



Ref:

Hon Andrew Leung Kwan-yuen, GBS, JP
 Chairman
 Bills Committee on Competition Bill
 c/o Legislative Council Secretariat
 3/F Citibank Tower
 3 Garden Road
 Central
 Hong Kong

7 January 2011

Honourable Chairman and Members,

Re: Hong Kong Competition Bill

The Hongkong and Shanghai Banking Corporation Limited welcomes this opportunity to provide comments to the Legislative Council regarding the Competition Bill. HSBC appreciates the government's efforts to provide Hong Kong with a balanced and equitable competition law regime. In particular we believe the following features of the Bill examined by your Committee should be commended:

- the proposed phased approach to the enforcement of the Competition Ordinance that will allow sufficient time for the business community to adapt to this new legislation after it has been enacted;
- the focus on conduct which may have anticompetitive effects rather than on control of market structure;
- the requirement that the Competition Commission issues enforcement guidelines and consults with interested parties prior to their issuance.

HSBC believes nevertheless that the Competition Bill could still be improved in a number of important aspects. Based on our experience in complying with competition law regimes abroad, we have prepared the enclosed submission for your consideration. In summary, we suggest that:

- being a tool of economic policy, some of the substantive aspects of the Bill ought to be better adjusted to the specific features of the Hong Kong economy; and
- some of the technical and procedural aspects of the Bill be brought in line with international best practices.

We hope that you will find these comments useful and remain at your disposal should you wish to receive clarifications on HSBC's position.

Yours faithfully,



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The Hongkong and Shanghai Banking Corporation Limited

**SUBMISSION TO THE BILLS COMMITTEE OF THE LEGISLATIVE COUNCIL ON
THE COMPETITION BILL**

EXECUTIVE SUMMARY

1. **Compliance with legal and regulatory requirements.** The Competition Ordinance should expressly recognize that conduct that is required, encouraged, recommended or authorized by Hong Kong or foreign legislative, administrative and regulatory authorities will not be liable to constitute a breach of competition law.
2. **Relationship between competition and financial services regulators.** There should be specific provisions to ensure an adequate level of cooperation between the Competition Commission and the financial services authorities in relation to conduct that is also subject to the jurisdiction of these authorities.
3. **Intra-group agreements.** The first conduct rule should not apply to intra-group relationships.
4. **Substantial market power.** The Competition Ordinance should refer to the notion of dominant position rather than to the notion of substantial degree of market power for purposes of the second conduct rule.
5. **Exclusion for mergers.** Merger situations should be expressly excluded from the first and second conduct rules.
6. **Materiality threshold.** HSBC suggests inserting a materiality threshold in the conduct rules.
7. **Issuance of enforcement guidelines.** There should be a general provision providing the Competition Commission with powers to issue guidelines on any matter of interest in addition to an expanded list of important matters for which the Commission would be required to issue guidelines.
8. **Pecuniary penalties.** Pecuniary penalties should be commensurate to the gains derived from the anticompetitive practices, and their maximum amount should be limited to 10 per cent of the total turnover achieved by the infringing party during the course of the preceding financial year on the Hong Kong markets affected by the contravention.
9. **Sanctions against individuals.** The Competition Ordinance should not provide for pecuniary penalties on individuals unless they qualify as undertakings.
10. **Disqualification orders.** Disqualification orders should only be imposed in relation to serious competition infringements and after careful consideration of all relevant circumstances.
11. **Offences.** Criminal sanctions should only be imposed for deliberate attempts to obstruct competition law investigations.
12. **Private enforcement.** Private actions should be limited to follow-on actions.
13. **Definition of confidential information.** The definition of confidential information should be clarified to provide for greater legal certainty.
14. **Duty of secrecy.** The Competition Ordinance should provide for safeguards against the unauthorized disclosure of any information (not only confidential information) obtained by or provided to the competition regulators.
15. **Disclosure of information with lawful authority.** Additional safeguards should apply to disclosure of confidential information, which should only be allowed when required to comply with a

legal requirement or to the extent strictly necessary and proportionate to enforce the law or to initiate criminal proceedings.

16. **Disclosure of confidential information by third parties.** A person who gets access to confidential information from the Commission should be prohibited from disclosure except with the express consent of the Commission or to comply with a legal requirement.

1 Compliance with legal and regulatory requirements

The Competition Ordinance should expressly recognize that conduct that is required, encouraged, recommended or authorized by Hong Kong or foreign legislative, administrative and regulatory authorities will not be liable to constitute a breach of competition law. The following suggestion addresses HSBC's specific concern with respect to the financial services industry.

1.1 Proposed amendment

HSBC suggests the following amendment to Section 2 of Schedule 1 of the Bill.

Schedule 1, Section 2, of the Bill	
Current Text	Proposed amendment
<p>(1) The first conduct rule does not apply to an agreement to the extent that it is made for the purpose of complying with a legal requirement.</p> <p>(2) The second conduct rule does not apply to conduct to the extent that it is engaged in for the purpose of complying with a legal requirement.</p> <p>(3) In this section "legal requirement" means a requirement: (a) imposed by or under any enactment in force in Hong Kong; or (b) imposed by any national law applying in Hong Kong.</p>	<p>(1) The first conduct rule does not apply to an agreement to the extent that it is made for the purpose of complying with a legal requirement.</p> <p>(2) The second conduct rule does not apply to conduct to the extent that it is engaged in for the purpose of complying with a legal requirement.</p> <p>(3) In this section "legal requirement" means a requirement: (a) imposed by or under any enactment in force in Hong Kong; or (b) imposed by any national law applying in Hong Kong.</p> <p>(4) The first conduct rule does not apply to an agreement, concerted practice or decision of an association of undertakings to which effect is given by or which is entered into between parties subject to the regulating provisions of domestic or foreign financial services authorities including the Hong Kong Monetary Authority, the Securities and Futures Commission, the Mandatory Provident Fund Schemes Authority or the Office of the Commissioner of Insurance, to the extent to which the agreement, concerted practice or decision is required, encouraged, recommended or authorized by any regulating provisions, codes of practice, circulars or any other guidance of the said authorities.</p> <p>The second conduct rule does not apply to conduct of an undertaking subject to the regulating provisions of domestic or foreign financial services authorities including the Hong Kong Monetary Authority, the Securities and Future Commission, the Mandatory Provident Fund Schemes Authority, or the Office of the Commissioner of Insurance, to the extent to which the conduct is required, encouraged,</p>

	recommended or authorized by any regulating provisions or codes of practice, circulars or any other guidance of the said authorities.
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1.2 Rationale

Where an undertaking's conduct is encouraged by or results from a requirement, a recommendation or an authorisation from a financial services regulator, and when such conduct has the object or effect to prevent, restrict or distort competition in Hong Kong, the undertaking concerned should not be held liable under competition law.

