

CB(1)1069/11-12(01)



13th February, 2012

Clerk to Bills Committee on Competition Bill
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Fax: 2978 7569

Email: bc_12_09@legco.gov.hk

Dear Sir/Madam,

IFPI (Hong Kong Group) Limited represents the recording industry in Hong Kong. Our membership at over 75 currently covers over 90% of record producers and licensees of recordings in Hong Kong. Most of our members are SMEs running a business of creating music recording copyrights and distribution in Hong Kong. Our group is also a federation member of IFPI worldwide since 1967. We are pleased to make this submission in respect of the Competition Bill.

Our position is that we do not support the passing of the Bill at its present form as it fails to address the more important antitrust issues on one hand and instead, bring uncertainty, confusion and higher business running costs among the SMEs and undoubtedly, they are the key stone of our small market economy and the very reason of the survivability of Hong Kong Economy. The only persons stand gain in this Bill would be the lawyers and the big corporations as the small guys cannot afford to fight a simple alleged anti-competitive case. It is not a pure coincidence or sheer luck that 'Hong Kong has been ranked as the world's freest economy for 18 consecutive years by the Heritage Foundation.'¹ It is because Hong Kong is indeed the freest and very competitive market to do business in the world without having the so called anti-competitive law.

We are afraid that the present Bill is moved by the usual suspects making hysterical predictions/illusions about our free market economy. The bone of contention is that the present Bill wrongly targets SMEs in an unfair and unwarranted manner and hits them below the belt; and lets big corporations go freely.

We would like to make our observations and comments as follows:

A. The Economic Justification of Anti-Competitive Law

1. First and foremost, let focus on what the goal the administration wants to achieve and see if they can really achieve it.

¹ 'Hong Kong retains top spot of world's freest economy' *BBC News* 12 January 2012, available at <http://www.bbc.co.uk/news/business-16523643>.



As Hong Kong is a small city compared to other leading jurisdictions, the Hong Kong's proposed competition law will not touch on the market structure (except telecommunication sector which has been subject to the merger rule under the Telecommunications Ordinance)² and targets more on the anti-competitive conduct and practices such as price-fixing, tying-in, concerted practice, cartel etc.

The administration stated in its brief that the justifications of '[t]he Government's competitive policy is to **enhance economic efficiency** and the free flow of trade through promoting sustainable competition to **bring benefits to both the business sector and consumers**'³ and '[t]he objective of the Bill is to prohibit and deter 'undertakings' in all sectors from **adopting abusive or other anti-competitive conduct** which has the object or effect of preventing, restricting and distorting competition in Hong Kong.'⁴ The proposed competition law aims to **enhance economic efficiency** and benefits to both the business sector and consumers. It necessarily follows that the goal of competition policy is to protect market against anti-competitive conduct, unless it is justifiable under the economic efficiency argument⁵ even though, sometime, it might work against consumer welfare, let alone the protection of competitors in the market.

2. Market economists use three criteria to analyze an economy: theory of supply and demand,⁶ equilibrium and the concept of marginal analysis.⁷ If the market is functioning properly, the force of competition drives the price down and produces greater quantities to meet market demand until a stable point is reached where the marginal cost is equal to the marginal revenue. Otherwise, if the price is well above the marginal cost, it will encourage other firms to produce a greater quantity of the

² The Legislative Council Brief on Competition Bill (CITB CR 05/62/43), paragraph 6 on page 3.

³ Legislative Council brief to the Legislative Council on Competition Bill dated 2 July 2010, available at http://www.legco.gov.hk/yr09-10/english/bills/brief/b35_brf.pdf.

The Bill passed the first reading on 14 July 2010, paragraph 2 on page 1.

⁴ Ibid, paragraph 4 on page 2.

⁵ *United States v. General Dynamic Corp.*, 415 U.S. 486 (1974). The case rules that the market share data are not necessarily indicative of the ability to sustain power in the future and applied economic reasoning for antitrust case. It represents the shifting of the protection of market structure to efficiency consideration. See also the 1997 Horizontal Guidelines of the U.S. Department of Justice and the Federal Trade Commission on Mergers and Acquisitions.

