

Submission on Competition Bill
By the Hong Kong General Chamber of Commerce

Introduction

The Hong Kong General Chamber of Commerce (“HKGCC”) has consistently supported the Government’s proposal to introduce a competition law in Hong Kong, provided that it is tailored to Hong Kong’s particular circumstances and is sufficiently clear for businesses to comply. We have provided many constructive suggestions for amendment to the Government and the Bills Committee, with these two conditions in mind. As LegCo appears to be entering the final stage of its deliberation on the Bill, the HKGCC would like to reiterate six of our most fundamental concerns with the Bill, as currently drafted.

Objective of Bill

2. The objective of the Bill – “overall economic efficiency” – is clearly stated for mergers (Schedule 7 paragraph 8(1), but is framed in different and unclear terms for the First Conduct Rule (Schedule 1 paragraph 1), and is completely missing from the Second Conduct Rule. It is crucially important that the objective is the same and consistent for all commercial arrangements and conduct. The same efficiency exclusion for mergers- in Schedule 7 paragraph 8(1)- should therefore replace the current wording in Schedule 1 paragraph 1, and be inserted into the Second Conduct Rule.

“SLC test” as Threshold

3. The threshold test for the application of the law should be the effect or likely effect of substantially lessening competition (“SLC test”), not the object or effect of preventing, restricting or distorting competition (“PRDC test”). Indeed, “object” is an unclear concept and has proved problematic in the EU case law. It should be deleted and replaced with “likely effect” (of SLC) which is far clearer as it states in unambiguous terms that the focus should be on the effect or likely effect of the conduct.

4. The SLC test is recognised internationally as the appropriate one, and is used in practice even by the EU Commission itself. By contrast, the PRDC test is recognised as outdated, overly intrusive, and unclear. The SLC test is included in the Bill in respect of mergers (Schedule 7 paragraph 3) and there is no valid reason why it should not also be used for the Conduct Rules.

5. The Administration has stated that an advantage of using the PRDC test is that the EU case law can be used for guidance – but this overlooks the fact that the EU case law is unclear, and in any event there is an abundance of overseas case law interpreting the SLC test which is much clearer. One EU expert has this to say about the PRDC test: “the case law is very opaque, and recent cases often restate bland pronouncements from earlier cases without adding any substance to them.”¹ The HKGCC thus urges the Government not to import this uncertainty into Hong Kong’s competition law.

6. In addition, the proposed threshold of HK\$11 million under the de minimis arrangement is too low to exclude the majority of SMEs (which do not have the ability to substantially lessen competition) from being regulated by the Bill. Accordingly, the Government should raise this threshold.

“Dominant Position”

7. Thirdly, the term “dominant position” should replace “substantial degree of market power” in the Second Conduct Rule because it is clearer and more appropriate for a small open economy like Hong Kong.

8. It is clearer because it is the term used in competition laws such as those of the UK and Singapore, which the Government has drawn guidance from in the drafting of the current Bill. As a matter of fact, the Government itself has repeatedly emphasised the importance of being able to draw on precedent from similar jurisdictions overseas to aid in interpretation and to give business more certainty as to the potential scope of the law in Hong Kong.

¹ G Monti *EC Competition Law* Cambridge University Press 2007 p 31.

9. For a small open economy like Hong Kong, higher market concentrations are a natural aspect of such economies and this is the reason behind Singapore setting its presumption of dominance at 60%. The Government has pointed to the high market concentrations in a number of sectors in Hong Kong as a reason for trying to lower the threshold at which the Competition Commission would intervene, which ignores the natural aspect of these higher market concentrations. Attempts to attack such natural market concentrations will simply undermine Hong Kong's efficiency and necessary economies of scale to the detriment of consumers. It may also expose SMEs to potential attack where they do not have sufficient market power to substantially lessen competition.

Replacing "Abuse" by Clearer Test

10. The word "abuse" in the Second Conduct Rule should be removed. The EU case law on "abuse" is notoriously unclear, with one expert commentator going as far as to state that the term "does not encapsulate a normative concept capable of satisfying the basic requirements of the rule of law and legal certainty".² Again, with the rule of law being a strong attraction to doing business in Hong Kong, we strongly recommend the Government against importing this uncertainty. The HKGCC's recommendation is that "abuse" should be replaced by a clearer test which defines more accurately the circumstances in which unilateral conduct may be harmful, namely where it substantially lessens (or is likely to lessen) competition by foreclosing competition and where there is no other economic rationale for the conduct. The HKGCC has already provided the Administration with draft wording to this effect. (See Annex)

² R O'Donoghue and AJ Padilla *The Law and Economics of Article 82 EC* Hart Publishing 2006 p 176.