HSBC, like many other business operators in Hong Kong, is conducting its business according to rules and guidance from sector regulators. These regulators have the power to issue regulations that are binding on the industry. In the exercise of their powers, regulators in the financial services sector have due regard to competition in the markets they regulate, but also to considerations of financial stability and protection of the investing public. Financial services operators must abide by these rules, even when their observance may lead to the prevention, restriction or distortion of competition in Hong Kong.

In addition, over time, financial services authorities have developed "soft law" enforcement practices which do not amount to a binding legal requirement but which companies nonetheless feel bound to abide by. These regulatory practices may not always squarely fit within the scope of section 2(3) of schedule 1 to the Bill as currently drafted. The proposed section 2(4) above would remedy this.

The above proposal is consistent with foreign practice. Section 164 of the UK Financial Services and Markets Act 2000 contains language very similar to the proposed new section 2(4) of schedule 1 to the Bill. See also a similar solution under United States federal antitrust law in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc* (1980).

2 Relationship between competition and financial services regulators

The Competition Ordinance should include specific provisions to ensure an adequate level of cooperation between the Competition Commission and the financial services authorities in relation to conduct that is also subject to the jurisdiction of these authorities.

2.1 Proposed amendment

HSBC proposes adding a new provision in Part 12 of the Bill.

New provision	
Current text	Proposed amendment
None	(1) As soon as is reasonably practicable after the coming into operation of this section, the Commission, the Securities and Futures Commission, the Hong Kong Monetary Authority, the Mandatory Provident Fund Schemes Authority and the Office of the Commissioner of Insurance must prepare and sign a Memorandum of Understanding for the purpose of ensuring an adequate level of cooperation between parties in relation to the functions of the Commission under the Competition Ordinance in so

	<p>far as they relate to conduct that is also subject to the jurisdiction of these authorities.</p> <p>(2) Subject to section 125 of this Ordinance, the Memorandum of Understanding must provide for the following matters: (a) arrangements whereby the Commission must inform the Securities and Futures Commission, the Hong Kong Monetary Authority, the Mandatory Provident Fund Schemes Authority or the Office of the Commissioner of Insurance that it is conducting an investigation under Part 3 of the Competition Ordinance; (b) arrangements whereby the Commission must consult with the Securities and Futures Commission, the Hong Kong Monetary Authority, the Mandatory Provident Fund Schemes Authority or the Office of the Commissioner of Insurance before applying for a financial penalty to the Tribunal in accordance with section 90 or before accepting a commitment in accordance with section 59; (c) arrangements whereby the Commission must consult the Securities and Futures Commission, the Hong Kong Monetary Authority, the Mandatory Provident Fund Schemes Authority or the Office of the Commissioner of Insurance before issuing guidelines or block exemption orders of specific interest to the financial sector; (d) arrangements for the supply of market information and intelligence between parties.</p> <p>(3) The Commission, the Competition Commission and Securities and Futures Commission, the Hong Kong Monetary Authority, the Mandatory Provident Fund Schemes Authority or the Office of the Commissioner of Insurance may amend or replace any Memorandum of Understanding prepared and signed under this section.</p>
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2.2 Rationale

The Competition Commission and the Hong Kong financial services authorities have different but complementary powers applicable to the financial services markets. Ensuring competitive markets is a key driver to ensure low prices, choice and quality also in financial sectors. However, the financial sector also presents some unique features. Regulators in the financial services sector have due regard to competition in the markets they regulate, but also to considerations of financial stability and protection of the investing public. It is crucial that the competition authorities and the financial services authorities work well together and exchange sufficient information (subject to appropriate confidentiality rules) so as to adopt consistent and effective decisions. Therefore, whenever the Competition Commission is reviewing conduct

relating to the financial services sector, it is important that it consults and takes into consideration the considerable industry expertise accumulated over the years by the Hong Kong financial services authorities, especially where such regulators are already familiar with general principles of competition law.¹

The above proposal is consistent with foreign practice. In the UK for instance, the UK Office of Fair Trading and the Financial Services Authority have recently renewed a Memorandum of Understanding which establishes a framework of cooperation between both authorities. This MOU includes specific cooperation on competition issues such as sharing information and market intelligence (subject to appropriate confidentiality requirements).

3 Intra-group agreements

The Competition Ordinance should clarify that the first conduct rule does not apply to intra-group relationships.

3.1 Proposed amendment

HSBC suggests amending Section 6 of the Bill as follows:

Section 6 of the Bill	
Current text	Proposed amendment
<p>(1) An undertaking must not (a) make or give effect to an agreement; (b) engage in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.</p> <p>(2) Subsection (1) applies in particular to agreements, concerted practices and decisions that (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; or (c) share markets or sources of supply.</p> <p>(3) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications). (4) The prohibition imposed by subsection (1) is referred to in this Ordinance as the "first conduct rule."</p>	<p>(1) An undertaking must not (a) make or give effect to an agreement; (b) engage in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.</p> <p>(2) Subsection (1) applies in particular to agreements, concerted practices and decisions that (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; or (c) share markets or sources of supply.</p> <p>(3) Subsection (1) does not apply to agreements, concerted practices and decisions between two or more entities that constitute a single undertaking. Two entities will be deemed to constitute a single undertaking for this purpose if one entity directly or indirectly holds more than 50% of the voting rights in the other entity.</p> <p>(34) Unless the context otherwise requires, a provision of this Ordinance</p>

¹ See Hong Kong Monetary Authority, "Testing for collusion in the Hong Kong Banking Sector", working paper of 8 February 2007; Hong Kong Monetary Authority, "Competition in Hong Kong's Banking Sector: A Panzar-Rosse Assessment", Research Memorandum 16/2006, October 2006.

	<p>which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).</p> <p>(45) The prohibition imposed by subsection (1) is referred to in this Ordinance as the "first conduct rule."</p>
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3.2 Rationale

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. This proposal is in line with the practice in many jurisdictions, including in Australia where section 45(8) of the Trade Practices Act expressly provides that the prohibition against restrictive agreements does not apply where the parties qualify as "related bodies corporate." A parent and a subsidiary are considered as such, as long as the parent company owns more than 50% of the equity of the subsidiary.

4 Substantial market power

The Competition Ordinance should refer to the notion of dominant position rather than to the notion of substantial degree of market power for purposes of the second conduct rule.

4.1 Proposed amendment

HSBC recommends amending Section 21 as follows:

Section 21(1) of the Bill	
Current text	Proposed amendment
<p>(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.</p>	<p>(1) An undertaking that has a substantial degree of market power dominant position in a market must not abuse that power position by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.</p>

4.2 Rationale

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 Competition Commission - to the detriment of effective competition and ultimately to the detriment of consumers. A dominance threshold would allow the Competition Commission to have regard to clear guidance in well-established European case law as well as precedents adopted in most other jurisdictions, including Mainland China.

5 Exclusion for mergers

The Competition Ordinance should expressly provide that the first and second conduct rules do not apply to merger and acquisition situations.

