HSBC

Ref:

The Hon Andrew Leung Kwan-yuan, GBS, JP
Chairman of the Bills Committee on the Competition Bill

22 March 2012

c/o Clerk to Bills Committee
Bills Committee on Competition Bill
Legislative Council
Legislative Council Complex
One Legislative Council Road
Hong Kong

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Honourable Chairman and Members,

Comments on the Competition Bill's proposed second conduct rule

The Hongkong and Shanghai Banking Corporation Limited (HSBC) would like to thank the Bills Committee for this opportunity to submit further comments on the Competition Bill.

HSBC appreciates the efforts from the Government and the Legislative Council members to provide Hong Kong with a balanced competition law regime. Constructive dialogue between the different stakeholders has resulted in some improvements to the Competition Bill. Notwithstanding these improvements, there are still a number of issues which are of concern to HSBC and we have prepared the enclosed submission for your consideration. In summary, HSBC believes that:

- the proposed second conduct rule in the Competition Bill would significantly increase the cost of doing business in Hong Kong; and
- adoption of a warning notice mechanism under the second conduct rule would provide a practical solution.

We hope the Bills Committee will find these comments helpful. We would also wish to take this opportunity to reiterate some of the outstanding issues under HSBC's Submission to the Bills Committee in January 2011, which are set out in the Appendix.

Should you wish to discuss any of the points raised we would be happy to accommodate the Committee.

Yours faithfully,

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THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED

COMMENTS ON THE SECOND CONDUCT RULE OF THE COMPETITION BILL

One of HSBC's main concerns relates to the legal test for the assessment of market power under the second conduct rule. On previous occasions, HSBC has explained why a "dominance" test is more appropriate for Hong Kong than a "substantial degree of market power" test as the relevant standard to assess market power. We would refer the Legislative Council members to our submission of 21 November 2011 (reference no. CB(1)444/11-12(01)) for a detailed discussion of our concerns in this regard.

While HSBC's concerns with the legal test remain, the purpose of the present submission is not to repeat these concerns but rather to draw your Committee's attention to the adverse consequences the proposed test will have in practice. The proposed second conduct rule in the Competition Bill would significantly increase the cost of doing business in Hong Kong if the Bill were to be adopted without changes. Hong Kong would become less attractive to investment and would lose out to other jurisdictions such as Singapore or Mainland China. Hong Kong consumers may also lose as companies would reflect additional operating costs in the form of higher prices.

The proposal set out in the present submission aims to ensure that the adoption of the Competition Bill does not lead to a significant increase in the cost of doing business in Hong Kong.

1 Relevance of the second conduct rule to companies

The abuse of market power regime is an exceptional regime

Virtually all competition laws include a prohibition on the abuse of market power.[1] In most jurisdictions, the abuse of market rules shares two common features.

First, the possession of market power is not as such prohibited. It is only the abuse of this power that is prohibited. This essential feature of any competition law regime was summarized as follows by the US Supreme Court:

> "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices - at least for a short period - is what attracts 'business acumen' in the first place; it induces risk taking and produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct".[2]

Second, the type of conduct that is prohibited is not anticompetitive by nature. It is only when it involves a company with market power that such conduct may sometimes have anticompetitive effects. In practice, the abuse of market power rules impose a very heavy burden on all companies meeting the relevant market power threshold. The regime limits their commercial freedom to engage in standard business practices which would otherwise be perfectly legitimate in the absence of market power. This basic proposition was expressly recognized by the EU Courts as follows:

> "It follows from the nature of the obligations imposed by Article [102 TFEU] that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves

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1 See, among many other sources, the *Recommended practices on dominance/substantial market power analysis pursuant to unilateral conduct laws* issued by the International Competition Network's Unilateral Conduct Working Group in April 2008.

