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HKFi
The Hong Kong Federation of Insurers
香港保險業聯會

Ref: Lv212/11

(By fax only: 2978 7569)

3 January 2012

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

Dear Sirs

Draft Competition Bill

We enclose for your review and consideration a copy of our letter dated 1 June 2011 which was forwarded to the then acting Secretary for Commerce and Economic Development together with the consolidated comments from our member companies on certain specific areas.

Please do not hesitate to contact the undersigned at 25825682 or Mrs Irene Wong at 2861-9377 if you require any further information.

Yours truly,

David Alexander
Chairman of the Task Force on
Competition Law

Encl.

DA/iw/sw

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FAXED
DATE: - 1 JUN 2011

Ref: Lv075/11

1 June 2011

Mr Gregory So, JP
Acting Secretary for
Commerce and Economic Development
Level 29, One Pacific Place
88 Queensway
Hong Kong

Dear Mr So

Competition Bill

On 5 August 2008, the Hong Kong Federation of Insurers submitted to the Government our comments on the Detailed Proposal for a Competition Law. We have now reviewed the draft Competition Bill and are pleased to enclose our comments on certain specific areas for your consideration.

Yours truly,

David Alexander
Chairman of the Task Force on
Competition Law

Encl.

c.c. Governing Committee Members ✓
the Hon K P Chan ✓

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Hong Kong Federation of Insurers Position on
The Competition Bill

The HKFI is generally supportive of the Competition Bill as another step towards developing Hong Kong's regulatory and business environment to be world class.

We do have some concerns about the detailed interpretation of the proposed regulations. These are summarised in the points below. Further details can be found in the attached paper.

- Definitions are somewhat unclear eg definition of "substantial market position".
- Are industry organizations in themselves anticompetitive? We assume not.
- Are exclusivity agreements between manufacturers and distributors in themselves anticompetitive? We assume not.
- The practical arrangements for consideration for exemption are onerous, bureaucratic and may result in adverse publicity even though the party applying is innocent. These need to be clarified and simplified.
- After the passing of the Competition Bill by the Legislative Council, there should ideally be a transitional period, say 6 to 12 months, for the stakeholders (in our case, the insurance industry) to get themselves familiar with the law and well prepared for its implementation, before the law shall come into effect. During the transitional period, the Competition Commission, perhaps together with Office of the Commissioner of Insurance/HKFI, should arrange awareness sessions for the insurance industry to help them take necessary actions for future compliance with the new legislation.

3 May 2011

	Comments from the Hong Kong Federation of Insurers in 2008 In response to the Public Consultation Paper on Detailed Proposals for a Competition Law	**Comments from HKFI in May 2011 following publication of draft bill**
1.	**Clarity of Definition** The Consultation Paper only sets out high level principles without defining clearly some of the important terminologies that are critical in ascertaining whether the operation of a company will be considered as having a "substantial degree of market power" e.g. 40% of market share. Specifically, we should stress the importance of more being included in the calculation for "substantial" market power than just market share. Market share can be misleading because it is based on transient market trends and only focuses on market performance. We would further suggest using the higher threshold of Domination as an appropriate alternative for such a concentrated market like Hong Kong as in many other similar regimes. In other countries such as Australia, "substantial" is determined on the basis of "control" of the market, which is determined by a number of characteristics (TPC v. Ansett Transport Industries (1978) 32 FLR 305). Accordingly, the test of "substantial" should be defined through a transparent analysis and detailed guideline of a mixture of market performance, market conduct (e.g. pricing policies, product strategies, advertising strategies, horizontal and vertical restraints on competition) and market structure (e.g. size and number of firms, barriers to entry, nature of product and degree of product differentiation). However, should the substantial degree of market power be retained as a threshold, for the sake of calculation of market share, we request clarity on the definition of "market" because its determination can have a profound effect. We stress the importance of it being given a very common and ordinary definition, which would allow for its broadest application. This definition should include all other goods and services that are substitutable for the first-mentioned goods and services. This would allow businesses flexibility and ensure that no business is unfairly classified into an unrepresentative market. We also seek further clarification on how the calculation of market share would apply to individual legal entity or group of companies and to companies with different product	• *Further clarity is still required on definitions; this is significant in terms of our understanding by member companies of whether they might be in breach* • *Our assumption about substantial market share is that it applies in the very broadest sense not to sub-segments of a market* • *Maximum fee seems excessive (although in line with other jurisdictions)*

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	lines. We would also like to point out the ambiguous and potential problematic nature of the term "purpose" under proposals 24 and 27. Competition by its nature seeks to exclude its competitors by product innovations, improved research and development and this activity results in better quality products and by its nature a lessening of competition. A firm with market power is entitled to protect its market share. The term "purpose" must be strictly read in determining whether the entity's subjective purpose or motive was to harm or damage a competitor or a potential new entrant. The cap of fines under Proposal 29 subject to 10% of total turnover during the period when the infringement occurred should be clarified. We need a clear definition of what is meant by "turnover". For example, it would be important to clarify whether it only applies to the turnover of a particular product / action of conduct infringing the legislation but not the entire turnover of a company or a company group during the infringement period.	
2.	**Position of Industry Representative Organizations** There are various trade associations and industry representative organizations in the insurance sector which may share information among their members. This situation applies to many other industries too. The typical industry representation is the Hong Kong Federation of Insurers, which performs, among other things, burning cost analysis and conducts research / study for the sake of its members. We recommend the activities/conduct of such type of industry representative organizations be exempted from the Law, to a reasonable extent and with clarity as to such extent spelled out in the guidelines, to reflect that such activities are in the interest of the industry, its consumers and the public at large. The reason for this is that the sharing of information on costs is not in itself anti-competitive as each company sets its price independently in a competitive market.	• *Our assumption is that trade associations and representative bodies are not in themselves anti-competitive. There would need to be evidence of specific breach of the rules within the operation of that organization to warrant investigation.*