5.1 Proposed amendment

HSBC suggests supplementing Section 30 of the Bill as follows:

Section 30 of the Bill	
Current text	Proposed amendment
The conduct rules do not apply in any of the cases in which they are excluded by or as result of Schedule 1	<p>(1) The conduct rules do not apply in any of the cases in which they are excluded by or as result of Schedule 1;</p> <p>(2) The conduct rules do not apply in any of the cases provided for in Section 3 (2) of Schedule 7.</p>

5.2 Rationale

Consistent with the Competition Policy Review Committee's recommendation that the Ordinance should not target market structures in the context of the Hong Kong economy, the Bill does not contemplate the extension of the merger rule outside of the telecommunications sector.² HSBC subscribes to this view but suggests that legal certainty requires that the Competition Ordinance expressly provides that the first and second conduct rules do not apply to merger and acquisition activity outside of the telecommunications sector.

6 Materiality threshold

HSBC suggests inserting a materiality threshold in the conduct rules.

6.1 Proposed amendments

HSBC suggests the following amendments to the name of the Competition Ordinance as well as to Sections 6(1); 7; 8; 21(1); 22 and 23.

Name	
Current text	Proposed amendment
<p>A BILL</p> <p>To</p> <p>Prohibit conduct that prevents, restricts or distorts competition in Hong Kong; [...]</p>	<p>A BILL</p> <p>To</p> <p>Prohibit conduct that substantially prevents, restricts or distorts competition in Hong Kong; [...]</p>

Section 6(1) of the Bill	
Current text	Proposed amendment
(1) An undertaking must not (a) make or give effect to an agreement; (b) engage	(1) An undertaking must not (a) make or give effect to an agreement; (b) engage

² Report on The Review of Hong Kong's Competition Policy, Competition Policy Review Committee, June 2006.

in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.	in a concerted practice; or (c) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to substantially prevent, restrict or distort competition in Hong Kong.
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Section 7 of the Bill	
Current text	Proposed amendment
<p>(1) 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 if one of its objects is to prevent, restrict or distort competition.</p> <p>(2) 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 even if that object can be ascertained only by inference.</p>	<p>(1) If an agreement, concerted practice or decision has more than one object, it has the object of substantially preventing, restricting or distorting competition under this Ordinance if one of its objects is to substantially prevent, restrict or distort competition.</p> <p>(2) 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 substantial prevention, restriction or distortion of competition even if that object can be ascertained only by inference.</p>

Section 8 of the Bill	
Current text	Proposed amendment
<p>The first conduct rule applies to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if (a) the agreement or decision is made or given effect to outside Hong Kong; (b) the concerted practice is engaged in outside Hong Kong; (c) any party to the agreement or concerted practice is outside Hong Kong; or (d) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.</p>	<p>The first conduct rule applies to an agreement, concerted practice or decision that has the object or effect of substantially preventing, restricting or distorting competition in Hong Kong even if (a) the agreement or decision is made or given effect to outside Hong Kong; (b) the concerted practice is engaged in outside Hong Kong; (c) any party to the agreement or concerted practice is outside Hong Kong; or (d) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.</p>

Section 21(1) of the Bill	
Current text	Proposed amendment
(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.	(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the substantial prevention, restriction or distortion of competition in Hong Kong.

Section 22 of the Bill	
Current text	Proposed amendment
<p>1) If conduct has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.</p> <p>(2) An undertaking may be taken to have engaged in conduct that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.</p>	<p>1) If conduct has more than one object, it has the object of substantially preventing, restricting or distorting competition under this Ordinance if one of its objects is to substantially prevent, restrict or distort competition.</p> <p>(2) An undertaking may be taken to have engaged in conduct that has as its object the substantial prevention, restriction or distortion of competition even if that object can be ascertained only by inference.</p>

Section 23 of the Bill	
Current text	Proposed amendment
The second conduct rule applies to conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong even if (a) the undertaking engaging in the conduct is outside Hong Kong; or (b) the conduct is engaged in outside Hong Kong.	The second conduct rule applies to conduct that has as its object or effect the substantial prevention, restriction or distortion of competition in Hong Kong even if (a) the undertaking engaging in the conduct is outside Hong Kong; or (b) the conduct is engaged in outside Hong Kong.

6.2 Rationale

The introduction of a materiality threshold will reduce the compliance burden for companies and will allow the Competition Commission and the Competition 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. In most mature competition law regimes, similar thresholds are specified. For example, under the Australian competition legislation, most anti-competitive conduct is not actionable unless it results in (or has the purpose of) substantially lessening competition.

7 Issuance of enforcement guidelines

There should be a general provision providing the Competition Commission with powers to issue guidelines on any matter of interest in addition to an expanded list of important matters for which the Commission would be required to issue guidelines.

7.1 Proposed amendments

HSBC suggests adding a new Division 4 in Part 4 of the Bill.

New Division	
Current text	Proposed amendment
<p>Section 35</p> <p>(1) The Commission must issue guidelines(a) indicating the manner in which it expects to interpret and give effect to the conduct rules; (b) regarding the manner and form in which it will receive applications for a decision or block exemption order; and (c) indicating how it expects to exercise its power to make a decision or grant block exemptions.</p> <p>(2) The Commission may amend any guidelines it issues under this section.</p> <p>(3) Guidelines issued under this section, and any amendments made to them, may be published in any manner the Commission considers appropriate.</p> <p>(4) Before issuing any guidelines or amendments to them under this section, the Commission must consult any persons it considers appropriate.</p> <p>(5) The Commission must make available at the offices of the Commission during ordinary business hours, and in any other manner it considers appropriate, copies of all guidelines issued under this section and of all amendments made to them.</p> <p>Section 38</p> <p>The Commission must issue guidelines indicating the manner and form in which complaints are to be made.</p> <p>Section 40</p> <p>The Commission must issue guidelines indicating (a) the procedures it will follow in deciding whether or not to conduct an</p>	<p>Section 35</p> <p>(1) The Commission must issue guidelines(a) indicating the manner in which it expects to interpret and give effect to the conduct rules; (b) regarding the manner and form in which it will receive applications for a decision or block exemption order; and (c) indicating how it expects to exercise its power to make a decision or grant block exemptions.</p> <p>(2) The Commission may amend any guidelines it issues under this section.</p> <p>(3) Guidelines issued under this section, and any amendments made to them, may be published in any manner the Commission considers appropriate.</p> <p>(4) Before issuing any guidelines or amendments to them under this section, the Commission must consult any persons it considers appropriate.</p> <p>(5) The Commission must make available at the offices of the Commission during ordinary business hours, and in any other manner it considers appropriate, copies of all guidelines issued under this section and of all amendments made to them.</p> <p>Section 38</p> <p>The Commission must issue guidelines indicating the manner and form in which complaints are to be made.</p> <p>Section 40</p> <p>The Commission must issue guidelines indicating (a) the procedures it will follow in deciding whether or not to conduct an</p>

investigation under this Part; and (b) the procedures it will follow in conducting any investigation under this Part.

Section 58

(1) The Commission may amend any guidelines it issues under this Part.

(2) Guidelines issued under this Part, and any amendments made to them, may be published in any manner the Commission considers appropriate.