2 *Verizon Communications, Inc v Law Offices of Curtis V. Trinko*, 540 U.S. 398.407 (2004).

abuses and **which would even be unobjectionable if adopted or taken by non-dominant undertakings**. (...)."[3] (emphasis added)

These two key features are at the core of any abuse of market power regime, and it is important to acknowledge that they are interdependent. It is only because a company has a unique and very significant position on the market that it will be prevented from engaging in otherwise legitimate business practices. The regime's exceptional nature explains why the notion of abusive conduct is far-reaching and also covers standard business practices.

Practical consequences for companies falling within the scope of the regime

As soon as a company acquires significant power on a market, competition law requires that it changes the way it does business on that market. This is the main practical significance of the abuse of market power rules for businesses. Many standard pro-competitive business practices, such as bundling, price discrimination, below-cost pricing, exclusivities and non-competes, etc. have the potential of becoming illegitimate when carried out by an undertaking with market power.

This is a very important practical aspect of the abuse of market power regime which the Government and the Legislative Council must bear in mind when designing a competition law regime for Hong Kong. The practices that will be prohibited under the proposed section 21 of the Competition Bill are not practices from which businesses would typically abstain. On the contrary, these are the very business practices which companies adopt in a healthy competitive environment and which directly benefit consumers. For instance, granting rebates or offering bundling products is something most consumers want and which directly translates into lower prices and more competitive markets. Any market power regime must therefore strike the delicate balance between limiting the risks of abusive conduct while at the same time not chilling the competitive process by preventing successful companies from engaging in pro-competitive conduct.

2 Compliance with the abuse of market power regime is very costly

Compliance with the abuse of market power rules is very costly for those companies that fall within its scope or which are likely to fall within its scope, for the following reasons.

(1) ***Different business standards must be adopted for different markets.*** As soon as a company attains the relevant market power threshold on a specific market it may be required to adapt its standard business practices. Complying with the abuse of market power rules therefore requires the adoption of sophisticated internal mechanisms meant to modify a company's commercial conduct for those products or services provided on markets where it may have market power, while maintaining the same conduct on other markets. It is worth restating that the same business practices, when involving companies with no market power, are perfectly legitimate and even pro-competitive. Adopting a single standard of conduct across all markets is therefore not a commercially viable option.

(2) ***The abuse of market power rules are a complex area of law.*** Competition law is a principles-based legislation with no black and white rules. The International Competition Network notes that "it can be difficult to distinguish between pro- and anticompetitive unilateral conduct".[4] The Government's draft *Guidelines on the Second Conduct Rule* agree and state that "there are no automatic breaches of the second conduct rule. The facts and circumstances of each case and all elements of the second conduct rule will need to be considered."[5] In other words, each time a company's conduct may possibly fall within the

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3 Case T-111/96 ITT *Promedia v Commission* [1998] ECR II-2937, at paragraph 139.

4 *Recommended practices on dominance/substantial market power analysis pursuant to unilateral conduct laws* issued by the International Competition Network's Unilateral Conduct Working Group in April 2008, page 1.

5 Draft *Guidelines on the second conduct rule*, CB(1)2618/10-11(01), page 11.

scope of the second conduct rule, it will have to assess whether a specific conduct is anticompetitive by not only reviewing the conduct itself but also its economic effects on the relevant market. This often requires complex and costly legal and economic analysis. In many cases, such economic effects are difficult to assess or to quantify. In many cases, the economic effects of a specific conduct are at best ambiguous and in practice it is often difficult to draw the line between legitimate and anticompetitive conduct.

