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25 March 2011

The Hon Andrew Leung Kwan-yuen, GBS, JP
Chairman
Bills Committee on Competition Bill
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Andrew,

Competition Bill - Institutional arrangements

As the Bills Committee continues its discussion on the institutional arrangement of the Competition Bill, the Chamber would like to draw your attention to our concerns on this subject.

We are of the view that the Bill should set an upper limit on the size of the Commission in order to control the cost to taxpayers. To decide on the appropriate size, the scope of the Commission's work needs to be properly defined. We feel that the public accountability and expertise on SME matters of the Commission may need to be strengthened. Other aspects such as powers of delegation and removal of Commissioners, amongst others, should be tightened.

Our views are detailed in the enclosed Chamber submission. We would be grateful if you could circulate our views to members of the Bills Committee on the Competition Bill.

Thank you very much for your attention on the matter.

Regards,

Alex Fong
CEO

Encl.

Competition Bill : Institutional Arrangements
Comments by the Hong Kong General Chamber of Commerce
25 March 2011

Executive Summary

- The Bill places no upper limit on the size of the Commission, and therefore on its potential cost to the Hong Kong public. Such a limit should be imposed, as in Singapore.

- To decide on the appropriate size, the scope of the Commission's workload needs first to be properly defined. This has not yet been done.

- Under the Bill in its current form, the Commission would be less accountable to the public than competition authorities in other relatively small jurisdictions. Public accountability may need to be strengthened.

- There is no requirement that one Commissioner with expertise in SME matters be appointed, contrary to the Government's previous proposal.

- The Commission's powers of delegation are excessively-wide and need to be narrowed.

- The provisions on removal and resignation of Commissioners need to be tightened.

- The Tribunal is a superior court of record –
    - the rules of evidence and other procedural protections afforded to litigants in the superior courts should apply to ensure fair administration of the law;
    - it should have the power to order costs against the Commission where it is unsuccessful; [1] and
    - there is no justification for the different (more onerous) test for grant of leave to appeal that is currently in the Bill.

[1] Compare clause 94, which allows the Tribunal to make orders against a person who has contravened a competition rule.

- Providing for concurrent jurisdiction of the TA and BA would dilute competition experience in the regulatory agencies and unnecessarily duplicate costs, significantly increasing the regulatory burden in Hong Kong.

Ultimately, the cost and regulatory burden for Hong Kong of the Commission and Tribunal will be heavily dependent on the scope of the competition law. The current draft of the Bill seeks to impose the broadest possible conduct rules, without definition of key terms, without appropriate carve outs for pro-competitive conduct or SMEs with low market shares, and without clarification as to the position regarding mergers. A law of this scope and ambiguity will inevitably place a heavy burden on the Commission, the Tribunal and the appeal courts as people try to seek some clarity through applications for decisions and litigation. The differential in running costs for the Commission and Tribunal under a well drafted, narrow and appropriate form of law (of the sort proposed by the Chamber) and the current proposal in the Bill could be of a magnitude of 10's or 100's of millions of dollars per annum. On a cost per head basis, the cost of running the Canadian competition law model (similar to the one the Chamber is proposing) is about 50 per cent lower than that of Singapore, which runs a EU-type competition regime like the one the Hong Kong government is proposing. Even allowing for factors such as differences in cost of living, economies of scale, etc, a model based on the Canadian approach is clearly both fairer and more efficient than the model the Government is currently proposing. In fact the Canadian Bureau enforces consumer protection legislation as well (unlike the Singapore Commission), so the Canadian consumer gets even more value for money.

The Bill places no upper limit on the size of the Commission (and therefore on its potential cost to the Hong Kong public). Such a limit should be imposed, as in Singapore.

Schedule 5 Paragraph 2(1) states that the Commission is to consist of not less than 5 members. (This contrasts with the minimum of 7 originally proposed in May 2008 – it is not clear why the Government has changed its mind). Unlike Singapore, however, there is currently no *upper* limit in the Bill. Legco should insist that an upper limit will also be set, in order to control the cost to the taxpayer- not just of employing the Commissioners themselves, but also the administrative infrastructure and specialist staff required to support the Commission's work. In Singapore, the Competition Act places an upper limit of **16** on the number of Commission members (and a minimum of 3). However, the upper number which is appropriate for Hong Kong would depend on the scope of the Commission's role, which has not yet been properly defined, as noted below. This should be done as a matter of priority, and certainly before the institutional arrangements are finalized. To do otherwise would be equivalent to deciding the tools for a job, without knowing what the job itself is. This is why the Chamber recommended, in its letter to the Chairman of the Bills Committee of 8 December 2010, that its work plan be changed, so that the institutional arrangements are discussed only after all other relevant matters had been discussed.

