THE LAW SOCIETY OF HONG KONG 香港律師會

Law Society's Submissions
Competition Bill

Introduction

In order to consider the Bill, the Law Society formed a committee of practitioners with experience or relevant interest in competition law regimes. It has considered the Bill both from the point of view of drafting and policy. As a general comment, it is noted that the Bill has been drafted in some detail, but also envisages guidelines being issued to clarify the practical scope of certain provisions. Without knowledge of the drafting instructions, it is often difficult to tell whether the Bill achieves its objects in so far as particular sections may have been drafted:

1. deliberately to follow drafting instructions;
2. simply to follow international precedents; or
3. in order to cover every eventuality.

This makes it very difficult to comment objectively on the Bill. Our comments thus in part seek clarity of purpose (whether in terms of drafting or policy) or in some cases propose alternative approaches, based on international precedents and domestic realities. These proposals are not necessarily shared by all members of the Law Society, but they do reflect a majority view of the Law Society and the Competition Law Committee, namely to have a competition law which is effective, clear and applicable to all. As against this must be balanced:

1. the concerns of those who fear that business freedoms may be eroded by having a law that is too complex or wide ranging;
2. the concerns of those who fear that a limited and weak competition law will serve no useful purpose and will merely waste taxpayer resources.

It seems that there is a general lack of understanding of competition law by the public in Hong Kong. We are concerned that the considerable resources being put into reviewing the complexities of the Bill would be wasted if it could not eventually be passed due to the concerns being expressed about current drafting or an insufficient understanding of its economic importance to Hong Kong. Even though many businesses involved in international trade, including business with mainland China are already subjected to competition law in other jurisdictions, there appears to be perception (in particular by SMEs) that the Bill will fundamentally affect their business practices. Thus, an important stage in achieving the introduction of a competition law is to respond to the concerns that are being expressed and to provide comprehensive education as to its purpose, manner of execution and practical effect.

Part 1 Preliminary

1. Short title and commencement

1.1 Object of the law

It is noted that the Bill has been drafted in some detail, but also envisages guidelines being issued to clarify the practical scope of certain provisions. Since competition law has evolved differently in different jurisdictions, it is not at present clear how a generally drafted law will be interpreted in practice in Hong Kong. We consider it important to have a competition law which is effective, clear and applicable to all.

We therefore propose that:

1. A definition of "*competition*" be included, otherwise, the concept is open to a number of different interpretations. The focus should be on workable competition (rather than the unrealistic notion of perfect or textbook competition), which would need to be assessed in the context of any given industry being scrutinized by the Competition Commission (Commission) and/or Competition Tribunal (Tribunal); and

2. Given the potentially ambiguous nature of the conduct rules, we consider that it would be useful for the Ordinance to contain a concise object, which may guide and assist the Commission and Tribunal in giving effect to the law. We would suggest:

> "*The object of this law is to promote economic efficiency in Hong Kong in the medium to long term in markets within Hong Kong and independent rivalry between competitors for the benefit of Hong Kong society by prohibiting conduct and mergers that inhibit or substantially lessen competition.*"

2. Interpretation

2.1 Definition of "undertaking"

It is noted that the definition is very wide as it covers any "*entity.... engaged in economic activity and includes a natural person engaged in economic activity*". It theoretically covers everyone running or connected to a business, including employees[1].

2.2 Whilst it may in practice be appropriate to have a wide definition for the purposes of the second conduct rule (which at least requires substantial market power), it should be made clear how far the first conduct rule is meant to apply to all businesses regardless of structure or size, such as SME's, sole practitioners, employees or other staff and the many small family businesses in Hong Kong, since the widely drafted meaning of "undertaking" catches them all. Such clarity is particularly necessary after the Government's indication during consultation that the competition law would not impose too heavy a burden on SME's.

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[1] In *Jean Claude Becu*, Case C-22/98 [1999] ECR I-5665, in the absence of a definition of undertaking, workers in employment were excluded.

2.3 Unlike under the European law (which does not define "undertaking") anti-competitive conduct as defined in the Bill relates not only to agreements, etc "*between undertakings*" but also to any "*undertaking*" giving effect to agreements, etc. The latter (i.e. agreements) are also very widely defined to include unenforceable promises and understandings.

2.4 Further, in view of the potentially wide scope of unlawful activity, it is not clear whether agreements between two or more people comprising a single economic unit (e.g. parent and wholly-owned subsidiary) are to be caught, or are outside the scope of the first conduct rule because they comprise a single undertaking.