(3) ***No off-the-shelf compliance solutions available.*** As explained above, whether a specific conduct falls foul of the abuse of market power rules requires a case-by-case analysis. It is very difficult to formulate general compliance conduct guidelines - for instance in the form of dos and don'ts. A number of foreign competition authorities have issued specific guidance on how to achieve compliance with competition law.[6] Unsurprisingly, the guidance provided on compliance with the abuse of market power rules limits itself to a list of business practices that might raise competition law risks and which therefore might warrant further assessment. No guidance is provided on how to proceed with such assessment in a timely and cost-effective manner. On the contrary, the *Guidance on how your business can achieve compliance with competition law* issued by the UK Office of Fair Trading expressly recognises that "when identifying potential competition law risks, particularly those relating to more complex areas such as abuse of a dominant position, business may wish to consult with specialist legal and other advisors".[7] Such case-by-case analysis is very costly and time-consuming. It significantly increases transaction costs and very often delays the commercial decision-making process.

(4) ***Structural and organizational measures must often be implemented.*** For a multi-products company active both on markets where it enjoys market power and other markets, compliance with the abuse of market power rules often translates into costly internal organisational or structural measures. Foreign experience shows that compliance with the abuse of market power rules often requires companies to change not only their market conduct but also the way they run their business internally. In practice, companies will often need to expend additional resources and costs to develop *ad hoc* commercial policies, complex accounting rules as well as costly risk management measures for products on markets on which they are likely to enjoy market power.

(5) ***Missed business opportunities.*** Because of the complexities involved in the assessment of potential abusive conduct, many companies cannot afford the luxury of proceeding to a detailed legal or economic analysis in each specific case. Instead, many companies will choose as a matter of policy not to engage in certain business practices which present certain competition law risks. By doing so, they forego business opportunities which a detailed legal and economic assessment would have shown do not raise any substantive competition law issue. In practice, this may also lead to businesses not to innovate or not to bring to market new services or products that would benefit consumers.

3 The proposed abuse of market power regime lacks balance

Because compliance with the abuse of market power rules imposes an exceptionally high burden on companies, and in view of the high potential for discouraging firms from engaging in pro-competitive conduct, the abuse of market power provisions in most jurisdictions are designed as an exceptional rule that only applies to very significant market players. Recognising the exceptional nature of the regime, and as illustrated in Annex I to the present submission, the overwhelming

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6 See for instance the Framework Document of 10 February 2012 on *Antitrust Compliance Programmes* released by the French Competition Authority; the UK Office of Fair Trading's *Guidance on how your business can achieve compliance with competition law* dated June 2011 (OFT1341); and the Bulletin on "*Corporate Compliance Programs*" released by the Canada Competition Bureau Competition of 27 September 2010.

7 UK Office of Fair Trading *Guidance on how your business can achieve compliance with competition law* dated June 2011 (OFT1341)

majority of foreign jurisdictions have opted for a "dominance" threshold and not a "substantial degree of market power" threshold as currently contemplated in the Competition Bill.

HSBC is concerned that the adoption of a low market power standard combined with a broad notion of abusive conduct could lead to an unbalanced competition regime that would be harmful to Hong Kong's economy.

3.1 A potentially low market power standard

HSBC does acknowledge that it is the substance and not the terminology that matters. Accordingly, HSBC would not be concerned if the reference to "substantial degree of market power" in section 21 of the Competition Bill did indeed reflect the widely accepted notion that the regime is meant only to apply to exceptional situations.

While HSBC's reading of the Bill has always been that the second conduct rule contemplates a high market power threshold, the Government's position on the matter is unclear and has created uncertainty. In its 2008 *Detailed Proposals for a Competition Law*, the Government explained that *"the difference between "dominance" and "substantial market power" relates to the degree of market power of a firm that would render it liable to possible charge of abusive conduct"*. It went on to propose that for Hong Kong *"rather than a test of dominance, the threshold for investigating possible abuse should be "substantial market power", i.e., a market share of about 40 %"*.[8] However, on later occasions the Government suggested that the concept of "substantial degree of market power" was interchangeable with that of dominance that there was little difference between the two concepts.[9] Yet the views of the Government now seem to be that the concepts are different. In a paper dated 26 October 2010, the Government explains that "SMP appears to represent a lower market share threshold than dominance."[10] In July 2011, during a Bills Committee meeting, the Government stated that the substantial degree of market power test was more adequate in the context of Hong Kong's small economy than the dominance test.[11] This position was reaffirmed several times by the Government in later Legislative Council meetings.[12] HSBC is very concerned about the lack of clarity around the notion of market power and the possibility that it may in practice lead to a lower market power standard than in most established competition law jurisdictions.