Also the Legislative Council Brief on Competition Bill (CITB CR 05/62/43), paragraph 15 on page 7: 'Following practices in other overseas competition jurisdiction, the Bill will provide that the first conduct rule and/ or the second conduct rule will not apply to any agreement that enhances or would be likely to enhance overall economic efficiency, or any agreement to the extent that it is made to comply with a legal requirement, or any undertaking entrusted by the Government with the operation of services of general economic interest.'

Available at <http://www.legco.gov.hk/yr09-10/english/bills/brief/b35_brf.pdf>

⁶ The theory of supply and demand represents competition among producers who produce a commodity that will meet the requirements of buyers both in terms of price and quantity.

⁷ Bewley, Truman F, *General Equilibrium, Overlapping Generations Models and Optimal Growth Theory* (Harvard University Press, Cambridge MA 2007)1-4. General equilibrium summarises mathematical descriptions of economic interactions between economic agents in a market where people are free to pursue their own interests and determines whether an exchange of goods or services achieves an efficient outcome. This forms the theoretical basis for further empirical research.

國際唱片業協會 (香港會) 有限公司

INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED

Unit 16A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣雲彩道1號億成中心A座16樓A

Telephone: (852) 2861 4318

Facsimile: (852) 2866 6839

E-mail: main@ifpink.org



commodity, which eventually will drive the price down again to the point where the marginal cost is equal to the marginal revenue. The outcome is that the market reaches an equilibrium state for supply and demand for that commodity in the market.

In general, the goal of an anti-competition policy is to protect the market structure and to protect against any accumulation of market power, unless it is justifiable under the economic efficiency argument,⁸ so it focuses more on consumer welfare.

3. **In a nutshell: the competition law only protects competition, not the competitors.**

Given the small economy of Hong Kong, it is not unusual for a few competitors dominating a market but they compete efficiently in that market. The policy makers should and cannot afford to forget or omit or neglect the importance and appreciation of **the concept of natural monopoly** in a competitive market, a single entity can and, very often than not, do **maximize the efficiency of production and distribution thereby promoting consumer welfare.**⁹ The question is how to identify (the set of criteria) and include one so that it may be exempted from the competition law at the outset without going through the Tribunal.

B. The Proposed Legal Framework of Competition Law

4. **First Conduct Rule**

The First Conduct Rule prohibits all agreements decisions and undertakings among more than one party joined together (concerted practices) for a common purpose or design for any restraint of trade that have the object or effect of preventing, restricting or distorting competition in Hong Kong,¹⁰ unless such agreements and undertakings enhance overall economic efficiency.¹¹ However, the Plaintiff must show that the restraint is unreasonable and its net effect is harmful to competition. It is therefore not enough to show that the Plaintiff suffers economic injury.¹²

Competition Commission "proposed not to pursue an agreement if the aggregate market share of the parties to the agreement did not exceed a certain level (i.e. the 'de

⁸ *United States v General Dynamic Corp.*, 415 US 486 (1974). The case ruled that market share data does not necessarily indicate ability to sustain power in the future and applied economic reasoning for antitrust cases. It represents the shifting of the protection of market structure to efficiency considerations. See also the 1997 Horizontal Guidelines of the US Department of Justice and the Federal Trade Commission on Mergers and Acquisitions.

⁹ The Legislative Council Brief on Competition Bill paragraph (c) 6 on page 2 of Annex B: "The economic benefits would likely be higher output, lower prices and more choices of products."

¹⁰ Sections 6 (1) and 7 of the Bill.

¹¹ Paragraph 1 of the Schedule One of the Bill.