Carving out Vertical Agreements

11. Vertical agreements should be carved out from the Bill. Given vertical agreements only affecting competition if there is dominance and significant market power being addressed under the Second Conduct Rule, it is clear that vertical agreements are pro-competitive and the regulatory burden and uncertainty imposed on businesses by exposing such agreements to potential attack under the law is very significant and not outweighed by any obvious benefit. A mechanism to apply the law to specified vertical agreements (similar to that found in the Singapore Act) could be considered, if there is a need to ensure that there is power to address certain vertical arrangements where experience of the law going forward demonstrates potential concerns that cannot be foreseen at this point. Such an approach would also be consistent with the UK's approach to vertical agreements before it was required to bring its competition law more in line with the (far less straightforward) approach to vertical agreements adopted in the EU competition law.

Enforcement

12. The Government should consider further amendment to the enforcement provisions. Penalties should be linked to the relevant goods or services in Hong Kong. This is consistent with the Guidelines in both the EU and Singapore. Other relief powers should be kept within reasonable bounds. For example, Schedule 3 presently provides that directions may be made requiring the profit gained or loss avoided by any person as a result of a contravention to be paid to the Government and also provides for orders as to damages. These provisions appear duplicative and potentially punitive in nature if applied in parallel against an undertaking. In addition, the law should not open up structural relief, given the Government's stated objective of not using the law to effect structural changes to the market.

Other Issues

13. It is important to note that none of the six changes listed above would require substantial re-drafting: they involve simple and straightforward amendments to the wording in the Bill. They would not therefore jeopardise the Government's objective to have the Bill passed into law by July this year. To illustrate this, the amendments to the relevant clauses are shown in the Annex.

14. While we have made many other suggestions for improvement of the Bill (which likewise involve straightforward drafting amendments), adopting at least the changes above would go a long way to ensuring that the Bill is not only internally consistent and in line with international best practice, but will be welcomed by this Chamber, which means the business community in general. Not to do so would be a regrettable missed opportunity.

15. Apart from the above six amendments, there are other issues that the Government should reconsider. For instance, the Chamber's members in the telecommunications sector are unconvinced that an effectively harsher "sector-specific Second Conduct Rule" for the telecommunications sector, as proposed in one of the consequential amendments (the so-called s7(Q) amendment), is justified. Concerns about concurrent jurisdiction for the telecommunications and broadcasting sectors remain unaddressed as well.³

³ The proposed s7Q to the Telecommunications Ordinance (in Schedule 8, Part 4 of the Bill), as one of the consequential and related amendments, will effectively create a "second or harsher second conduct rule" for the telecommunications industry, which is seen as discriminatory against the sector. On the other hand, the proposed concurrent jurisdiction (Part 11 of the Bill) of the Telecommunications Authority and Broadcasting Authority would – as the Chamber argued in its previous submission, dilute competition experience in the regulatory agencies and unnecessarily duplicate costs, significantly increasing the regulatory burden. For example, the two separate appeal procedures, where s7Q cases go to the Appeal Board and Second Conduct Rule cases to the Competition Tribunal, will likely lead to inconsistencies in judgments and increase in costs, as an abuse of dominant position complaint could easily carry both s7Q and Second Conduct Rule allegations.

Ancillary Restraints

16. A final point that we would raise is in relation to mergers, which has not previously been flagged to our knowledge. At present, the carve-out, which appears to follow the wording used in Singapore's Competition Act, only picks up the first limb of the carve-out (carving out the agreement or conduct that results in the merger).⁴ The proposed drafting for Hong Kong's law does not appear to pick up the second limb of the carve-out, relating to ancillary restraints. It needs to be made clear in the drafting that ancillary restrictions related and necessary to the implementation of a merger are also protected from attack under the Conduct Rules, failing which, the effectiveness of the proposed merger carve-out will be substantially undermined. An example of an ancillary restraint would be where two companies merge their businesses into a jointly-owned company, and agree not to compete with that company. These restrictions are a common, and commercially necessary, feature of such transactions, and regarded as acceptable under competition law.