The negative consequences of the adoption of a low market power threshold in the Bill would be further exacerbated if the relevant markets were defined narrowly for the purpose of assessing market power. In line with international best practice, it should be made clear that the notion of "market" is an economic concept entailing both a product dimension and a geographic dimension and referring to a group of goods or services that are substitutable with one another from an economic demand or supply-side perspective.

However HSBC understands that the Government considers it is not appropriate to include a definition in the Bill itself as the future Competition Commission will be better placed to issue market definition guidelines.[13] Even though the draft *Guidelines on market definition* released last June

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8 See *Detailed Proposals for a Competition Law - A Public Consultation Paper*, issued by the Commerce and Economic Development Bureau in May 2008, pages 26 and 27.

9 See Speech by the Under Secretary for Commerce and Economic Development, Mr Gregory So, at the 5th Annual Conference of the Asian Competition Forum, 7 December 2009; and Administration's response to the Assistant Legal Adviser's letter dated 26 October 2010 (LC Paper No. CB(1)1034/10-11(05)).

10 Administration's response to the Assistant Legal Adviser's letter dated 26 October 2010 (LC Paper No. CB(1)1034/10-11(05)).

11 Minutes of eighteenth Bills Committee meeting on Competition Bill held on Tuesday, 5 July 2011 (LC Paper No. CB(1)44/11-12).

12 See for instance page 10 of the Minutes of the Legislative Council meeting of 11 October 2011 (LC Paper No. CB(1)516/11/12) or pages 3 and 4 for of the Government Responses to follow-up questions arising from previous meeting of 21 November 2011 ((CB(1)389/11-12(02)).

13 See page 5 of Paper No. CB (1)1034/10-11(04) paper "Summary of views expressed by deputations on the object, commencement and interpretation of the Bill, and the Administration's response" issued by the Government on 14 January 2011.

by the Government provide some comfort that a relevant product market will be defined in accordance with sound economic principles, the guidance provided is more uncertain when it comes to relevant geographic markets.[14] Indeed the guidelines recognise the principle that a market may sometimes be wider than Hong Kong but only discuss this possibility for markets facing significant imports. Significant imports is only one of many indicators that a market may extend beyond the borders of a specific jurisdiction. In the banking sector for instance, there is a broad range of banking services (such as for example, corporate banking services or investment management services) that are supplied on regional or international markets which are not characterised by significant imports. Given the small size of Hong Kong and in view of its open economy, it is particularly important to recognise the principle that the territorial scope of a relevant market may extend beyond Hong Kong.

For the above reasons, HSBC believes that the current Bill proposals do not provide sufficient comfort that the second conduct rule will only apply as an exceptional rule to companies that enjoy real economic market power.

3.2 A broad notion of abusive conduct

HSBC is particularly concerned about the prospect of a low market power standard, as the Government insists on retaining a broad list of prohibited conduct. Whereas HSBC understands that the Bill is only meant to capture exclusionary abuses - and not exploitative abuses - the concept of abuse in section 21 of the Competition Bill remains broad and open-ended. As explained in the Government's draft *Guidelines on the Second Conduct Rule,* the types of exclusionary conduct meant to be prohibited under the second conduct rule are very similar to those prohibited in jurisdictions with a high market power threshold: predatory pricing, tying and bundling, margin squeeze, and refusal to supply and access to essential facilities. What is more, and as explained in paragraph 7.5 of the draft *Guidelines on the Second Conduct Rule*, the proposed regime for Hong Kong contains a second important departure from international practice: "[w]here the conduct has as its object the prevention, restriction or distortion of competition in Hong Kong, it is not necessary for the competition authority to prove that the conduct would have an anti-competitive effect in order to find an infringement of the second conduct rule." The possibility of a breach of the abuse of market power rules by object, without any need to establish any effect on market competition, is unprecedented and very worrying in view of the proposed low market power threshold.