(3) Before issuing any guidelines or amendments to them under this Part, the Commission must consult any persons it considers appropriate.

(4) The Commission must make available at the offices of the Commission during ordinary business hours, and in any other manner it considers appropriate, copies of all guidelines issued under this Part and all amendments made to them.

~~investigation under this Part; and (b) the procedures it will follow in conducting any investigation under this Part.~~

~~Section 58~~

~~(1) The Commission may amend any guidelines it issues under this Part.~~

~~(2) Guidelines issued under this Part, and any amendments made to them, may be published in any manner the Commission considers appropriate.~~

~~(3) Before issuing any guidelines or amendments to them under this Part, the Commission must consult any persons it considers appropriate.~~

~~(4) The Commission must make available at the offices of the Commission during ordinary business hours, and in any other manner it considers appropriate, copies of all guidelines issued under this Part and all amendments made to them.~~

Division 4 - Guidelines

New section

(1) The Commission may issue guidelines indicating the manner in which it expects to interpret and give effect to this Ordinance.

(2) The Commission must issue guidelines indicating (a) how it expects to interpret and give effect to the conduct rules; (b) how it expects to exercise its power (i) to make a decision and grant block exemptions under Part 2; **(ii) to issue infringement notices and make leniency agreements under Part 4; (iii) to apply for a financial penalty or a disqualification order under Part 6;** (c) the manner and form in which (i) it will receive applications for a decision or block exemption order under Part 2; (ii) complaints are to be made under Part 3; and (d) the relevant procedures for opening and conducting an investigation under Part 3.

(3) The Commission must also issue guidelines indicating how it expects to interpret and give effect to the conduct rules in the banking sector and other sectors of significant importance for the Hong Kong

	<p>economy.</p> <p>New section #</p> <p>(1) The Commission may amend any guidelines it issues under the above section.</p> <p>(2) Before issuing any guidelines or amendments to them, the Commission must consult any persons it considers appropriate. At the minimum it must 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.</p> <p>(3) Guidelines issued by the Competition Commission and any amendments made to them may be published in any manner the Commission considers appropriate. The Commission must make available at the offices of the Commission during ordinary business hours, and in any other manner it considers appropriate, copies of all guidelines issued under the above section and all amendments made to them.</p>
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7.2 Rationale

The draft of the Bill proposed to your Committee only provides for the possibility of guidelines in relation to discrete issues and fails to require the Competition Commission to issue guidelines on such important matters as leniency or the sentencing policy.

Granting the Competition Commission with broad powers to issue guidelines on any matter of interest would greatly improve the predictability and transparency of the enforcement regime, which would in turn increase the overall effectiveness of the Competition Ordinance. It would provide the Competition Commission with the flexibility to address and explain its enforcement priorities in specific areas or sectors.

In addition to its discretionary powers to issue guidelines, the Competition Commission should be required to issue guidelines on a number of important matters. Under the Bill as presented to your Committee, the Competition Commission is required under sections 35, 38, 40 and 58 to issue a series of guidelines on (i) complaints; (ii) investigation procedures; (iii) its interpretation of the conduct rules; (iv) procedural and substantive matters in relation to individual decisions and block exemptions. However, there are a number of other important matters such as leniency and sanctions, where the Competition Commission should also be expressly required to issue guidance.

In most established jurisdictions - including those where Courts play a prominent role in adjudicating competition law cases - specific guidelines usually exist on the following matters:

- (a) Fining and sentencing guidelines. Such guidelines limit the risk of (perceived) arbitrary sentencing decisions and are often adopted on the principles of optimal deterrence of infringements. Clear and fair sentencing guidelines can also be instrumental for the successful implementation of related commitments or leniency regimes: the incentives to apply for leniency or to propose a commitment may be reduced if parties cannot roughly assess the expected sanctions they may face. See for instance the *US Sentencing Guidelines* last amended in November 2009, the European Commission *Guidelines on the method of setting fines* imposed pursuant to Article 23(2) of Regulation No 1/2003 or the *Guidelines on the appropriate amount of penalty* issued by the Singapore Competition Commission. For guidelines on disqualification orders, see recent OFT guidelines on *Director Disqualification orders in competition cases*, released in 2010. Ideally, guidelines on the pecuniary penalties should be adopted by the authority that has adjudicating powers on the matter. However this might be difficult to achieve in a judicial context. The adoption of guidelines at the Commission level would already provide a useful indication on the level of financial penalty the Commission would be seeking.
- (b) Leniency guidelines. In addition to clear sentencing guidelines, procedural transparency, legal certainty - in particular as regards the benefits of leniency cooperation - and adequate protection of confidentiality are key elements for a successful leniency regime. In most jurisdictions, these key elements are addressed in detailed leniency guidelines. See for instance, the European Commission's *Notice on immunity from fines and reduction of fines in cartel cases* or the Canadian *Draft Information Bulletin on sentencing and leniency in cartel cases*.
- (c) Sector-specific enforcement guidelines. The structure or regulatory environment of certain industry sectors - such as the Hong Kong financial services sector - raises specific competition issues which require additional clarity regarding the Commission's enforcement approach. Sector specific guidelines also exist in other jurisdictions. See for instance the *UK OFT guidelines on the energy sector*, released in 2005, and the Canadian *Merger Enforcement Guidelines as applied to a Bank Merger*.

8 Pecuniary penalties

The amount of pecuniary penalties should be commensurate to the profits generated by the anticompetitive practice and their maximum should be limited to 10 per cent of the total turnover achieved by the infringing party during the course of the preceding financial year on the Hong Kong markets affected by the contravention.

8.1 Proposed amendment

- 8.2 HSBC suggests the following amendments to Section 91 of the Bill as well as to Section 1 of Schedule 3.

Section 91 of the Bill

Current text	Proposed amendment
<p>91. Tribunal may impose pecuniary penalty</p> <p>(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate.</p> <p>(2) Without limiting the matters that the Tribunal may have regard to, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters:</p> <p>(a) the nature and extent of the conduct that constitutes the contravention; (b) the loss or damage, if any, caused by the conduct; (c) the circumstance in which the conduct took place; and (d) whether the person has previously been found by the Tribunal to have contravened this Ordinance.</p> <p>(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total: (a) 10% of the turnover of the undertaking concerned, for the year in which the contravention occurred; or (b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in which the contravention has continued.</p>	<p>91. Tribunal may impose pecuniary penalty</p> <p>(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount proportionate to the profits improperly made as a result of the infringement—it considers appropriate.</p> <p>(2) Without limiting the matters that the Tribunal may have regard to, In determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters:</p> <p>(a) the profits improperly made as a result of the infringement; (ab) the nature and extent of the conduct that constitutes the contravention; (bc) the loss or damage, if any, caused by the conduct; (cd) the circumstance in which the conduct took place; and (de) whether the person has previously been found by the Tribunal to have contravened this Ordinance.</p> <p>(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total: (a) 10% of the turnover of the undertaking concerned achieved in Hong Kong for in the preceding business year on the relevant market(s) affected by the contravention. in which the contravention occurred; or (b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in which the contravention has continued.</p>