2.5 In some overseas jurisdictions such as the UK[2], EU[3] and Singapore[4], entities which form a single economic unit will be deemed to comprise only one undertaking for the purpose of the competition rules. According to the single economic unit doctrine, agreements between a parent company and its subsidiary, or between two companies which are under the common control of a third company will not be agreements between undertakings if the subsidiary concerned has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence[5]. This in turn has an impact on the amount of penalty imposed based on the turnover of the "*undertaking concerned*" under clause 91(3).

Some of the factors that may be considered in assessing whether a subsidiary is independent of or forms part of the same economic unit with its parent include: (a) the parent's shareholding in the subsidiary; (b) whether or not the parent has control of the board of directors of the subsidiary; and (c) whether the subsidiary complies with the directions of the parent on sales and marketing activities and investment matters.

2.6 In other jurisdictions for example, in the UK and the EU, the competition rules apply to all economic operators, including small businesses, but in a number of instances, the rules will include a materiality test or a "*de minimis*" exemption or there will be a block exemption which will apply to operators which have market shares below a

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[2] According to the guidelines on "Agreements and concerted practices" issued by the Office of Fair Trading ("OFT") of the UK, the prohibition under article 81 of the Treaty establishing the European Community ("EC Treaty") and Chapter I of the UK Competition Act 1998 of the UK (equivalent to the first conduct rule under the Competition Bill) do not apply to agreements where there is only one undertaking, that is, between entities which form a single economic unit.

[3] See *J R Geigy v. Commission* [1972] ECR 787 (decided by the European Court of Justice on 14 July 1972), *Instituto Chemioterapico SpA & Commercial Solvents Corp v. Commission* [1974] ECR 223 (decided by the European Court of Justice on 6 March 1974) and *Metsa-Serla Oyj & Ors v. Commission* [2000] ECR I - 10065 (decided by the European Court of Justice on 16 November 2000). The single economic entity doctrine has also been invoked in the merger clearance context, see *Group Vilar Mir/EnBW* OJ L 48 (decided by the European Court of Justice on 16 November 2000).

[4] According to the "CCS Guidelines on the Section 34 Prohibition", the same single economic unit doctrine applies to the section 34 prohibition (equivalent to the first conduct rule under the Competition Bill). The rationale was followed by the decision by the Competition Commission of Singapore ("CCS") on Notification by Qantas Airways and Orangestar Investment Holdings of their Co-Operation Agreement: CCS 400/003/06.

[5] 22/71 Beguelin Import v GL Import Export [1971] ECR 949, [1972] CMLR 81

certain threshold. The effect of such provisions will be to exclude small businesses from the application of the rules in many cases.

3. Application to statutory bodies

3.1 There is no apparent reason why statutory bodies that are engaging in economic activity should have a *prima facie* exclusion or why parties potentially affected by exclusion of statutory bodies should be denied the opportunity to be heard on whether an exclusion should be granted.

3.1.2 A similar exemption provision for statutory bodies can be found in the Singapore Competition Act. However, it was noted in Singapore that such exemptions would be reviewed (although six years on this review has still not been conducted) and Hong Kong's Legislative Council Secretariat Research and Library Services Division notes that these broad exclusions from Singapore's Competition Act have been criticised for creating an *uneven* playing field for businesses.[6]

3.1.3 Other jurisdictions such as the UK and EU have opted to omit such a general and broad exemption in legislation but focused on analysing the general provisions. For example, the European Court of Justice in the FENIN case (Case C-205/03 P, [2006] ECR I-6295) held that the public bodies would be caught under the rules if they act as "undertakings" and are undertaken for an "economic purpose". Under the Bill, the rules are only potentially applicable to undertakings that engage in economic activity. On interpretation, this means that the rules would, if applied to statutory bodies, only apply to them insofar as they were carrying out economic activities.

3.1.4 There are hundreds of statutory bodies in Hong Kong which operate economic activities. Such broad exemption of statutory bodies as it is currently proposed will create an uneven playing field between the government and private sectors, and have an impact on the economic efficiency of specific markets, in particular where the statutory bodies are in direct competition with private entities or have crowded out or prevented competition from the private sector. Furthermore, given that Hong Kong is a capitalist economy which has hitherto focused on minimal and efficient government, it seems less appropriate for us to have such broad exemptions, and particularly when other economies which are mixed market economies with a high degree of government involvement do not have any exemption for their government bodies. Another concern is that the general exemption may draw attention away from whether the bodies that would enjoy the exemption are truly providing public services.