3.3 An overall unbalanced regime

In light of the above, HSBC is concerned that the Competition Bill does not meet the required balance between the two core principles of the regime, i.e. the market power threshold and the types of prohibited conduct. HSBC acknowledges that any competition law regime must be tailored to the needs of the Hong Kong economy, but the Government should appreciate the importance of maintaining a balance between the two core principles of the regime.

The Government should also take note of the important added compliance costs which businesses will incur as a result of the adoption of an unbalanced abuse of market power regime. HSBC is concerned that the adoption of section 21 without changes would unreasonably increase the cost of doing business in Hong Kong well beyond what is the case in other jurisdictions that have adopted an abuse of dominance regime:

- Many more companies and activities would become subject to the abuse of market power rules than in other jurisdictions. This would immediately translate into high compliance costs for many business operators in Hong Kong. The heavy compliance burden described in the

[14] See Draft *Guidelines on the second conduct rule*, CB (1)2420/10 - 11(031).

previous section would become the norm and not the exception for successful companies active in Hong Kong.

- A low market share threshold would also markedly increase the complexity and cost for companies operating across borders - considering that other jurisdictions, including Mainland China, mostly apply a dominance threshold. The dominance test is not only more suited for multinational companies active in several jurisdictions, but also for smaller regional players who may only be active within the Pearl River Delta region, a single market which under the Government's proposals would be subject to two different market power standards.

Such increased cost and complexity of doing business in Hong Kong would not only harm Hong Kong businesses. It would also harm Hong Kong consumers and the economy as a whole:

- There is a real risk that in the face of these high costs, certain companies may choose not to invest in Hong Kong or to withdraw from the Hong Kong market altogether. Already today, Hong Kong is facing increased competition from places such as Singapore or Shanghai, which provide a more welcoming regulatory environment. By adopting a low market power threshold, Hong Kong would be doing exactly the opposite, i.e. harm Hong Kong's reputation as a free market economy where companies can strive with minimal governmental intervention.

- Consumers will lose out not only because fewer companies will invest in Hong Kong but also because companies that will remain active in Hong Kong will reflect these additional operating costs in the form of higher prices for consumers. In addition, as mentioned above, a significant number of companies will choose not to engage in conduct - such as bundling or rebates - which is generally beneficial to consumers out of fear of infringing the abuse of market power rules.

In short, competition law aims to promote a competitive environment to the ultimate benefit of consumers and of market efficiency. Achieving this goal requires a balanced regime. Adopting a stringent notion of abusive conduct together with a low market power threshold would create an unbalanced competition law regime to the detriment of Hong Kong.

HSBC's position therefore remains that section 21 of the Competition Bill should be reworded as proposed in its submission of 15 November 2011.

4 The warning notice mechanism as a practical solution for Hong Kong

Irrespective of the legal standard that will ultimately be retained in the Bill, HSBC would propose, as a practical measure aimed at addressing the above concerns, to extend the proposed warning notice mechanism to enforcement of the second conduct rule.

Last October, the Government proposed the introduction of a warning mechanism under the first conduct rule whereby undertakings suspected of having concluded agreements involving non-serious anticompetitive conduct would be put on notice and required to cease the contravening conduct within a prescribed period of time before the Competition Commission can bring the matter before the Competition Tribunal. HSBC understands that a key consideration underlying such proposal is that there are no hard and fast rules to assess whether non-hardcore cartel conduct may give rise to competition concerns: the Commission and the parties need to conduct a competition analysis based on the specific circumstances and facts of each case before coming to a determination. In these cases parties will be offered an opportunity to remedy their conduct without however facing sanctions for the period preceding the issuance of a warning notice.