17. We would suggest (drawing on cl. 10 of the Third Schedule to Singapore's Competition Act) the following amendments to the proposed carve-out in Hong Kong's Competition Bill to bring the carve-out in line with the international best practice approach to ancillary restraints and the Government's stated policy objective:

SCHEDULE 1 [ss. 9, 15, 24, 30

& 36]

GENERAL EXCLUSIONS FROM CONDUCT RULES

4. Mergers

(1) To the extent to which an agreement (either on its own or when taken together with another agreement) results in, or if carried out would result in, a merger, the first conduct rule does not apply to the agreement.

(2) To the extent to which conduct (either on its own or when taken together with other conduct) results in, or if engaged in would result in, a merger, the second conduct rule does not apply to the conduct.

⁴ See the Third Schedule to the Singapore Competition Act (Cap 50B).

(3) The First and Second Conduct Rules shall not apply to any agreement or conduct that is directly related and necessary to the implementation of a merger.

18. We remain willing to work with the Government and the Bills Committee in seeking to ensure that Hong Kong has a competition law which is genuinely “fit for purpose”.

Objective of Bill

Insert a new clause on efficiency exclusion (as in Schedule 7 paragraph 8(1)) into the Second Conduct Rule (Division 2, Subdivision 1, paragraph 21):

Subsection (1) does not apply where the substantial lessening of competition arises only from the superior competitive performance of the relevant undertaking.

Replace the current wordings in Schedule 1 paragraph 1 by relevant ones in Schedule 7 paragraph 8(1))

SCHEDULE 1

General Exclusions from Conduct Rules

1. **Conduct** enhancing overall economic efficiency

(1) The first conduct rule does not apply to any agreement as to which the economic efficiencies that arise or may arise from the agreement outweigh the adverse effects caused by any lessening of competition in Hong Kong.

(2) The second conduct rule does not apply to any conduct as to which the economic efficiencies that arise or may arise from the conduct outweigh the adverse effects caused by any lessening of competition in Hong Kong.

“SLC Test” as Threshold

Proposed Amendment for First Conduct Rule:

PART 2

The Conduct Rules

Division 1—Agreements etc.

格式化: 置中

删除: Agreements

删除: that—
(a) . contributes

删除: —
(i) . improving production or distribution; or
(ii) . promoting technical or

删除: progress; and

删除: (b) .

删除: impose on the undertakings concerned restrictions

删除: are not indispensable to the attainment of the objectives stated in paragraph (a); and
(c) . does not afford the undertakings concerned

删除: possibility

删除: eliminating

删除: respect of a substantial part of the goods or services in question.

格式化: 置中

删除: Preventing, Restricting or Distorting

Substantially Lessening Competition

Subdivision 1—First Conduct Rule

6. Prohibition of anti-competitive agreements, concerted practices and decisions

(1) An undertaking must not—

(a) ~~give effect to an agreement;~~

(b) engage in a concerted practice; or

(c) as a member of an association of undertakings, ~~give effect to a decision of the association;~~

to do any of the things specified in subsection (2), if the effect or likely effect of the agreement, concerted practice or decision is to substantially lessen competition in Hong Kong.

(2) Subsection (1) ~~shall apply to agreements, concerted practices and decisions between two or more actually or potentially competing undertakings to directly or indirectly—~~

(a) ~~increase, maintain, or prevent the reduction of selling prices;~~

(b) ~~subvert competitive tendering or procurement processes; or~~

(c) ~~share geographical markets or customers;~~

with the effect or likely effect of substantially lessening competition in Hong Kong.

Proposed Amendment for Second Conduct Rule:

Division 2—Unilateral Conduct Substantially Lessening Competition

Subdivision 1—Second Conduct Rule

21. Prohibition of anti-competitive unilateral conduct

(1) ~~Where an~~ undertaking has a dominant position in a market:

(a) 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 an order prohibiting conduct of that undertaking which it has reasonable cause to believe is having the effect or likely effect of substantially lessening competition in Hong Kong;

(b) If the Tribunal is satisfied, on application by the Commission under subsection (a), that the effect or likely effect of the conduct is to substantially lessen competition in

删除: make or

删除: make or

删除: , if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

删除: applies in particular

删除: that—
(a) .