Section 1 of Schedule 3 to the Bill	
Current text	Proposed amendment
<p>1. Orders</p> <p>The Tribunal may make the following orders with respect to a contravention of the competition rules:</p> <p>[...]</p> <p>(o) an order requiring that any person or class of person be given the right to use goods, facilities or services specified in the order on the terms specified in the order;</p> <p>(p) an order requiring any person to pay to the Government or to any other specified person, as the Tribunal considers appropriate, an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention; or</p> <p>(q) for the purpose of securing compliance with any other order made under this section, an order requiring any person who has contravened or been involved in the contravention to do or refrain from doing anything specified in the order.</p>	<p>1. Orders</p> <p>The Tribunal may make the following orders with respect to a contravention of the competition rules:</p> <p>[...]</p> <p>(o) an order requiring that any person or class of person be given the right to use goods, facilities or services specified in the order on the terms specified in the order; or</p> <p>(p) an order requiring any person to pay to the Government or to any other specified person, as the Tribunal considers appropriate, an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention; or</p> <p>(ep) for the purpose of securing compliance with any other order made under this section, an order requiring any person who has contravened or been involved in the contravention to do or refrain from doing anything specified in the order.</p>

8.3 Rationale

The current proposal sets the maximum amount at “10% of the turnover of the undertaking concerned, for each year in which the contravention has continued”. The proposed statutory limit is not consistent with international standards where maximum fines are expressed as 10 per cent of a single reference year. Adopting a higher threshold would make the Competition Ordinance the most repressive competition law in the world, which would not sit well with a newly introduced competition regime.

Hong Kong is a small territory and calculating financial penalties based upon worldwide turnover figures would be unfair as the turnover achieved outside Hong Kong may be grossly disproportionate to the undertaking’s operations in Hong Kong. Requiring that the maximum amount of pecuniary sanctions be solely based on the value of relevant turnover achieved in Hong Kong is consistent with the practice in other small jurisdictions, such as Singapore. In addition, this maximum amount should not exceed the value of the market(s) affected by the contravention. This would be consistent with the methodology relied upon by foreign authorities to calculate the appropriate amount of fines for competition law infringements. See for instance the European Commission *Guidelines on the method of setting fines* imposed pursuant to Article 23(2) of Regulation No 1/2003 or the UK OFT’s *Guidance 423 as to the appropriate amount of a penalty*.

Also, legal certainty would be increased if it is made clear in the Ordinance itself that the pecuniary sanctions imposed must be proportionate to the profits improperly made as a result of the infringement. The current text of the Bill (at Section 1(p) of Schedule 3) proposes to authorise the Competition Tribunal to sanction contraveners by ordering the payment of profits

gained from the infringement. HSBC proposes to make this the standard rule for pecuniary sanctions.

9 Sanctions against individuals

The Bill provides for the possibility to impose pecuniary penalties upon any person - undertakings or individuals - involved in a contravention of a competition rule. The Competition Ordinance should not provide for pecuniary penalties on individuals unless they qualify as undertakings.

9.1 Proposed amendment

HSBC suggests the following amendments respectively to Sections 90(1) and 91(1) of the Bill:

Section 90(1) of the Bill	
Current text	Proposed amendment
(1) If, after carrying out such investigation as it considers appropriate, the Commission considers it appropriate to do so, it may apply to the Tribunal for a pecuniary penalty to be imposed on any person it has reasonable cause to believe (a) has contravened a competition rule; or (b) has been involved in a contravention of a competition rule."	(1) If, after carrying out such investigation as it considers appropriate, the Commission considers it appropriate to do so, it may apply to the Tribunal for a pecuniary penalty to be imposed on any person undertaking it has reasonable cause to believe (a) has contravened a competition rule; or (b) has been involved in a contravention of a competition rule.

Section 91 (1) of the Bill	
Current text	Proposed amendment
(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate.	(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person an undertaking has contravened or been involved in a contravention of a competition rule, it may order that person undertaking to pay to the Government a pecuniary penalty of any amount it considers appropriate.

9.2 Rationale

The Bill already provides for a wide array of possible sanctions against individuals - including far reaching disqualification orders. Including pecuniary penalties within the array of possible sanctions would be inefficient, disproportionate and counterproductive. Excessive fines may result in over-deterrence by providing incentives to engage in excessive monitoring and compliance expenditures or to refrain from engaging in risky but overall competitive projects. It can also create conflicting interests between individuals and undertakings in the context of leniency or commitment procedures. Finally, it would single out Hong Kong as one of the most severe competition law regimes in the world, which might harm Hong Kong's broader business interests. The disqualification orders contemplated in Section 99 of the Bill - which already appear to be more severe than the sanctions in most established jurisdictions - provide sufficient and more adequate deterrence.

10 Disqualification orders

Disqualification orders should not be made against directors who did not have knowledge that the conduct of their company constituted a contravention of a competition rule. In addition, the seriousness and other relevant circumstances of the contravention shall be taken into account when deciding whether to make a disqualification order.

10.1 Proposed amendment

HSBC suggests amending Section 101 of the Bill as follows:

Section 101 of the Bill	
Current text	Proposed amendment
<p>(1) For the purpose of deciding under section 100(b) whether a person is unfit to be concerned in the management of a company, the Tribunal (a) must have regard to whether subsection (2) applies to the person; and (b) may have regard to the conduct of the person as the director of a company, in connection with any other contravention of a competition rule.</p> <p>(2) This subsection applies to a person if as a director of the company (a) the person's conduct contributed to the contravention of the competition rule; (b) the conduct of the person did not contribute to the contravention, but the person had reasonable grounds to suspect that the conduct of the company constituted the contravention and took no steps to prevent it; or (c) the person did not know but ought to have known that the conduct of the company constituted the contravention.</p>	<p>(1) For the purpose of deciding under section 100(b) whether a person is unfit to be concerned in the management of a company, the Tribunal (a) must have regard to whether subsection (2) applies to the person; and (b) may must have regard to (i) the conduct of the person as the director of a company, in connection with any other contravention of a competition rule; (ii) the nature of the contravention of the competition rule and whether a financial penalty has been imposed; (iii) whether the company in question benefited from leniency; and (iv) the existence of adequate compliance procedures designed to prevent contraventions of the competition rules.</p> <p>(2) This subsection applies to a person if as a director of the company (a) the person's conduct contributed to the contravention of the competition rule; (b) the conduct of the person did not contribute to the contravention, but the person knew or had reasonable grounds to suspect that the conduct of the company constituted the contravention and took no steps to prevent it.; or (c) the person did not know but ought to have known that the conduct of the company constituted the contravention.</p>

10.2 Rationale

Disqualification orders are far-reaching sanctions which should be limited to the most severe contraventions of the competition rules. Director disqualifications do not exist in most of the established competition law regimes. Any disqualification sanction should be perceived and experienced as fair and reasonable, especially when introduced as part of a new competition law regime. The possibility to impose a disqualification order on directors for constructive knowledge, as currently contemplated in Section 101(2)(b) and (c) of the Bill, should be abandoned as it constitutes an overly broad extension of director duties in Hong Kong.