¹² *Clorox Co.*, 117 F.3d at 56. See also *Continental Airlines v United Airlines; Dulles Airport Airline Management council* (2002) 277 F.3d 499 and also *Virgin Atlantic Airways Ltd. v British Airways PCL* 257 F.3d 256 (2d Circuit 2001).



minimis approach) except where 'hard core' conduct was involved".¹³ The question is what is the threshold for invoking investigation of an alleged anti-competitive conduct? Singapore, which has similar economic structure and system to Hong Kong, has adopted the threshold of investigation of 20% for intra-brand competition and 25% for inter-brand one¹⁴ and it is not sure if Hong Kong will follow similar approach. Any arrangements, decisions and concerted practices among the arbitrators may well below the threshold depending how one defines the relevant market in a particular case or undertaking.

5. The Second Conduct Rule

Section 21(1) or the Second Conduct Rule prohibits an undertaking that has a substantial degree of market power in a market abuses that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong unless such an undertaking or conduct is necessary in order to comply with a legal requirement or is entrusted by the Government with the operation of services of general economic interest.¹⁵

Monopoly power is defined as 'the power to control prices or exclude competition. The existence of such power ordinarily may be inferred from the predominant share of the market.'¹⁶ To prove the Defendant's conduct constituted an attempted monopolization, the Plaintiff must establish '(1) that Defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'¹⁷

It was proposed that 40% market share is the threshold for a substantial degree of market power in a market because of Hong Kong's relatively small but concentrated economy as compared to 60% for Singapore, 50% for EU and 70% for the US.¹⁸

6. The summary

¹³ LegCo's updated background brief on the introduction of a Competition Law in Hong Kong on 28 June 2010 LC Paper No. CB(1)2301/09-10(04), paragraph 14. Available at

<http://www.legco.gov.hk/yr09-10/english/panels/edev/papers/edev0628061-2301-4-e.pdf>

¹⁴ Competition Commission of Singapore 'CCS Guidelines on the section 34 prohibition'

Paragraph 2.19 at page 7: see http://app.ccs.gov.sg/cms/user_documents/main/pdf/S34_Jul07FINAL.pdf

¹⁵ The Legislative Council Brief on Competition Bill, paragraph 10 at p 162 under Explanatory Memorandum explains that 'Clause 30 excludes the cases listed in Schedule 1 from the application of the conduct rules. The exclusions provided in Schedule 1 are (1) for agreements that contribute to improving production or distribution or to promoting technical or economic progress for Conduct Rule One, (2) for agreements or conduct that is necessary in order to comply with a legal requirement [for both Conduct Rules], and (3) for undertakings that are entrusted by the Government with the operation of services of general economic interest [for both Conduct Rules].'

¹⁶ *United States v. Grinnell Corp. Et Al.* (1966) 384 U.S. 563

¹⁷ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993) as referred to in *Continental Airlines v United Airlines; Dulles Airport Airline Management council* (2002) 277 F.3d 499,

¹⁸ Legislative Council Brief 'Public Consultation on Detailed Proposals of A Competition Law: Introduction' May 2006 CITB CR 05/62/25/13. Paragraphs 11 and 12 at pp 26-27.

<http://www.legco.gov.hk/yr07-08/english/panels/es/papers/edev0506-citbcr05622513-e.pdf>

國際唱片業協會(香港會)有限公司

INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED

Unit 16A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億辰中心A座16樓A

Telephone: (852) 2861 4318

Facsimile: (852) 2866 6869

E-mail: main@ifpihk.org



Broadly speaking, the Bill provides for the cross sector approach in two systems governing conduct rules of competition in a free market; First Conduct Rule-prohibits anti-competitive agreements¹⁹, which is modeled on the then Article 81 (now Article 101) of EC Competition law,²⁰ and Second Conduct Rule-prohibits abuse of dominant market position,²¹ modeled on the then Article 82 (now Article 102) of EC Competition law except the control of mergers and acquisitions. The First Conduct rule proscribes concerted anti-competitive conduct; and if there is no other party involved in an undertaking, the Second Conduct Rule applies. 'The focus of the prohibition on agreements should be on horizontal agreements. Vertical agreements should only be addressed in the context of abuse of substantial market power.'²²

C The Recent Alleged Anti-Competitive events

7. The pork retailers allegedly complained a supermarket's purported selling the pork to its consumers underprice with an aim to driving them out of business and therefore an anti-competitive conduct is misconceived as the cheaper price only benefits the consumers although it may hurt the competitors. To 'protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws [so does the anti-competitive law] require no such perverse result.'²³

It stems from the misconception about the proposed Bill that gives two examples, namely '(a) predatory behavior towards competitors; or (b) limiting production, markets or technical development to the prejudice of consumers.'²⁴ The Bill condemns price discrimination only to the extent that it threatens to injure competition.²⁵ **NOT COMPETITORS** as some might have perceived wrongly.