删除: fix purchase or

删除: or any other trading conditions;

删除: (b) . limit or control production, markets, technical development or investment; or .

格式化: 字型: 斜體

格式化: 字型: 斜體

删除: sources

删除: supply

格式化: 置中

删除: Abuse of Market Power

删除: An

删除: that

删除: substantial degree of market power

删除: must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of

Hong Kong by foreclosing competition where there is no other economic rationale for this conduct, the Tribunal may make an order that the undertaking engaging in the conduct shall not continue to give effect to the conduct or any part of the conduct as from the date of the Tribunal's determination or, where considered appropriate, some future date;

删除:

“Dominant Position”

As in (2) “Proposed Amendment for Second Conduct Rule” above

Replacing “Abuse” by Clearer Test

Division 2, Subdivision 1, paragraph 21:

(1)(b) If the Tribunal is satisfied, on application by the Commission under subsection (a), that the effect or likely effect of the conduct is to substantially lessen competition in Hong Kong by foreclosing competition where there is no other economic rationale for this conduct, the Tribunal may make an order that the undertaking engaging in the conduct shall not continue to give effect to the conduct or any part of the conduct as from the date of the Tribunal's determination or, where considered appropriate, some future date;

删除:

Carving Out Vertical Agreement

A new paragraph 4 is suggested for Schedule 1:

(4) Vertical agreements

The first conduct rule does not apply to any vertical agreement, other than such vertical agreement as the Chief Executive in Council may by order published in the Gazette specify.

Relief Powers

SCHEDULE 3

格式化: 置中

Orders that may be Made by Tribunal in Relation to Contraventions of Conduct Rules

删除: Competition

1. Orders

The Tribunal may make the following orders with respect to a contravention of the conduct rules—

- (a) a declaration that a person has contravened a conduct rule;
- (b) an order restraining or prohibiting a person from engaging in any conduct that constitutes the contravention or the person's involvement in the contravention;
- (c) an order requiring a person who has contravened a conduct rule or been involved in the contravention to do any act or thing for the purpose of restoring the parties to any transaction to the position in which they were before the transaction was entered into;
- (d) an order prohibiting a person from making or giving effect to an agreement;
- (e) an order requiring the parties to an agreement (the making or giving effect to which constitutes the contravention of the conduct rules) to modify or terminate that agreement;
- (f) an order declaring any agreement (the making or giving effect to which constitutes the contravention of the conduct rules) to be void or voidable to the extent specified in the order;
- (g) an order prohibiting the withholding from any person of—
 - (i) any goods or services; or
 - (ii) any orders for any such goods or services;
- (h) an order prohibiting requiring as a condition of the supply of goods or services to any person—
 - (i) the buying of any goods or services;
 - (ii) the making of any payment in respect of goods or services other than the goods or services supplied; or
- (i) an order requiring that any person or class of person be given access to goods, facilities or services specified in the order on the terms specified in the order;
- (j) an order requiring that any person or class of person be given the right to use goods, facilities or services specified in the order on the terms specified in the order;
- (k) for the purpose of securing compliance with any other order made under this section, an order requiring any person who has contravened or been involved in the contravention to do or refrain from doing anything specified in the order.

~~删除~~: competition

~~删除~~: competition

~~删除~~: competition

~~删除~~: , including the taking of steps

~~删除~~: restraining or prohibiting a person from acquiring, disposing of or otherwise dealing with any property specified in the order; .
 (e) . an order requiring a person to dispose of such operations, assets or shares of any undertaking specified in the order, in the manner specified in the order; .
 (f) . an order appointing a person to administer the property of another person; .
 (g) . an order

~~删除~~: .
 (h)

~~删除~~: competition

~~删除~~: i

~~删除~~: competition

~~删除~~: j

~~删除~~: (k) . an order requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention; .
 (l)

~~删除~~: (iii) . the doing of any other similar thing or the refraining from doing of anything mentioned in subparagraph (i) or (ii) or any other similar thing; .
 (m) . an order prohibiting a person from exercising any right to vote that is exercisable by virtue of the holding of any shares, stock or securities; .
 (n)

~~删除~~: o

~~删除~~: (p) . an order requiring any person to pay to the Government or to any other specified person, as the Tribunal considers appropriate, an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention; or
 (q)