Even in the few competition law regimes that have introduced a specific director disqualification sanction, it may only be imposed after careful consideration of all relevant factors, including the nature of the contravention. In this context it is important that adequate safeguards are built into the Competition Ordinance to ensure that the Tribunal will carefully consider all relevant circumstances before adopting a disqualification order. Those proposed by HSBC are inspired by the UK Company Directors Disqualification Act and the recently amended OFT *guidelines on Director Disqualification orders in competition cases*.

As a matter of policy, HSBC believes that disqualification should only be imposed in relation to the most serious infringements and in circumstances that will not defeat other important policy objectives (such as ensuring effective leniency procedures or promoting compliance programs). Accordingly, the circumstance that adequate compliance procedures designed to prevent contraventions of the competition rules have been adopted should be taken into account when deciding whether to impose a disqualification order.

11 Offences

Negligence or omission should not be a ground for imposing criminal sanctions under the Competition Ordinance. Instead, there should be a higher threshold for the state of mind (*"mens rea"*) required for any finding of criminal liability under the Ordinance.

11.1 Proposed amendment

HSBC suggests amending Section 173(1) and 174 of the Bill as follows:

Section 173(1) of the Bill	
Current text	Proposed amendment
(1) A person who, without reasonable excuse, obstructs a specified person in the performance of any function under this Ordinance commits an offence and is liable (a) on conviction on indictment, to a fine of \$1,000,000; or (b) on summary conviction, to a fine at level 6.	(1) A person who intentionally and without reasonable excuse, obstructs a specified person in the performance of any function under this Ordinance commits an offence and is liable (a) on conviction on indictment, to a fine of \$1,000,000; or (b) on summary conviction, to a fine at level 6.

Section 174 of the Bill	
Current text	Proposed amendment
(1) If a person by whom an offence under this Ordinance is committed is a body corporate, and it is proved that the offence (a) was committed with the consent or connivance of a director, manager, secretary or other person concerned in the management of the body corporate; or (b) was attributable to any neglect or omission on the part of a director, manager, secretary or other person concerned in the management of the body corporate, the director, manager, secretary or other person also commits the offence.	(1) If a person by whom an offence under this Ordinance is committed is a body corporate, and it is proved that the offence (a) was committed with the consent or connivance of a director, manager, secretary or other person concerned in the management of the body corporate; or (b) was attributable to any neglect or omission on the part of a director, manager, secretary or other person concerned in the management of the body corporate, the director, manager, secretary or other person also commits the offence.

<p>(2) If a person by whom an offence under this Ordinance is committed is a partner in a partnership, and it is proved that the offence (a) was committed with the consent or connivance of any other partner or any person concerned in the management of the partnership; or (b) was attributable to any neglect or omission on the part of any other partner or any person concerned in the management of the partnership, the partner or the person concerned in the management of the partnership also commits the offence.</p>	<p>(2) If a person by whom an offence under this Ordinance is committed is a partner in a partnership, and it is proved that the offence (a) was committed with the consent or connivance of any other partner or any person concerned in the management of the partnership; or (b) was attributable to any neglect or omission on the part of any other partner or any person concerned in the management of the partnership, the partner or the person concerned in the management of the partnership also commits the offence.</p>
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11.2 Rationale

In its Detailed Proposals for a Competition Law published in 2008, the Hong Kong Government acknowledged that the introduction of competition laws would be a new step for Hong Kong and therefore that it was appropriate to limit sanctions to civil penalties.

Criminal sanctions should only be applicable in exceptional circumstances to sanction reckless conduct or deliberate attempts to obstruct competition law investigations. Negligence should not form a basis for criminal liability. More in particular:

- Obstructions of competition law investigations should only give rise to criminal liability in case a person *intentionally* and without reasonable excuse obstructs a specified person in the performance of its functions. This is consistent with the practice in other jurisdictions. See for instance Article 42 of the UK Competition Act 1998.
- Negligence or omission should not be sufficient to attribute criminal liability to directors and managers for offences committed by a body corporate. Similarly, a partner in a partnership should not be held liable for offences committed by another partner unless it is proved that the offence was committed with his or her consent or connivance. HSBC's proposal is consistent with the standard retained in Section 32 of the Hong Kong Telecommunications Ordinance, where proof of consent or connivance is required to attribute an offence committed by a corporation to its directors or officers. Holding directors and managers criminally liable for mere negligence would constitute an overly broad extension of director and manager duties in Hong Kong.

12 Private enforcement

Private enforcement should be limited to follow-on rights of action, i.e. actions which follow a prior finding of a competition law infringement.

12.1 Proposed amendment

HSBC suggests to amend section 104 and to delete sections 111 to 120 included.

Section 104 of the Bill	
Current text	Proposed amendment
<p>In this Part “follow-on action” means an action brought by a person who has a right to bring the action under section 108(1);</p> <p>“stand-alone action” means an action brought by a person who has a right to bring the action under section 111(1).</p>	<p>In this Part “follow-on action” means an action brought by a person who has a right to bring the action under section 108(1).;</p> <p>“stand-alone action” means an action brought by a person who has a right to bring the action under section 111(1).</p>

Sections 111 to 120 of the Bill
<i>Delete these provisions</i>

12.2 Rationale

HSBC believes that it would be beneficial to defer the proposal to allow stand-alone damage actions until the new regime is well-established and the Competition Commission and Tribunal have gained experience in enforcing the Competition Ordinance and have set relevant precedents.

HSBC is concerned that stand-alone damage actions might result in a significant number of unfounded and vexatious claims. This would put an unfair burden on defendants who would be forced to spend time and resources on frivolous actions.

Hong Kong Courts have as yet no experience in dealing with competition law matters. Allowing stand-alone private actions at an early stage of competition law enforcement would impose a strain on the limited resources of the Hong Kong Courts before they have had the opportunity to develop a relevant body of precedents.

At least during an initial period, it would be beneficial to let the Competition Commission alone decide which cases to bring before the Competition Tribunal rather than to allow any person to bring costly and time-consuming proceedings before the courts. To ensure a broad adoption of the Competition Ordinance, it is important to set the right precedents and bring the rights cases before courts. We understand that a similar reasoning explains why in Singapore, the Competition Act does not provide for stand-alone actions.

In the jurisdictions where private enforcement is available, stand alone damage actions are considered very difficult, costly and time-consuming to implement. Compared to follow-on litigants, courts facing stand alone suits are not able to rely on a former antitrust decision, thus they may not possess enough information to substantiate their claim. For some types of infringements, evidence of anticompetitive behaviour requires an assessment of the effects and of the potential pro-competitive nature of the observed practice. Competition authorities are usually better equipped than courts to proceed to this complex assessment.

13 Definition of confidential information

The definition of confidential information should be clarified. The current definition leads to legal uncertainty and provides the Competition Commission with too much leeway to decide what constitutes confidential information.