HSBC submits that a similar warning notice mechanism would be suitable for the application of the second conduct rule. Perhaps more so than under the first conduct rule, assessing whether a

particular conduct may infringe the second conduct rule will require a detailed case-by-case competition analysis. The analysis would be made even more complex under the Bill - and the associated compliance costs even higher - in view of the uncertainty relating to the market power threshold that will apply in Hong Kong. For these reasons HSBC believes that the warning mechanism proposed by the Government should be extended to enforcement of the second conduct rule.

In particular, HSBC is proposing to extend the proposed warning notice mechanism for any contravention of the second conduct rule by a company on a market where its market share does not exceed 60 per cent. Above that threshold, the warning notice mechanism would not apply and the Competition Commission would exercise discretion to accept commitments, issue an infringement notice or to institute proceedings before the Competition Tribunal.

This proposal offers several advantages:

- This mechanism would still allow the Competition Commission to intervene and remedy any abusive conduct falling within the scope of application of the second conduct rule - even below the 60 per cent market share threshold. At the same time, it would enable the Competition Commission to act promptly on conduct with a more detrimental impact on competition which is carried out by undertakings with very significant market power. The resources of the Competition Commission are thus better utilised in being able to focus on more likely harmful effects represented by a high market share threshold.

- On the other hand, it would allow companies to focus their compliance efforts in the first place on those markets where they are the most likely to enjoy real market power. They would not have to spend excessive compliance costs on markets where their market share remains below 60 per cent. It would also enable companies to align their compliance policies in Hong Kong with those in place for other jurisdictions.

- Whether a specific conduct constitutes an abuse is often ambiguous. With the prospect of high fines, most companies are inclined to take a conservative approach and not to engage in any conduct which presents certain competition law risks - even in situations where a careful legal and economic assessment would have concluded to the absence of any competition issue. With a warning notice mechanism in place, companies would be more willing to engage in such pro-competitive conduct.

- Finally this mechanism would also alleviate the concern expressed by many companies that the broad "catch-all" nature of market power test and the absence of any clear definition of abuse may lead them to inadvertently commit breaches of the second conduct rule and be penalised by large fines.

HSBC believes that a 60 per cent market share threshold below which the warning notice regime would apply is appropriate for Hong Kong. This threshold is in line with the threshold used in Singapore, an export economy which shares many common features with Hong Kong. Also, because this threshold would not limit the substantive review powers of the Competition Commission, HSBC believes this threshold can be set at a high level without impacting on the effectiveness of the abuse of market power regime.

The warning mechanism regime would operate the same way as under the first conduct rule:

- If the Commission has reasonable cause to believe that an undertaking with a market share below 60 per cent has contravened the second conduct rule, it would issue a warning notice to the undertaking concerned.

- In the warning notice, the undertaking concerned would be asked to cease the relevant conduct within a period to be determined by the Commission or to offer commitments addressing the Commission's concerns. During that prescribed period, the Commission will not take enforcement action against the undertaking concerned.

- At any time after the expiry of the prescribed period, if the Commission has reasonable cause to believe that the relevant conduct described in the warning notice is still ongoing or repeated, the Commission may institute proceedings before the Tribunal.

- Proceedings may only be brought before the Tribunal in relation to the conduct which continued after the expiry of the warning period and not in respect of the conduct that preceded it.

This proposal could be easily introduced in the Competition Bill by way of amending Section 80A of the Bill. A concrete proposal in this regard is included in Annex II to the present submission.

ANNEX I

To HSBC's knowledge, the "substantial degree of market power" test proposed in the Hong Kong Competition Bill is used only in a handful of foreign jurisdictions. Of the 124 jurisdictions that have an abuse of market power regime in place, only 6 refer to the substantial degree of market power test. 112 jurisdictions use the dominance test, and 6 use a monopoly test which is closer to the concept of dominance than to substantial degree of market power.