¹⁹ Sections 6-7 of the Proposed Competition Bill: The first conduct rule prohibits agreements concerted practice etc that has the effect of preventing restricting or distorting competition such as price fixing, control of production or share markets or sources of supply.

²⁰ Chapter 1 of Part III of the EC Rome Treaty of 1957, as renumbered by the Amsterdam Treaty (consists of 314 Articles). With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate.

²¹ Sections 21-23 of the proposed Bill which prevent any undertaking that abuses of a substantial degree of market power that has its object or effect the prevention, restriction or distortion of competition in Hong Kong such as predatory behaviour, limiting productions, markets or technical development (§ 21(2)).

²² See (n 18) above, paragraph 26 at page 9.

²³ *Brooke Group Ltd., Petitioner v. Brown & Williamson Tobacco Corporation* (1993) 509 U.S. 209; 113 S. Ct. 2578. 'They do not threaten competition. . . . To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.'

²⁴ Section 21(2)

²⁵ See Brooke (n 23) above: The Court said that 'the availability of statutory defenses permitting price discrimination when it is based on differences in costs, § 13(a), 'changing conditions affecting the market for or the marketability of the goods concerned,' *ibid.*, or conduct undertaken 'in good faith to meet an equally low price of a competitor,' § 13(b)'.²⁵



In the US, '[l]ow prices benefit consumers regardless of how those prices are set and so long as they are above predatory levels'²⁶ and '[t]he antitrust laws were passed for "the protection of competition, not competitors."²⁷ Price cutting itself is not unlawful.²⁸ *Standard Oil Co*²⁹ confirmed that Congress did not intend to outlaw price differences that result from or further the forces of competition.³⁰ 'Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.'³¹ Predatory pricing schemes are irrational and in general are implausible.³² 'The predatory pricing schemes are rarely tried, and even more rarely successful.'³³ The US courts show increasing tendency to dismiss private claims alleging predation³⁴ and '[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws'.³⁵

Therefore in US, for condemning predatory pricing, the test is if it poses 'a **dangerous probability of actual monopolization**,' under the Sherman Act³⁶ and a plaintiff is required to prove that '(1) the prices complained of are below an appropriate measure of the rival's costs, and (2) under the Sherman Act, a **dangerous probability--of recouping the rival's investment in below-cost prices.**'

²⁶ *Brooke* (n 23) above.

²⁷ *Brown Shoe Co., Inc., v. United States* (1962) 82 S. Ct. 1502

²⁸ *Brooke* (n 23): 'The mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.'

²⁹ *Standard Oil Co. v. FTC*, 340 U.S. 231, 250, 95 L. Ed. 239, 71 S. Ct. 240 (1951).

³⁰ Thus 'the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.' - *Brooke* (n 25): *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80, n. 13, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979). See also *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63, 74, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953).

³¹ *Brooke* (n 23).

³² *Brooke* (n 23).

³³ See Section III of the Judgment of *US v. AMR* (2003) 335 F.3d 1109.

³⁴ *United States of America v AAMR corporation* (2003) 335 F.3d 1109. AMR was alleged to engage predatory pricing conduct but the Government failed to prove the genuine issue as to whether AMR had priced below an appropriate measure of costs and demonstrated that AMR had a dangerous probability of recouping its investment in below-cost prices. The Government formulated 4 different tests to show that AMR was engaged in predatory pricing by using AMR's own accounting method for assigning costs to each flight. The court concluded that all four tests were invalid as a matter of law because each of the tests included an allocation of fixed costs 'fatally flawed in their application and fundamentally unreliable... many costs that are not related to the operation of a particular flight or route dispatch, city ticket offices, certain station expenses, certain maintenance expenses, American's flight academy, flight simulator maintenance, general sales and advertising). In other words, FAUDNC includes costs that are not entirely avoidable even if American were to abandon an entire route.'