To decide on the appropriate size, the scope of the Commission's workload needs first to be properly defined.

Three matters in particular will affect the size and cost of the Commission:

- *Whether the Commission is to have cross- sector merger review powers.* The Administration has stated to Legco on a number of occasions that this will *not* be the case (in line with recommendations of the Competition Policy Review Committee).[2] However, Under-Secretary Greg So has said in private briefings with business groups that the Conduct Rules in the Bill *could* cover mergers. The Bill is currently ambiguous on this issue, and the position could be clarified by a simple amendment to the Conduct Rules excluding mergers from their scope, as in Singapore and Jersey. The Chamber has advocated this previously in its submission to the Bills Committee, and even provided the text of a draft amendment to this effect, but so far the Government has not responded.

- *Whether the wide-sweeping, vague prohibitions in the Conduct Rules are to be altered.* The vague way in which these prohibitions have been drafted, the vague criteria for exclusion, and the potentially severe sanctions for breach, will inevitably mean that many businesses will feel the need to apply to the Commission for clearance for their proposed commercial transactions and conduct, to minimise the risk of breaking the law and incurring sanctions. In fact, the Commission is likely to be inundated with such applications, thereby increasing substantially the cost of

[2] See for example CB(1)320/10-11(02) *Overview of Major Components of the Competition Bill* paragraph 19.

administering the regime. This was certainly the experience in the EU, where the sheer volume of such applications, due to the vague and wide sweeping nature of the prohibition (on which the Hong Kong Bill is currently based), forced the EU to abandon the facility of issuing individual exemption decisions in 2003.

The Administration has said that the facility of the Commission issuing exclusion decisions has been proposed in order to provide legal certainty (thereby effectively conceding that the rules are not sufficiently certain and predictable). However, this objective would not be achieved unless the Commission is *required* (not merely empowered) to respond to such applications, and is fully resourced to do so. This would increase substantially the cost to the Hong Kong public.

As an alternative, the Chamber has put forward proposed amendments to the Conduct Rules which will provide sufficient legal certainty, while minimizing the cost to the taxpayer by reducing substantially the volume of clearance applications to the Commission, and preserving the authorities' ability to stop genuinely harmful conduct. The Chamber's proposal is also consistent with the principle under the rule of law that only clearly-defined conduct should be subject to a statutory prohibition, in contrast to the Bill as it currently stands. So far, the Government has not responded to this proposal. We would welcome the opportunity to provide further detail on our proposal in a presentation to Members of the Bills Committee.

- *Whether standalone private actions are to be permitted, as well as follow-on actions.* The Government itself has recognized that the effect of private standalone actions will mean that more businesses will choose to litigate directly in the Tribunal, rather than make a complaint to the Commission. The Chamber and many other respondents to the Government's consultation have warned that allowing such standalone actions will lead to excessive litigation, thereby jeopardizing the effective administration of justice in Hong Kong. Moreover, in other jurisdictions such as the EU and the UK, standalone actions have only been contemplated after many years of experience of competition laws. Hong Kong should also proceed with similar caution, and only allow follow-on actions for the first few years. While this means that more cases will go to the Commission for possible investigation, the extra burden will be more than compensated for by the resources saved through a clear exclusion of mergers, and vast reduction in the volume of clearance applications, as proposed by the Chamber above.

Under the Bill in its current form, the Commission would be less accountable to the public than competition authorities in other relatively small jurisdictions. Public accountability may need to be strengthened.

Schedule 5 Part 6 of the Bill provides that the Commission must submit annual budgets to the Chief Executive ("CE") for approval. Schedule 5, Part 6 provides that the Commission

must publish an annual report and audited accounts each year, and that the Government's Director of Audit may from time to time conduct an examination into the economy, efficiency and effectiveness with which the Commission has used its resources in performing its functions. These are, in essence, the only requirements placed on the Commission in terms of public accountability.

