainland China). Other conduct should not be prohibited since assessing future economic effects and economic efficiencies is too arbitrary and subjective. The Competition Commission (“Commission”) could, however, have powers to intervene in respect of conduct where the competitive harm is not outweighed by economic benefit.

We remain concerned that the Government is proposing to leave it to the future Commission to define fundamental concepts through non-statutory guidelines. Such guidelines would not be binding on the Commission itself, nor on the future Competition Tribunal and will not provide sufficient legal certainty. The definition of the underlying prohibitions should be determined by Legco to facilitate compliance and to restrain the future competition authorities from interpreting the law in a way that was not intended.

## **2. Penalties**

The proposed penalties for non-compliance under the Bill are extremely severe for a new, untested law. In particular, the proposed financial penalty of up to 10% of group worldwide turnover for each financial year in which the infringement occurred is wholly disproportionate compared to other competition regimes elsewhere. Consistent with the practice in other countries, the fines should be linked to the turnover in the relevant market – both in terms of the specific goods/services which are the subject of the infringement, and the relevant geographical market. The excessive penalties in the Bill are of particular concern in light of the legal uncertainty surrounding what is, and is not, permitted under the Bill.

## **3. Litigation risks and costs**

We note that, despite the concerns raised by many different groups during the public consultation regarding ‘stand alone’ actions, the Bill does still include the right for private actions irrespective of any finding of anti-competitive conduct by the Commission / Tribunal. The Government has not given any justification as to why such ‘stand alone’ actions are necessary or appropriate in the Hong Kong context. Moreover, it has not addressed the main concerns that, particularly in light of the lack of clear definitions and the non-binding nature of any Commission guidance, such actions would ‘open the floodgates’ to speculative claims, and the administrative and financial burden of dealing with such claims should not be underestimated.



For claimants with genuine grievances, the risks and costs of bringing a Tribunal claim, such as the need for expert economist evidence, would also seem difficult to justify. In such cases the Commission would provide a cheaper and more accessible means of resolving the matter. The Commission would also be able to screen out vexatious and ill-founded claims at an early stage and more cheaply than court proceedings – a positive outcome for both complainant and defendant.

If private actions are to be allowed in the Bill, then they should be limited to “follow-on” actions, so as to permit redress only where there is proven anti-competitive conduct. In any event, appropriate safeguards need to be put in place to ensure that the provisions are not abused.

#### **4. Market Power**

The Bill does not make it clear how ‘substantial degree of market power’ will be determined, nor what will constitute ‘abuse’. These terms should be clearly defined to enable businesses to understand what they can, and cannot do, under the proposed law.

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 whether there are any barriers to entry (or exit). Guidelines on how the Commission will address these issues should be issued as part of the statutory process (and be open for public consultation).

The ‘illustrative examples’ of what constitutes an abuse of market power are also much too vague. If the Government cannot provide clear definitions of the above concepts and cannot identify specifically what types of conduct will be considered an abuse, businesses will be unable to predict what conduct is prohibited.

#### **Conclusion**

Our overriding concern is that the Bill, in its current form, leaves the core concepts undefined. The lack of legal certainty arising from vague general notions of ‘preventing, restricting or distorting competition’ and ‘abuse of substantial market power’ could in fact hinder competition, as businesses might compete less vigorously for fear of breaching a law they do not understand. In addition, there is a real risk that by leaving it to the future Competition Commission to define these fundamental concepts, this may result in unintended consequences, which are inconsistent with the overall objective of enhancing economic efficiency for the benefit of consumers.

Yours faithfully,



Philippe Giard  
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Regional Managing Director, Greater China (Food Retail)