Legal test	Number of countries	Percentage
Dominance	112	90.3%
Monopoly	6	4.8%
Substantial degree of market power	6	4.8%
Total	124	100%

The following is a geographic breakdown:

- In Asia-Pacific, 29 out of 38 jurisdictions that have adopted competition law rules prohibiting the abuse of market power use the dominance test (including Hong Kong in the broadcasting and telecommunications ordinances, as well as Mainland China). Only 4 refer to the substantial market power test (Australia, Fiji, New Zealand and Papua New Guinea);

- In Africa and Europe, all of the competition law jurisdictions refer to the dominance test;

- In the Americas, of 27 countries which have rules prohibiting the abuse of market power, only 2 countries refer to the substantial market power test in their legislations (Costa Rica and Mexico).

Further, in Asia-Pacific, we note that many jurisdictions use a market share threshold of between 40 and 50 per cent as an indicator of the existence of dominance. Singapore, which is usually referred to in the Government's submissions to the Legislative Council and in the Bills Committee's working papers, has a presumption of dominance at 60 per cent.

ANNEX II

HSBC's proposal to introduce a warning notice regime under the second conduct rule could be introduced by making only minimal changes to the current proposals for a Hong Kong Competition Bill. In October 2011, the Government proposed the introduction of a warning mechanism under the first conduct rule by adding a new Section 80A to the Competition Bill. HSBC believes that a similar warning notice regime could be introduced under the Competition Bill by making the following amendments to this Section 80A:

Section 80A	
Current text	Proposed amendment
80A. Commission may issue warning notice	**80A. Commission may issue warning notice**
(1) If the Commission has reasonable cause to believe that –	(1) If the Commission has reasonable cause to believe that –
(a) a contravention of the first conduct rule has occurred; and	(a) a contravention of the first conduct rule has occurred; and
(b) the contravention does not involve serious anticompetitive conduct,	(b) the contravention does not involve serious anticompetitive conduct,
the Commission must, before bringing proceedings in the Tribunal against the undertaking whose conduct is alleged to constitute the contravention, issue a notice (a "warning notice") to the undertaking.	the Commission must, before bringing proceedings in the Tribunal against the undertaking whose conduct is alleged to constitute the contravention, issue a notice (a "warning notice") to the undertaking.
(2) A warning notice must –	**(2) If the Commission has reasonable cause to believe that –**
(a) describe the conduct (the "contravening conduct") that is alleged to constitute the contravention;	**(a) a contravention of the second conduct rule has occurred; and**
(b) identify the undertaking (the "contravening undertaking") that has engaged in the contravening conduct;	**(b) the contravention involves conduct by an undertaking on a market where its market share does not exceed 60 per cent,**
(c) identify the evidence or other materials that the Commission relies on in support of its allegations;	
(d) state –	**the Commission must, before bringing proceedings in the Tribunal against the undertaking whose conduct is alleged to constitute the contravention, issue a notice (a "warning notice") to the undertaking.**
(i) that the Commission requires the contravening undertaking to cease the contravening conduct within the period (the "warning period") specified in the notice, and not to repeat that conduct after the warning period;	(3) A warning notice must –
(ii) that, if the contravening conduct	(a) describe the conduct (the