³⁵ "Those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce'" *Hunt v. Crumboch*, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945).

³⁶ whereas 'the Robinson-Patman Act requires only that there be a reasonable possibility of substantial injury to competition.'

國際唱片業協會 (香港會) 有限公司

INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號匯京中心A座18樓A
Telephone: (852) 2861 4518 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

6



The Bill only increases the transaction costs of doing business among SMEs as they must consult the lawyers for advice for any allegation of an anti-competitive behavior and undertaking given that such allegation of an anti-competitive behavior or undertaking is easy to make but difficult to defend. It is therefore imperative to ensure the people who make wrongful accusation against their competitors do pay.

8. The SMEs' dilemma

The costs of running business in Hong Kong are very high and competitive. Most of the business entities are SMEs,³⁷ it is not unusual for a few SME getting together to source a product from a supplier at a bulk discount price so that they may be able to sell the products at a lower price within a district or even a street. However, if their cutting cost exercise were to be viewed by other less efficient SME as anti-competitive, the costs of defending against any follow up investigation on an alleged anti-competitive conduct will have a devastating effect on their financial positions and will drive them out of the business making those less efficient ones survive in the market. In other words, Hong Kong competition law will be used to protect competitors not competition. Furthermore, it is arguable that a large supermarket chain may run the business in a much more efficient and effective manner as compared to those of SMEs. SMEs will be damned if they do, damned if they don't work together.

9. The supermarket who sells the soda cheaper than the hawkers or street vendor. In Hong Kong, free market economy dictates that every business must run efficiently and it is difficult to dictate a price of a specific goods as Hong Kong does allow the free importation of parallel import of such goods from other sources abroad and indeed there are many success stories of retailers that mainly sell parallel import goods, be that cosmetics or consumer electronic one. In short, people do have a choice of getting a cheaper parallel import goods or the one from the authorized dealers. Furthermore, it is hardly unlawful for a wholesaler to supply the goods to any retailer on the terms as it thinks fit such as the creditworthiness of (and therefore the risk of doing business with) a particular purchaser. However, that particular purchaser may allege that the wholesaler breaches the Second Conduct Rule by 'prevention, restriction or distortion of competition.' Unless it falls within the 'de minimis' principle, and not a hard core conduct, the wholesaler must employ expensive lawyer to defend its case before the tribunal. It adds to the costs of doing business for SMEs in Hong Kong.

Anybody who complains that the supermarket prices the street vendor or hawkers out of the market have this head in the clouds and the complaint simply does not hold

³⁷ The Legislative Council Brief on Competition Bill paragraph (c) 6 on page 2 of Annex B: "Experience from other jurisdictions suggests that small businesses would not face a significant increase in compliance costs, given that they would unlikely be targeted by competition regulation." This statement may not be true here in Hong Kong because of its unique market structure and of its small economy. It is only an assumption but we need empirical research to support it. That is why we urge the government to focus on specific sector first when implementing competition law and then extend it to other sectors later.



water as cheaper prices bring better consumer welfare under our free market economy system.

Equally, anybody who complains the prices at the convenient stores are higher than other places do not understand how the market economy works as consumers do know there is a price difference but they still prefer to deal with convenient stores (otherwise they will be priced out of the market long time ago) for person reasons and choice as that price represents the consumers' willingness to pay (or the utility function of the consumers is different from the one of price conscious ones).

