THE LAW SOCIETY OF HONG KONG 香港律師會

Law Society's Comments
Major Issues on the Competition Bill

No.	Clause reference	Issues	Law Society's comments
1.	Preliminary	Need for definition of "competition" applicable to Hong Kong and the object of the law to be clearly stated	It is noted that the Bill has been drafted in some detail, but also envisages guidelines being issued to clarify the practical scope of certain provisions. Since competition law has evolved differently in different jurisdictions, it is not at present clear how a generally drafted law will be interpreted in practice in Hong Kong. We consider it important to have a competition law which is effective, clear and applicable to all. As against this must be balanced the concerns of those who fear that business freedoms may be eroded by having a law that is too complex or wide ranging. We therefore propose that: 1. A definition of "competition" be included. Otherwise, the concept is open to a number of different interpretations. The focus should be on workable competition (rather than the unrealistic notion of perfect or textbook competition), which would need to be assessed in the context of any given industry being scrutinized by the Commission/Tribunal; and 2. given the potentially ambiguous nature of the conduct rules, it would be useful for the

			Ordinance to contain a concise object at the outset, which may guide and assist the Commission and Tribunal in giving effect to the law. We would suggest: "The object of this law is to promote economic efficiency in Hong Kong in the medium to long term in markets within Hong Kong and independent rivalry between competitors for the benefit of Hong Kong society by prohibiting conduct and mergers that substantially lessen competition."
2.	2.1	Definition of "undertaking" should be clarified	It is noted that the definition is very wide as it covers any "entity.... engaged in economic activity and includes a natural person engaged in economic activity". It theoretically covers everyone running or connected to a business, including employees. Whilst it may in practice be appropriate to have a wide definition for the purposes of the Second Conduct Rule (which at least requires substantial market power), it should be made clear how far the First Conduct Rule is meant to apply to all businesses regardless of structure or size, such as SME's, sole practitioners, employees or other staff and the many small family businesses in Hong Kong, since the widely drafted meaning of "undertaking" catches them all. Such clarity is particularly necessary after the Government's indication during consultation that the competition law would not impose too heavy a burden on SME's. Further, in view of the potentially wide scope of unlawful activity, it is not clear whether agreements between two or more people comprising a single economic unit (eg parent and subsidiary) are to be caught, or are outside the scope of the Bill because they comprise a single undertaking. While it is understood that the notion of "undertaking" is defined to include any entity that is engaged in the economic activity, it is not clear whether separate businesses and companies under common control will be deemed as a single undertaking. This in turn will have an impact on the amount of penalty imposed based on the turnover of "the undertaking concerned" under Clause 91(3). In summary, we question whether it is appropriate in Hong Kong's small business environment, and given the opportunity Hong Kong has to learn from the experience (and pitfalls) of other jurisdictions to have such a broad ranging "catch all" definition of "undertaking".

3.	3	Whether statutory bodies that are engaging in economic activity should have a *prima facie* exclusion from application of the conduct rules?	Whilst we agree on having exemptions for certain statutory bodies, a general blanket exemption involves the risks of abuse as to many statutory bodies are likely to fall within the current definition. Certainty as to which statutory bodies are covered is desirable so that the extent of the exemption is known. Rather than exempting all statutory bodies from the conduct rules (with regulations used to "opt-in" those that are engaging in economic activities), it would be preferable to have an agreed list of statutory bodies which are subject to the conduct rules or an agreed listing of statutory bodies which are exempt from the conduct rules annexed to the Bill.
4.	1st & 2nd conduct rules	Whether all of the conduct that would be caught by the conduct rules is sufficiently certain and possibilities for addressing this?	Certainty is obviously an essential element of any law in Hong Kong, particularly where it could have very serious financial or other ramifications. Experience implementing similar competition laws in overseas jurisdictions shows that while some conduct (such as bid-rigging, cartels and market sharing) is relatively certain, other conduct that might be caught is far less certain. This is no doubt why it was initially proposed that the competition law for Hong Kong would target such hard core conduct. Canada (which has the oldest competition law) has recently made significant amendments to address this issue, only applying serious penalties to the more certain types of conduct. We query whether Government has considered the appropriateness of such an approach for Hong Kong. This could be achieved in the Bill by making minor amendments to retain the prohibition for hard core conduct from the time it occurs but making it clear that other conduct (which parties might quite legitimately not realize the potential anticompetitive implications of) only be prohibited from the time it is declared to be anticompetitive, or that such uncertain conduct be subject to lesser penalties/relief provisions. The 1st conduct rule also does not make it clear whether vertical agreements will have a general exclusion. The position regarding vertical agreements should be made clear in the drafting of the conduct rule, rather than being left to the discretion of the Commission and/or Tribunal.
5.	1st & 2nd	Whether efficiency gains	We are of the view that the Bill needs to be clearer that efficiency gains need to be