13.1 Proposed amendment

HSBC suggests amending Section 122 of the Bill as follows:

Section 122 of the Bill	
Current text	Proposed amendment
<p>(1) In this Part "confidential information" means (a) information that has been provided to or obtained by the Commission in the course of, or in connection with, the performance of its functions under this Ordinance, that relates to (i) the private affairs of a natural person; (ii) the commercial activities of any person that are of a confidential nature; or (iii) the identity of any person who has given information to the Commission; (b) information that has been given to the Commission on terms that or in circumstances that require it to be held in confidence; or (c) information given to the Commission that has been identified as confidential information in accordance with subsection (2).</p> <p>(2) If a person (a) identifies information that the person has given to the Commission as confidential; and (b) provides a statement in writing setting out the reasons why, in that person's opinion, the information is confidential, the information is also to be regarded as confidential information under this Part.</p>	<p>(1) In this Part "confidential information" means (a) information that has been provided to or obtained by the Commission in the course of, or in connection with, the performance of its functions under this Ordinance, that relates to (i) the private affairs of a natural person; or (ii) the commercial activities of any person the disclosure of which might harm the legitimate business interests of the person to whom it relates that are of a confidential nature; or (iii) the identity of any person who has given information to the Commission; (b) information that has been given to the Commission on terms that or in circumstances that require it to be held in confidence; or (eb) information given to or obtained by the Commission that has been identified as confidential information in accordance with subsection (2).</p> <p>(2) If a person (a) identifies other information that the person has given to or obtained by the Commission as confidential; and (b) provides a statement in writing setting out the reasons why, in that person's opinion, the information is confidential, the information is also to be regarded as confidential information under this Part unless the confidentiality claim is expressly rejected in writing by the Commission.</p>

13.2 Rationale

The Competition Ordinance would benefit from a more specific definition of what constitutes confidential information. Undertakings need clear and predictable rules to protect against unwarranted disclosures of confidential information. In the first place, this requires the adoption of a clear, objective and transparent definition of what constitutes confidential information:

- Whether information is confidential should not depend on the terms or the circumstances in which the information has been obtained or given but rather its objective content. Such an objective approach - in line with the practice in other jurisdictions - increases legal certainty and reduces the risks of disputes and inconsistencies between competition regulators. It allows a speedy identification of confidential information without the need to analyze the specific circumstances of each case.
- The definition of confidential commercial information proposed in the Bill is circular and ambiguous: under the proposed text for section 122(1)(a)(ii), information is confidential if it relates to the commercial activities of any person that are of a confidential nature. In

addition, one possible reading of the current text is that the “confidential nature” must attach to the underlying commercial activity rather than to the information relating to it, which would *de facto* exclude most commercial information relating to products or services offered to the public.

- The above proposal is consistent with other rules applicable in Hong Kong, such as the Hong Kong Code on Access to Information, and provides an adequate level of protection against unnecessary disclosures of sensitive information during the investigation phase.
- Finally, to ensure a clear and transparent confidentiality regime, it is important that there be clear rules on how to make specific confidentiality representations and when such representations will be deemed accepted by the relevant competition regulators.

14 Duty of secrecy

The Competition Ordinance should provide for safeguards against the unauthorized disclosure of any information obtained by or provided to the competition regulators irrespective of whether such information qualifies as confidential information under section 122.

14.1 Proposed amendment

HSBC suggests amending Section 123 of the Bill as follows:

Section 123 of the Bill	
Current text	Proposed amendment
(1) The Commission, the Telecommunications Authority and the Broadcasting Authority must establish and maintain adequate procedural safeguards to prevent the unauthorized disclosure of confidential information.	(1) The Commission, the Telecommunications Authority and the Broadcasting Authority must establish and maintain adequate procedural safeguards to prevent the unauthorized disclosure of confidential information.
(2) In this section “unauthorized disclosure” means disclosure that is either prohibited or not authorized by or under this Ordinance.	(2) In this section “unauthorized disclosure” means disclosure that is either prohibited or not authorized by or under this Ordinance.

HSBC further suggests adding the following provision immediately after Section 123 of the Bill:

New provision	
Current text	Proposed amendment
none	(1) A specified person (a) must preserve and aid in preserving secrecy with regard to any matter coming to his or her knowledge by virtue of his or her appointment in the performance of any function under or in carrying into effect or doing anything authorized under this Ordinance, (b) must not disclose any such matter to any other person and (c) shall not suffer or permit any other person to have access to any record or document which is in his or her possession by virtue of his or her appointment in the performance of any

	<p>function under or in carrying into effect or doing anything authorized under this Ordinance.</p> <p>(2) Subsection (1) does not apply to the disclosure of information with lawful authority within the meaning of section 125.</p>
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14.2 Rationale

The successful implementation of the Competition Ordinance will to a large extent depend upon its acceptance by the Hong Kong business community and in particular the willingness of undertakings and consumers to provide competition regulators with relevant information to identify and investigate anticompetitive conduct. These might be reluctant to share information absent adequate safeguards to protect against undue information disclosures in other contexts.

Imposing a general duty of secrecy that would apply to any information obtained by or provided to a competition regulator would provide a satisfactory level of comfort without however restricting the regulator's ability to make disclosures in the performance of their tasks under the Competition Ordinance, in accordance with Section 125 of the Bill. A similar duty of secrecy also exists in other Hong Kong regulations such as for instance Section 178 of the Securities and Futures Ordinance. It is also consistent with the practice abroad. See for instance Section 237 of the UK Enterprise Act 2002. The above proposal would ensure consistency in the approach to professional secrecy in the Competition Ordinance and in the Securities and Futures Ordinance.

15 Disclosure of information with lawful authority

Section 125 of the Bill describes when confidential information may be disclosed with lawful authority by a competition regulator. Instead it should apply more generally to any information that has been provided to or obtained by the Commission. If the proposed disclosure relates to confidential information, additional safeguards should apply: absent express consent, disclosure of confidential information should only be allowed when required to comply with a legal requirement or to the extent strictly necessary and proportionate to enforce the Ordinance or to initiate criminal proceedings.