For illustration, some swimmers in a hot summer day may prefer to buy a bottle of cool drink from a refreshment stand 10 meters away from him at a higher price than walking down a street 100 meters away to get a cheaper drink although some other swimmers may. You do not need an anti-competition lawyer but common sense to tell you that the market will drive the 10 meter stand out of the market if all choose to buy from a 100 meter one. It is how our free market economy works. After all, the anti-competition does not focus solely on consumer welfare but business efficiency. However, the owner of the 10 meter stand, under the advice of an anti-competition lawyer, may file a complaint against the 100 meter one for undercutting the price under our present Bill if it falls outside the ambit of *de minis* principle, and not a hard core conduct, (depending on how you define market in the beach area). And the 100 meter stand will incur substantial legal costs to defend its case. Of course, those stands many meters away may work with the 10 meter one to drive the 100 meter one out of business if they are not doing so well as compared with the 100 meter one because of inefficiency. The question now is that are we protecting the competitors or the structure of the market.

D The Block Exemption Orders

10. Under the Bill, the government may grant exemptions by way of block exemption orders³⁸ from certain type of agreements for activities covered under the First Conduct Rule; or by reasons of **public policy**,³⁹ or of **avoiding conflict with international obligations**⁴⁰ for undertakings⁴¹ covered by both the First and Second Conduct Rules. More importantly, Schedule 1 of the Bill proposed 'General Exclusions from Conduct Rules exempting (1) agreements enhancing overall

³⁸ Section 15 of the Bill, similar to Article 81(3) of the EC Competition law; by applying Article 81(3), on 28 September 2009 the European Commission Regulation (EC) No 906/2009 adopts a new exemption of concerted practices among shipping Companies for another five years. In July 2006, Singapore granted a Block Exemption Order for Liner Shipping agreement under section 36 of the Competition Act (chapter 50B) for 5 years up to December 31 2010 and the extension of which is now under review. See website: <http://www.ipvancouverblog.com/2010/10/global-competition-law-update-asia-europe-africa-and-the-americas/>

³⁹ Section 31 of the Bill.

⁴⁰ Section 32 of the Bill.

⁴¹ Section 2 of the Bill; 'undertaking' (業務實體) means any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity and includes a natural person engaged in economic activity.

國際唱片業協會(香港會)有限公司

INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 10A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon, 九龍灣宏光道1號億景中心A座10樓A
Telephone: (852) 2861 4318 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

8



economic efficiency, (2) compliance with legal requirements and (3) services of general economic interest etc. from the application of conduct rules.⁴²

11. It is argued that certain exempted statutory bodies or NGO may have a trading entity and the activities of such a trading entity may create unnecessary restrictions for other competitors to compete with them. The issue is that very often than not, the 'trading entity' of a statutory body or NGO serves for specific social functions or benevolent purposes and not to mention that it will reduce the subsidies from the government which in turn, saving substantial taxpayers' money. And more importantly, it is not unusual and in fact only natural to have one or two bodies that will be run much more efficient and beneficial or a small economy such as Hong Kong. For example, Jockey Club, HK Trade Development Council, hospital authority, housing authority etc. After all, free market economy provides an environment that fosters the business of any competitors if they can find a way work more efficient than these exempted organizations.

E The Collecting Societies

12. The U.S. Supreme Court in its landmark decision in *BMI v. CBS*,⁴³ endorsed the transaction costs justification for the idea of copyright collective administration in which it was held that the issuance by ASCAP and BMI of blanket licenses does not constitute price-fixing *per se* unlawful under the antitrust laws.
13. We would like to refer you to 54 American Jurisprudence 2d Monopolies, Restraints of Trade, Unfair Trade Prac. § 87 further provides that:

The system of blanket copyright licensing employed by the music industry, whereby organizations operating as clearinghouses for copyright owners and users issue blanket licenses for the use of the copyrighted musical compositions, pursuant to which the licensees are given the right to perform any and all of the compositions owned by the organizations' members or affiliates as often as the licensees desire, for a stated term, in return for a fee that does not directly depend on the amount or type of music used, but

⁴² The Legislative Council Brief on Competition Bill, paragraph 10 at p 162 under Explanatory Memorandum explains that 'Clause 30 excludes the cases listed in Schedule 1 from the application of the conduct rules. The exclusions provided in Schedule 1 are (1) for agreements that contribute to improving production or distribution or to promoting technical or economic progress for Conduct Rule One, (2) for agreements or conduct that is necessary in order to comply with a legal requirement [for both Conduct Rules], and (3) for undertakings that are entrusted by the Government with the operation of services of general economic interest [for both Conduct Rules].'