By contrast, we note that, under the Singapore Competition Act, the Minister for Trade and Industry is entitled to give binding directions to the Commission as to "the policy the Commission is to observe in the exercise of its powers, the performance of its functions and the discharge of its duties".[3] Similarly, in Jersey, the Minister for Economic Development may issue guidance or directions to the competition authority on matters concerning such things as corporate governance, accountability, efficiency and economy of operation, and conflicts of interest.[4] Even in Hong Kong, the Financial Secretary can require the Securities and Futures Commission to provide him with "such information as he specifies on the principles, practices and policy it is pursuing or adopting , or proposes to pursue or adopt, in furthering any of its regulatory objectives or performing any of its functions, and the reasons therefor".[5]

We would recommend that the Government and the Bills Committee should consider seriously inserting in the Bill additional minimal safeguards of this kind, which fully respect the Commission's independence in performing its day-today functions and commercial confidentiality, rather than give the Commission a complete freedom as to how it conducts itself. We believe that such safeguards may be particularly appropriate at the start of a new, untested competition regime.

We also recommend that the provision for the approval of the Commission's budget be strengthened, in two ways.

First, we question whether the CE is the appropriate minister to perform the role of vetting the Commission's expenditure for the forthcoming year, or whether it should be done by the Commission's "sponsoring" minister (Secretary for Economic Development) – who should have a greater day-to-day knowledge of the Commission's work – or the Secretary for Financial Services and the Treasury. We note that in Singapore, it is the Minister for Trade and Industry who is responsible for approving the budget.[6] In Jersey, it is the Minister for Treasury and Resources, on the recommendation of the Minister for Economic Development.[7]

Secondly, we note that the Singapore Competition Act provides that, after the estimates are submitted by the Commission to the Minister:

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[3] Section 8.
[4] Competition Regulatory (Jersey) Law 2001 section 10.
[5] Securities and Futures Ordinance section 12.
[6] Singapore Competition Act section 12.
[7] Competition Regulatory Authority (Jersey) Law 2001 Article 13(3).

"The Minister may approve or disallow any item or portion of any item shown in the estimates, and shall return the estimates as amended by him to the Commission, and the Commission shall be bound thereby."[8]

We believe that an express provision along these lines should be inserted in Schedule 5 paragraph 19. This would have two benefits : (a) to make it clear that approval of the proposed budget is not a *fait accompli* or automatic and (b) to make it clear that the budget must be itemized : broad figures without specifying the estimates on an item-by-item basis are not sufficient.

There is no requirement that one Commissioner with expertise in SME matters be appointed, contrary to the Government's previous proposal.

The Government proposed in its May 2008 Consultation Paper that at least one Commission member should have experience of SME matters. However, Schedule 5 paragraph 2(2) gives the CE only a *discretion* to decide whether this is the case. Paragraph 2(2) should be revised to provide that, in considering the composition of the Commission, the CE shall *ensure* that the Commission members between them have experience and expertise in all of the relevant disciplines identified in Clause 2(2). Under the Singapore Competition Act, Commission members *must* be chosen on the basis of their ability and experience in certain fields.[9] In addition, as regards paragraph 7, in appointing a "suitable person" to fill a vacancy as a member of the Commission, the CE should be subject to the same obligation referred to in relation to paragraph 2(2) above to maintain a balance of the respective disciplines across the Commission.

The Commission's powers of delegation are excessively- wide and need to be narrowed.

We are very concerned about the proposal in Schedule 5 paragraph 28 to allow the Commission to delegate its functions (save for the exceptions in paragraph 29(2)) to a committee, which might not (according to paragraph 28(2)) consist *exclusively* of Commission members. This gives rise to significant risks of leakage of confidential information and conflicts of interests, particularly in a relatively small business environment like Hong Kong. Any committees formed by the Commission should consist exclusively of Commission members. We note that the equivalent provision in Jersey, for example, allows delegation to a committee *"whose member or members are drawn only from the members, officers and employees of the Authority"*.[10] Indeed, depending on the size of the Commission – which depends on the scope and nature of the Bill, as noted above – the Commission itself may be able to handle all material decisions without the need for delegation.

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[8] Section 12(4).
[9] First Schedule, paragraph 1(3).
[10] Competition Regulatory Authority (Jersey) Law 2001 section 9(1)(d).

As regards Schedule 5 paragraph 29(2)(e), we strongly believe that the power to apply for an interim order should be one for the Commission itself to take, and should not be capable of delegation to the CEO, particularly since the CEO is not a member of the Commission. It is a very significant decision whether to institute an application for an interim order, which may cause adverse publicity and disruption to the business concerned, and as such it needs to be subject to the checks and balances of a proper Commission decision. The provisions for decision-taking should be sufficiently flexible for the Commission to make an urgent decision without the need for delegation, particularly if Commission members are employed on a full-time basis.