15.1 Proposed amendment

Accordingly, HSBC suggests the amend Section 125 as follows:

Section 125 of the Bill	
Current text	Proposed amendment
<p>(1) Disclosure of confidential information is to be regarded as made with lawful authority if the disclosure is made (a) subject to section 126, with the required consent, as specified in subsection (2); (b) subject to subsection (3), in the performance of any function of the Commission or in carrying into effect or doing anything authorized by this Ordinance; (c) in accordance with an order of the Tribunal or any other court or in accordance with a law or a requirement made by or under a law; (d) in connection with judicial proceedings arising under this Ordinance; (e) for the</p>	<p>(1) Subject to section 125 (3), disclosure of confidential information is to be regarded as made with lawful authority if the disclosure is made (a) subject to section 126, with the required consent, as specified in subsection (2); (b) subject to subsection (3), in the performance of any function of the Commission or in carrying into effect or doing anything authorized by this Ordinance; (c) in accordance with an order of the Tribunal or any other court in Hong Kong or in accordance with a law or a requirement made by or under a law the laws of Hong Kong; (d) in</p>

<p>purpose of obtaining advice from counsel, a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance; (f) with a view to the bringing of, or otherwise for the purposes of any criminal proceedings, or any investigation carried out under the laws of Hong Kong, in Hong Kong; (g) with respect to information that has already been lawfully disclosed to the public on an earlier occasion; or (h) by one competition regulator to another.</p> <p>[...]</p> <p>(3) In deciding whether or not to disclose confidential information, where disclosure is lawful under subsection (1)(b), the specified person must consider and have regard to (a) the need to exclude as far as is practical, from such disclosure (i) information the disclosure of which would, in the opinion of the specified person, be contrary to public interest; (ii) commercial information the disclosure of which would or might be likely to, in the opinion of the specified person, significantly harm the legitimate business interests of the person to whom it relates; and (iii) information relating to the private affairs of a natural person, the disclosure of which might (in the opinion of the specified person) significantly harm the interest of that person; and (b) the extent to which the disclosure is necessary for the purpose sought to be achieved by the disclosure.</p>	<p>connection with judicial proceedings arising under this Ordinance; (e) for the purpose of obtaining advice from counsel, a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance; (f) with a view to the bringing of, or otherwise for the purposes of any criminal proceedings, or any investigation carried out under the laws of Hong Kong, in Hong Kong; (g) with respect to information that has already been lawfully disclosed to the public on an earlier occasion; or (h) by one competition regulator to another.</p> <p>[...]</p> <p>(3) In deciding whether or not to disclose confidential information pursuant to subsection (1) above, where disclosure is lawful under subsection (1)(b), the specified person must consider and have regard to (a) the need to exclude as far as is practical, from such disclosure (i) information the disclosure of which would, in the opinion of the specified person, be contrary to public interest; (ii) commercial information the disclosure of which would or might be likely to, in the opinion of the specified person, significantly harm the legitimate business interests of the person to whom it relates; and (iii) information relating to the private affairs of a natural person, the disclosure of which might (in the opinion of the specified person) significantly harm the interest of that person; and (b) the extent to which the disclosure is necessary for the purpose sought to be achieved by the disclosure.</p>
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15.2 Rationale

Unduly broad disclosure grounds risk harming the legitimate business or private interests of the persons to whom the information relates and are likely to negatively impact upon the effective implementation of the Competition Ordinance by discouraging undertakings from sharing relevant information with the competition regulators.

Therefore HSBC recommends strengthening the lawful disclosure regime based upon the following principles:

- Information provided to or obtained by the Competition Commission should never be disclosed to foreign authorities or courts except where such disclosure is necessary to comply with a Hong Kong law requirement or a domestic court order. Information does not benefit from the same level of protection in all jurisdictions. Hong Kong business operators may be reluctant to share information with competition regulators if there is even a remote possibility that this information could be disclosed to a foreign authority with lower disclosure standards. Foreign disclosures could be particularly harmful to the

successful implementation of the proposed leniency regime: undertakings are unlikely to share incriminating information with the Commission if there is even a remote possibility that this information could be used against them in foreign jurisdictions. Similar rules apply in established jurisdictions. See for instance Section 243 of the UK Enterprise Act 2002.

- Except for criminal proceedings, confidential information should not be disclosed for matters which do not arise under the Competition Ordinance. Again, business operators may be reluctant to share information with a competition regulator if there is even a remote possibility that this information could be used against them in other contexts. Similar rules apply in established jurisdictions. See for instance Section 242 of the UK Enterprise Act 2002.
- The disclosure of confidential information should be subject to additional safeguards. In its Detailed Proposals for a Competition Law published in 2008, the Hong Kong government acknowledged the principle that confidential information provided to or obtained by the Commission should not be disclosed except in exceptional situations where such disclosure is necessary for the Commission to perform its duties under the Ordinance or for the purpose of proceedings before the Tribunal or a court. In deciding whether or not to disclose confidential information, a competition authority should always have regard to the considerations set out in section 125(3) of the Bill. Section 125 (3) provides clear criteria to assist a competition regulator in striking the right balance between protecting confidential information and achieving the lawful purpose sought to be achieved by the lawful disclosure grounds. Extending the scope of 125(3) to all disclosure grounds offers safeguards against unduly broad disclosures and also provides clear and objective criteria against whom to assess any disagreements between parties regarding the scope of disclosure. Similar rules apply in established jurisdictions. See for instance section 244 of the UK Enterprise Act 2002.

16 Disclosure of confidential information by third parties

The Commission should act as a gatekeeper for the disclosure of confidential information by third parties. Where disclosure of confidential information by third parties is required in the context of judicial proceedings arising out of the Competition Ordinance, such disclosures should comply with the relevant Court procedures.

16.1 Proposed amendment

HSBC suggests amending Section 127 of the Bill as follows:

Section 127 of the Bill	
Current text	Proposed amendment
<p>(1) A person, other than a specified person, who (a) has received confidential information from the Commission; or (b) has otherwise, directly or indirectly, received such information from a specified person, must not disclose that information to any other person or suffer or permit any other person to have access to that information.</p> <p>(2) Subsection (1) does not apply to the disclosure of information where (a) the Commission has consented to the disclosure; (b) the information has already been lawfully disclosed to the</p>	<p>(1) A person, other than a specified person, who (a) has received confidential information from the Commission; or (b) has otherwise, directly or indirectly, received such information from a specified person, must not disclose that information to any other person or suffer or permit any other person to have access to that information.</p> <p>(2) Subsection (1) does not apply to the disclosure of information where (a) the Commission has consented to the disclosure; (b) the information has already been lawfully disclosed to the</p>

<p>public on an earlier occasion; (c) the disclosure is for the purpose of obtaining advice from counsel, a solicitor or other professional adviser, acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance; (d) the disclosure is made in connection with any judicial proceedings arising under this Ordinance; or (e) the disclosure is made in accordance with an order of the Tribunal or any other court or in accordance with a law or a requirement made by or under a law.</p>	<p>public on an earlier occasion; (c) the disclosure is for the purpose of obtaining advice from counsel, a solicitor or other professional adviser, acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance; (d) the disclosure is made in connection with any judicial proceedings arising under this Ordinance in accordance with the applicable court procedures; or (e) the disclosure is made in accordance with an order of the Tribunal or any other court in Hong Kong or in accordance with a law or a requirement made by or under the laws of Hong Kong.</p>
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16.2 Rationale

The Commission must act as a gatekeeper to avoid unnecessary disclosures of confidential information. In line with the practice in other jurisdictions, a person who gets access to confidential information directly or indirectly from the Commission should be prohibited from further disclosing this information except with the express consent of the Commission or to comply with a legal requirement. Disclosure of confidential information in connection with judicial proceedings should comply with the applicable court procedures to limit the risk of abusive practices - for instance using information on the Commission's file as basis for stand alone civil damage actions.