The Chief Executive may only subject a specific statutory body to the competition rules where (i) it is engaged in an economic activity in direct competition with another undertaking; (ii) the economic activity of the statutory body affects the economic efficiency of a specific market; (iii) the economic activity is not directly related to the provision of an essential public service or the implementation of public policy; and (iv) there are no other exceptional and compelling reasons of public policy against subjecting the statutory body to the competition rules. Until such regulation enters into force, all statutory bodies are exempted from the Bill.

⁴³ *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1 (1979).

國際唱片業協會(香港會)有限公司

INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 16A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億利中心A座16樓A
Telephone: (852) 2861 4318 Facsimile: (852) 2866 6869 E-mail: main@ifpihk.org



ordinarily is based upon a percentage of total revenues or a flat dollar amount, **does not constitute a type of price fixing that is illegal per se under the Section 1 of the Sherman Act** Rather, such an agreement falls within the statutory right accorded to intellectual property owners to forbid the sale of licensed material, or to restrict the price at which licensed material may be sold, because **the restriction is reasonably adapted to secure pecuniary reward for the licensor's lawful monopoly.**

14. We believe that Hong Kong's anti-competitive law will find that copyright collecting societies such as our organization should be exempted based on economic efficiency test.
15. If we may, we would like to invite members of the Bills Committee to consider if the following activities amount to anti-competitive conduct:
 - a. A mobile phone supplier tries to sell a favorable telecommunication services or to provide free services with a particular mobile phone operators to customers
 - b. A music concert organizer who works with a particular credit card company to promote the sale of its events or alternatively the credit card company promotes its serves by giving free concert tickets.
 - c. A shoes store gives out discount dinner coupons to its customers, what if it is the discount coupon for the next store but for a specific brand of shoes.
 - d. A supermarket gives out discount coupons to its customers for buying certain brands of goods there.
 - e. Many other examples of conduct that lead to network effects which promote and produce market efficiency in the long run such as membership programme for dining out at any restaurant at a high discount value which is within its dining programme.

Clearly, these activities increase consumer welfare at the expense of competitors.

F Conclusion

16. If the members find the above confusing, then we can ensure you that there are 10 logs more confusing in the real life situations and among the SMEs that we have been able to say. The Bill in its present form will only serve the lawyers well but not the consumers at the end of the day.
17. Last but not least, we should let the market tell what the business people want not the so-called experts or legal scholars as they may understand how the principles work on a large jurisdiction such as US, Europe but not on our small economy that comprise mainly SMEs and in a place where it is praised as the freest economy in the world in which both the US and Europe have failed to achieve even if they have the antitrust and anti-competition laws. **The so called scholars' opinion should therefore be treated with caution** especially those purportedly borrow from the experience of other jurisdictions; paralleling with the ruling of the U.S. Supreme

國際唱片業協會(香港會)有限公司

INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
 Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億景中心A座18樓A
 Telephone: (852) 2861 4318 Facsimile: (852) 2866 6839 E-mail: main@ifpihk.org

10



Court which stated that they did not accept any **expert opinion** which "was not supported by sufficient fact to validate it" and also that "expert testimony rooted in **hypothetical assumptions** cannot substitute for actual market data."⁴⁴

We are pleased to make the above submission and for further clarifications, I may be reached at rickceo@ifpihk.org and 2861 4303.

For and on behalf of
International Federation of the Phonographic Industry
(Hong Kong Group) Limited

A handwritten signature in black ink, appearing to be 'Ricky Fung', written over a large, stylized circular mark.

Ricky Fung
Chief Executive Office

c.c. Committee – IFPI (Hong Kong Group) Limited.

⁴⁴Brooke (n 23) above and also (n 37).