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3.	**Common Conduct as Market Practice that is for Public Benefit** Under Proposal 47, *the Commission may issue a block exemption in respect of a category of agreement that is likely to yield economic benefit that outweighs any anti-competitive harm.*	• *Further clarity is still required on this topic* • *We would like to see some private hearing at the start of the Competition Commission's investigation in order to avoid problems* • *A relevant example is the PDPO where the sharing of data for the purposes of preventing or discovering crime is allowed* • *The process suggests that if there was a concern by the Competition Commission about one of the above issues, the Competition Commission could potentially impose some conditions upon the industry prior to going to tribunal however such a course of action would be public already and hence reputational damage to the industry would have been done* • *Hence the insurance industry may need to apply for exemption,* o *The Commission may choose not to offer a comment (in which case the situation is still unresolved)* o *An exemption application which is considered by the Competition Commission has to be publicized by law by the Competition again leading to potential adverse publicity*

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4.	**Exclusivity Arrangements between Manufacturers and Distributors (including brokers)** This will be an area of complexity for the application of the laws and guidelines in the insurance industry, and worthy of further consideration and elaboration as the guidelines evolve. For example, it is an industry practice in Hong Kong where insurers quote exclusively to a single broker. Also, insurers may make agreements containing an exclusivity clause/term with partners/producers such as providing exclusive products for partners' customers or providing partners with an exclusive partnership with insurers for a period of time. Such arrangements are deemed necessary in order that sufficient volumes are reached to justify product development and distribution expenses to provide more customers' choice and meet the needs of specific categories of consumers.	• *Further clarity is still required on this topic* • *The insurance industry (and potentially every industry) may need to apply for an exemption to avoid reputational damage* • *We do not believe that such distribution agreements are in breach of the law as drafted* • *Lack of clarity of what constitutes substantial market position in a company with multiple subsidiaries, product lines and vertical agreements eg with suppliers and distributors within the same group.*
5.	**More Flexible Considerations for Exemption** Proposal 46 provides that some agreements may be exempted from the prohibition if they yield economic benefits which outweigh the potential anti-competitive harm. We request more flexible considerations for exemption as some of the conduct/activities may generate benefits important to the well being of the society but may be unable to be translated into significant economic value from day one, for examples, commonly agreed Code of Conducts, market reference contract terms and conditions wordings, market self-regulatory initiatives. With respect to the whistle blower Proposal 32, it should also be clear that a company can mitigate its liability by having proper compliance procedures in place to discourage anti-competitive behavior. In other words, the company's liability should be mitigated in situations where certain employees act outside of Corporate Policy and engage anti-competitive behavior. The criteria for exemptions to the anti-competitive provisions under the new bill should be	• *The industry and individual companies may need to apply for many exemptions: is this efficient?* • *Can the Competition Commission handle the number of potential exemption requests?* • *We would like to see some private hearing at the start of the Competition Commission's investigation in order to avoid the excessive numbers of applications for exemptions and to make the whole process cost efficient and unbureaucratic.* • *We would like to see reference to internal training and policies being allowed as mitigation of a company's full responsibility for any breach*

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	more specific for pragmatic enforceability. Albeit these would not be detailed in the Ordinance (as per Proposal 25), this should be clearly spelled out in the proposed guidelines to be issued by the "Competition Commission". We would also like to stress the importance of a prompt and efficient clearance system for conduct not covered by a block exemption, but is still eligible under an individual exemption because the economic efficiencies achieved outweigh any possible anti-competitive effects. If a business would like to get a specific undertaking approved through this exemption, it is important to ensure that it can be approved in a timely manner.	*made by an individual employee or a small group of employees, particularly if the breach is discovered by the company* • *If the company discovers a breach within its own organization, is that company obliged to report that to the Competition Commission and is there any leniency given for the fact that the company's own processes discovered the breach?*
6.	**No Merger Control** We would like to support option "c" on page 30 of the consultation paper because in an economy such as Hong Kong, mergers may be the most efficient way to achieve economies of scale, which benefits the market and the consumer. This seems to fit best the objective of the Hong Kong competition law, which is to enhance economic efficiency thereby benefiting consumers.	• *Merger control only applies to the Telecommunications Industry hence there is no concern about this aspect from the HKFI.*
7.	**General Comments** In the absence of detailed drafting of the proposed legislation, we could only comment on high level principles at this stage. We look forward to a full version of the draft legislation, together with the relevant guidelines, so that we are in a better position to provide further specific input.	• *As mentioned above there are continued concerns about the practical implementation of this bill and the amount of paperwork it might involve thus affecting the competitiveness of Hong Kong companies.* • *One additional concern is the control of malicious referrals to the Competition Commission which may result in unwarranted reputational damage even before the case is proven.* • *The block exemption of statutory bodies may*

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		cause some issues – we do not expect this to affect the insurance industry directly. • *Compliance officers will be very concerned about this legislation without knowing how it will be operated in practice. For example, local Compliance Officers may have to give undertakings to their head office that they are in compliance – this may be very difficult without getting additional clarity requested above.* • *Hence more information about the practical and pragmatic operation of this law is required including some examples and case studies eg from other markets.*