Paragraph 30 should be deleted for the same reason – in the limited cases where non-material decisions are taken by the CEO, he or she should not have the power to delegate the decision to someone else.

The provisions on removal and resignation of Commissioners need to be tightened.

It is conspicuous that, under Schedule 5 paragraph 5, commission of a criminal offence is not listed as specific reason for disqualification or removal of office (in contrast to Singapore).[11] Moreover, the threshold for removal on grounds of mental incapacity, under paragraph 5(1)(b), is set very high: it should not require a court finding that a person is incapable of managing and administering his or her own property and affairs to justify removal – inability to manage or administer the Commission's affairs should be sufficient. In Singapore and Jersey the threshold is triggered merely when a Commission member is "incapacitated by physical or mental illness".[12]

As regards resignations, we note from Schedule 5 paragraphs 4 and 8 that no minimum notice period is specified for the resignation of a member of the Commission, including a Chairperson. This contrasts with Singapore, where the minimum period notice is specified to be one month.[13]. A minimum period of notice must be specified, to avoid undue disruption to the work of the Commission.

The Tribunal is a superior court of record.

(a) The rules of evidence and other procedural protections afforded to litigants in the superior courts should apply to ensure fair administration of the law

Clause 146 of the Bill provides that the Tribunal is not bound by the normal rules of evidence which apply in court proceedings, unless the Commission is seeking a penalty

[11] Singapore Competition Act, First Schedule paragraph 10(b).
[12] Singapore Competition Act, First Schedule paragraph 10(c); Competition Regulatory Authority (Jersey) Law 2001 section 4(4)(d).
[13] First Schedule paragraph 4.

order. However, competition cases involve very high value and strategically important issues. The Tribunal also has the power to make potentially serious and far reaching orders where a contravention is established, even where no penalty is involved. The very profound impact that such decisions could have on peoples' private property rights, the ability to hold directorships and the workings of the markets in Hong Kong demonstrate the need for the protections that are usually afforded to litigants in the superior courts to also be available in competition cases. As the Law Society observed in its submission to the Bills Committee "[t]here would need to be a strong and compelling reason advanced to justify departing from the normal rules that ensure fairness and justice to parties to legal proceedings before the courts in Hong Kong".[14]

(b) It should have the power to order costs against the Commission where it is unsuccessful

Clause 94 of the Bill provides that the Tribunal can make orders against persons who are found to have contravened a competition rule that they must pay the Commission's costs. The Tribunal should have the same power to make costs orders against the Commission where it fails to establish its case. This is the position in the Superior Courts of Hong Kong at present and under the existing sectoral competition regimes in broadcasting and telecommunications. It would be quite exceptional for a successful party not to be entitled to costs in Hong Kong, and the potentially enormous costs associated with defending competition cases means that parties could, even if successful, suffer considerable detriment having to foot the full legal costs of their defence. The potential for adverse costs orders is also a necessary discipline on the Commission.

(c) There is no justification for the different (more onerous) test for grant of leave to appeal that is currently in the Bill.

Clause 153(3) states that leave to appeal is *not* to be granted unless the appeal has a "reasonable prospect of success" (or unless there is some other reason in the interests of justice as to why the appeal should be heard). This is considerably more stringent than the existing leave requirement in the High Court – i.e. leave *is* to be granted unless the appeal has "no realistic prospects of success". Given the complexity and importance of competition issues and the potential ramifications of a finding of contravention (see above), parties should be entitled to the usual protections afforded by the appeal process. There are compelling arguments that there should be no leave requirement as this will just add cost and time to proceedings. If there is to be a leave requirement, this should be in the same terms as the existing requirement.

[14] *Law Society's Comments: Major Issues on the Competition Bill*, 23 November 2010.

Providing for concurrent jurisdiction of the TA and BA would dilute competition experience in the regulatory agencies and unnecessarily duplicate costs, significantly increasing the regulatory burden in Hong Kong.

As a small market, Hong Kong will want to make the most efficient use of any available regulatory skills and experience, consistent with Hong Kong's focus on ensuring minimal and efficient regulation. The telecommunications and broadcasting sectors have been liberalized and, with *ex ante* regulation being wound back in those sectors, there is no pressing need for maintenance of separate competition regulators in those sectors. The cost of running a competition agency with the broad and discretionary powers being proposed will be very significant and it would also lead to any available competition regulatory skills being spread thinly. This could cause poorer quality enforcement. Multiple regulators also increase the risk of jurisdictional contests and divergent decisions which will require expensive litigation to obtain clarification at the appeal level.