	conduct rules	need to be balanced against any lessening of competition?	balanced against any lessening of competition. The Canada Competition Act has been amended earlier this year to the effect that except “hardcore” agreements (i.e. price-fixing cartels, etc.), the anti-competitive agreements are no longer automatically prohibited and are subject to a new provision – section 90(1) – whereby they can be reviewed by the Commission and ultimately be subject to an order by the Tribunal either prohibiting any person from doing anything under the agreement or requiring any person to take any other action. In particular, there is an efficiency exception in section 90(4) as follows: "The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made".
6.	21(1)	Whether the threshold test for abuse of market power should be “substantial degree of market power” or “dominance”?	The threshold test of "substantial degree of market power" is a lower threshold than "dominance". We consider "dominance" is a more appropriate threshold given both the small and open nature of Hong Kong's market and its capitalist constitution (which should raise a presumption that regulators and the government should not be 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 Mainland China's Antimonopoly Act. Having consistency between the tests in Hong Kong and Mainland China will reduce the complexity of cases considering conduct that might straddle both jurisdictions.
7.	21(2)	There are two types of conduct that could potentially be caught by a unilateral conduct prohibition as set out in clause 21(2). The first is	The antitrust law in the United States does not apply to exploitative conduct such as excessive (monopoly) pricing. The Privy Council has ruled that exploitative conduct is not covered by the unilateral conduct provisions of the New Zealand Commerce Act 1986 (which adopts similar drafting to that proposed in Hong Kong).

		exclusionary conduct, i.e. conduct engaged in by an undertaking with market power to foreclose competition by either pushing other existing competitors out of the market or excluding entry by potential competitors. The second is exploitative conduct, i.e. conduct engaged in by an undertaking with market power that does not foreclose competition but which exploits the market power the undertaking has, e.g. monopoly pricing. Whether exploitative conduct shall be regarded as anti-competitive and therefore subject to the second conduct rule?	European competition law has recognised a prohibition on exploitative conduct. However, the relevant case law has proved extremely problematic and the EU is retreating from the doctrine. In other words, competition law directs itself to producing the competition which should in due course reduce monopolies. Price control is an altogether different function, which should only be considered when there are severe and intractable monopoly issues and then only by a sectoral regulator established for that purpose. It should also be noted that Hong Kong already has in place effective *ex ante* regulations in various sectors such as the electricity sector (through the Schemes of Control) and public transport e.g. rail, taxis, buses, ferries and trams. Therefore, the legislation (or guidelines) should provide clarity that exploitative conduct is not caught by the second conduct rule. We believe defining the particular unilateral conduct that should be the focus of enforcement activity in the Bill will be difficult and recommend this be left to the guidelines to the Competition Ordinance that will be issued in due course.
8.	31	Whether Chief Executive in Council alone should have the power to exempt specified agreement/conduct from the application of conduct rules on public policy grounds?	We think that the powers given to the Chief Executive in Council under this provision are very extensive and should therefore only be exercised after consultation with the Competition Commission. The views of the Competition Commission and any person who advises either the Competition Commission or the Chief Executive in Council should be made public. This consultation is particularly necessary in the light of the retrospective nature of clause 31(5). There is no definition of “services of general economic interest” though there are cases and guidelines on this issue in other jurisdictions. As previously proposed, guidance is