continues after the expiry of the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and (iii) that, if the contravening undertaking repeats the contravening conduct after the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct and the repeated conduct; and (e) indicate the manner in which the contravening undertaking may cease the contravening conduct. (3) In determining the warning period, the Commission must have regard to the amount of time that the contravening undertaking is likely to require to cease the contravening conduct. (4) After the expiry of the warning period – (a) if the Commission has reasonable cause to believe that the contravening conduct continues after the expiry, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and (b) if the Commission has reasonable cause to believe that the contravening undertaking repeats the contravening conduct after the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct and the repeated conduct. (5) To avoid doubt, proceedings under subsection (4) may not be brought in respect of any period that precedes the warning period.	"contravening conduct") that is alleged to constitute the contravention; (b) identify the undertaking (the "contravening undertaking") that has engaged in the contravening conduct; (c) identify the evidence or other materials that the Commission relies on in support of its allegations; (d) state – (i) that the Commission requires the contravening undertaking to cease the contravening conduct within the period (the "warning period") specified in the notice, and not to repeat that conduct after the warning period; (ii) that, if the contravening conduct continues after the expiry of the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and (iii) that, if the contravening undertaking repeats the contravening conduct after the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct and the repeated conduct; and (e) indicate the manner in which the contravening undertaking may cease the contravening conduct. (**4**) In determining the warning period, the Commission must have regard to the amount of time that the contravening undertaking is likely to require to cease the contravening conduct. (**5**) After the expiry of the warning period – (a) if the Commission has reasonable cause to believe that the contravening conduct continues after the expiry, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and

	(b) if the Commission has reasonable cause to believe that the contravening undertaking repeats the contravening conduct after the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct and the repeated conduct. (6) To avoid doubt, proceedings under subsection (4) may not be brought in respect of any period that precedes the warning period.

APPENDIX

This is an extract of the outstanding issues under HSBC's Submission to the Bills Committee on Competition Bill in January 2011.

1 Intra-group agreements

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

1.1 Proposed amendment

HSBC suggests amending Section 6 of the Bill as follows:

Section 6 of the Bill	
Current text	Proposed amendment
(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. (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. (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.	(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. (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. **(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 50% or more of the voting rights in the other entity.** (~~3~~4) 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). (45) The prohibition imposed by subsection (1) is referred to in this Ordinance as the "first conduct rule."

1.2 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.

2 Sanctions against individuals

2.1 Pecuniary Penalties

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.

(a) 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.

(b) 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.

2.2 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.

(a) Proposed amendment

HSBC suggests amending Section 101 of the Bill as follows:

Section 101 of the Bill	
Current text	Proposed amendment
(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	(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

a company, in connection with any other contravention of a competition rule. (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.	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.** (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.~~

(b) 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.

2.3 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.

(a) 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. (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	(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. (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.	~~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.

(b) 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.

3 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.

3.1 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
(1) The first conduct rule does not apply to an agreement to the extent that it is	(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. (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. (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.	made for the purpose of complying with a legal requirement. (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. (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. **(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.** **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, recommended or authorized by any regulating provisions or codes of practice, circulars or any other guidance of the said authorities.**

3.2 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).

4 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.

4.1 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 far as they relate to conduct that is also subject to the jurisdiction of these authorities.** **(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. **(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.**

4.2 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).

5 Treatment of confidential information

5.1 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.

(a) Proposed amendment

HSBC suggests amending Section 122 of the Bill as follows:

Section 122 of the Bill	
Current text	Proposed amendment
(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). (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	(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 (~~c~~b) information given to **or obtained by** the Commission that has been identified as confidential information in accordance with subsection (2). (2) If a person (a) identifies **other**

[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.

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.	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.**

(b) 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.

5.2 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.

(a) 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. (2) In this section "unauthorized disclosure" means disclosure that is either prohibited or not authorized by or under this Ordinance.	(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.

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

(b) 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.

5.3 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.

(a) Proposed amendment

Accordingly, HSBC suggests the amend Section 125 as follows:

Section 125 of the Bill	
Current text	Proposed amendment
(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 purpose of obtaining advice from counsel, a solicitor or other	(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 connection with judicial proceedings arising under this Ordinance; (e) for the

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. [...] (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.	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. [...] (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.

(b) 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.

5.4 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.

(a) Proposed amendment

HSBC suggests amending Section 127 of the Bill as follows:

Section 127 of the Bill	
Current text	Proposed amendment

(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. (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 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.	(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. (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 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**.

(b) 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.