			required in order to better identify the scope of the exclusion.
9.	46	Importance of retaining legal professional privilege	Although it is noted that confidentiality does not excuse disclosure of information or documents to the Commission, this should not in any event apply to any information or document to which litigation or legal professional privilege applies.
10.	91	Whether the Tribunal should have far-reaching power to impose pecuniary penalty on persons involved in a breach?	While some overseas regimes confine penalties to an undertaking intentionally or negligently infringing the competition rules, the existing provision of clause 91(1) empowers the Tribunal, upon application by the Commission, to order any person that has contravened or <u>been involved</u> in a contravention of a competition rule to pay a pecuniary penalty of any amount it considers appropriate (subject to the limitation in sub- clause (3)). A person so involved in a contravention may be a legal person or natural person, therefore any senior management and board members of an undertaking may be subject to such far-reaching financial penalties if his/her direct or indirect involvement of conduct rule contravention is proved. The maximum penalty (10% of the worldwide turnover of the undertaking concerned for each year in which the contravention has continued) is also higher than a number of other jurisdictions.
11.	99	Whether use of the disqualification power should be subject to leniency agreement?	If leniency does not cover potential use of the disqualification power as currently drafted by the Bill, it will seriously undermine the appeal of the leniency procedure for senior management.
12.	106 and 108	Clause 106 prohibits any person from initiating any proceeding in Hong Kong independently of the Ordinance if the cause of action is the defendant's contravention, or involvement in contravention, of a conduct rule. With the current draft, it is uncertain whether any	This clause should be amended to provide that "no person <u>other than the Commission</u> may bring any proceeding <u>under this Part</u> independently of this Ordinance, whether under any rule of law or any enactment, in any court in Hong Kong, if the cause of action is <u>only</u> the defendant's contravention, or involvement in a contravention, of a conduct rule". In other words, only the Commission should have the power to bring pure Competition matters before the Tribunal. We also recommend that mixed claims could only be brought before the Court of First Instance with the leave of the Court of First Instance to avoid the risk of conflicting outcomes and the incurrence of additional costs.

		person can bring proceedings independently of the Ordinance if (a) the action is not a pure competition proceeding and instead is a composite claim or (b) the cause of action is an infringement of the merger rule, as the merger rule is not encompassed within the terms "conduct rule" under the Bill.	As the Court of First Instance has non-exclusive jurisdiction to adjudicate a composite claim, on both the competition law part and the non-competition law part, for the purpose of section 108(1), if the Court of First Instance should also have the jurisdiction to determine whether or not a claim falls within its jurisdiction, sections 108(4)(a) and (b) should be amended accordingly.
13.	Notably 63 and 125	Protection of confidential business information	There is insufficient protection of confidential business information: notably on what is disclosed in the register of commitments (clause 63) and what can be disclosed "with lawful authority". The Law Society believes that increased safeguards should be inserted into the bill to ensure that business and confidential information is, as far as practicable, not disclosed (clause 125).
14.	125(1)	Under clause 125(1)(d) and (f), disclosure of confidential information by a specified person is regarded as lawful if the disclosure is made in connection with judicial proceedings arising under this Ordinance or with a view to bringing any criminal proceedings or any investigation under Hong Kong laws in Hong Kong. However, the Bill is silent as	We recommend this be clarified by adding "Notwithstanding any other provisions of this Ordinance" at the beginning of clause 45(2) of the Bill, which addresses the rules on the admission of evidence against self-incrimination regarding information obtained during the course of an investigation by the Commission.

		to whether such lawful disclosure of confidential information affects the privilege against self-incrimination.	
15.	125(1)(h)	Whether disclosure of confidential information should be made "by one competition regulator to another"?	The permission under clause 125(1)(h) is very far-reaching. This provision should also be made "subject to sub-section (3)" in its amended version. Not all competition regulators around the world protect the disclosure of confidential business information to the same standards.
16.	125(2)	Clause 44 of the Bill provides a person with the same privileges and immunities as are available in civil proceedings in the Court of First Instance. However, under clause 146, the Tribunal is not bound by the rules of evidence in a court of law except when the Commission applies for an order under clause 91 or 168. Accordingly, except proceedings in which the Commission applies for an order under clause 91 or 168, the Tribunal may admit any evidence it deems appropriate and disregard any immunity or privilege to which a person	Since clause 127(2)(d) creates a channel for the Commission to provide information to the Tribunal in any competition proceedings, the same degree of immunity and privilege to which a person is entitled during the Commission's investigation under clause 44 should also be available in proceedings before the Tribunal with respect to such information disclosed under clause 127. As such, it is submitted that a clear statement should be made as to the extent to which such immunities and privileges will be available in a proceeding before the Tribunal.

		may otherwise be entitled in a civil proceeding.	
17.	143	Procedures before the Tribunal and whether to be held in public	It is noted that the Tribunal may decide its own procedures and that the civil procedures of the Court of First Instance may be adopted. Since the tribunal is to be a superior court of record, we consider that the Rules of the Court of First Instance should normally apply. Moreover, it is not clear what rights of audience will apply, for example with regard to the parties' legal representatives (including solicitors) and whether corporate parties would be allowed to act in person generally; and if not, under what circumstances would they be so allowed; and with or without leave. There would need to be a strong and compelling reason advanced to justify departing form the normal rules that ensure fairness and justice to parties to legal proceedings before the courts in Hong Kong. It should also be clarified whether substantive hearings will be open to public whether or not held in Chambers.
18.	162	The Bill does not provide for a general cross sector merger control. At present, merger control only applies to merger activities in the telecommunications sector by way of Schedule 7	Whilst we appreciate the issue of merger control is difficult, and it is often argued that it is irrelevant given Hong Kong's small geographical size and open market economy, it is nevertheless submitted that a cross sector merger control should be a fundamental feature of the future Competition Ordinance. That said, a cross sector merger control will be in nature complex and the Government may need to conduct a further consultation process on this issue (i.e. to ascertain whether Schedule 7, as it currently stands, can be applied in an economy wide context). We note that Schedule 7 does not appear to provide for specific percentage thresholds (for changes in control in the target company). This would seem to be intentional on the part of the drafters, as the thresholds used by the TA may not be appropriate thresholds for merger activities in the general economy. However, it would appear that the current determining factors/requirements set out in Section 5 of Schedule 7 are too vague and may need to be further addressed by future guidelines issued by the Commission and/or the TA.

			If the position is maintained that there will not be a general merger regime in the first instance, then it is also imperative that it be made clear that the conduct rules will not apply to agreements and other conduct undertaken in anticipation of, or to give effect to, a merger. EU experience shows that failing to clarify this from the outset will result in considerable uncertainty and unnecessary litigation, both of which are undesirable and would undermine the Government's stated policy objectives in introducing this law.
19.	Schedule 7, paragraph 9	Scope of exemption of merger on public policy grounds	In relation to Schedule 7, Part 4, Division 2, there is high degree of concern at the extreme breadth of the exemption from the merger rule granted by these provisions. The Chief Executive is given extensive powers to exempt from the application of the merger rule any proposed merger on broad grounds of "public policy", even if the proposed merger would be likely to result in a "substantial lessening of competition in Hong Kong". It is hard to see the justification for such overriding powers with very few checks and balances. The starting point should be that all mergers should be reviewed against the same criteria. Where any proposed merger is prohibited as being likely to result in "a substantial lessening of competition in Hong Kong", the Chief Executive should be empowered to consider the negative effects of the proposed merger and weigh them against any overriding considerations of "public policy" and invite and take into consideration the views of any interested parties, before making a decision. Where the Chief Executive decides that the proposed merger should be allowed on grounds of "exceptional and compelling reasons of public policy", he should be obliged to make a reasoned decision which should be published in the Gazette and which would become effective only after a period of two months. Any interested party would then be entitled to apply to the Competition Tribunal for judicial review of the Chief Executive's decision within the two month period.
20.	Schedule 8, Part 4, Section 14	Proposed inclusion of a new section 7Q in the Telecommunications Ordinance (TO)	While it is proposed that the existing competition provisions in the Broadcasting Ordinance (BO) and Telecommunications Ordinance (TO) would be repealed when the general competition law comes into force, it is proposed section 7Q be introduced into the TO to regulate any conduct that, in the opinion of the Telecommunications Authority (TA), comprises exploitative conduct by a dominant telecommunications licensee. There

			is inevitably going to be enormous difficulty trying to determine whether claims of abuse of dominance against telecoms licensees (which will often involve pricing) should be brought in the Telecommunications (Competition Provisions) Appeal Board (TAB), under section 7Q of the TO, the Competition Tribunal, under the second conduct rule, or both. Maintaining an exploitative conduct prohibition within the TO, which is necessarily predicated on dominance, is, therefore, likely to cause serious and intractable conflicts in jurisdiction between the TA and TAB, on the one hand, and the Competition Commission and Competition Tribunal, on the other hand, in relation to unilateral conduct cases involving Telecoms licensees.

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