3.1.5 The EU, the UK, Australia, New Zealand, Japan and many other economies, with some qualifications in certain circumstances, generally subject statutory bodies that are engaging in economic activity to their competition laws. Two obvious exceptions to this are the US and Singapore. As the Research and Library Services Division Legislative Council Secretariat report of 25 June 2010 (RP02/09-10) observes, however:

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6. Jacky Wu of Research and Library Services Division Legislative Council Secretariat, *Competition polices in selected jurisdictions*, 25 June 2010, page 96, para 6.2.15.12.

1. as to the United States: "In any event, federal government departments and agencies seldom engage in commercial activities"; and

2. as to Singapore: "Government departments and statutory bodies are exempted from the competition law. However, there are concerns that such arrangements may create an unfair playing field for businesses. Examples are Government linked corporations."

3.1.6 For the above reasons, whilst we agree on having exemptions for certain statutory bodies, a general blanket exemption involves risks of abuse as many statutory bodies are likely to fall within the current definition. Certainty as to which statutory bodies are covered is desirable so that the extent of the exemption is known. Rather than exempting all statutory bodies from the conduct rules (with regulations used to "opt-in" those that are engaging in economic activities), it would be preferable to have an agreed list of statutory bodies which are wholly or partly exempt from the conduct rules annexed to the Bill. There may be a provision for other statutory bodies to apply to the Commission for exemption from certain aspects of their activities if they consider there to be some justification for this, with affected parties having the right to be heard.

3.2 The reference in Clause 3(1)(d) to Schedule 7 (Mergers) should only be applicable to mergers where all the parties to the transaction are statutory bodies which are exempted bearing in mind our comments in 3.1.6.

4. Application to specified persons and persons engaged in specified activities

4.1 It is not clear from either clause 4 or clause 5(1)(b) what activities it is proposed would be excluded under the specified persons and activities provisions. This needs to be clarified before we can provide meaningful comment. Otherwise, see comments below re clause 5.

5. Regulations

5.1 We consider that exemptions from the conduct rules under clauses 5(1)(a)/5(2) should apply only to any activities of statutory bodies insofar as they do not constitute "*economic activity*".

5.2 We note our comments at clause 3 above as to the need to ensure that statutory bodies engaged in economic activities are not excluded from application of the law.

5.3 As noted above, our preference is for "*opt-out*" rather than "*opt-in*" of statutory bodies. However the current drafting of clause 5(1) is, in any event, rather confusing. Also, we consider that the power to opt-out for *other* persons in clause 5(1)(b) is too broad. We note the similarly broad power of the Chief Executive in Council's under clause 31 to exempt (by order in the Gazette) a specified agreement or conduct where there are exceptional and compelling reasons of public policy for doing so. The same criteria should apply to the exemption under clause 5(1)(b) and should only be exercised after consultation with the Competition Commission (c.f. clause 31, and our comments on that clause). We also agree that since the present clause relates to specific bodies and persons it is appropriate that the power be exercised by regulation rather than by an order published in the Gazette.

Noting with respect to clause 5 that our general preference with regard to statutory bodies is, instead, for the approach outlined in 3.1.6 above and 5.6 below, we recommend the changes which have been underlined:

> "(1) The Chief Executive in Council may, by regulation -
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> (a) specify that the provisions referred to in section 3(1) shall apply to-
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> (i) any statutory body that is engaged in an economic activity; and
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> (ii) any statutory body, to the extent that it is engaged in any activity specified in the regulations; and
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> (b) if, following consultation with and written advice from the Competition Commission, he is satisfied that there are exceptional and compelling reasons of public policy for doing so, specify that the provisions referred to in section 3(1) shall not apply to (or shall not apply in part) to -
>
> (i) any person who is engaged in an economic activity; or
>
> (ii) any person, to the extent that the person is engaged in an economic activity specified in the regulation."

5.4 It is submitted that the additional references to "engaged in an economic activity" are required here to make clear that the powers of the Chief Executive in Council are predicated on the statutory body or the relevant person being engaged in an economic activity. It should not be possible for the Chief Executive in Council to make a regulation in respect of a statutory body which provides a public service under a public service obligation even if that service is in competition with private operation, unless the public service in question can be considered to be "an economic activity". This is implied by other provisions, but we think that it should be made clear in this provision.

5.5 The interpretation of this provision turns largely around the concept of "*economic activity*". This term is not defined anywhere in the Bill. In our view, this is a serious omission. We think that a definition could be inserted into clause 2, "Interpretation" along the following lines:

> "economic activity" means "the provision of goods or services by any person or persons or entity with the intention or object of making profits out of the provision of such goods or services for the relevant person or persons or for the proprietor, shareholders, owners or other persons or entities which control the entity providing such goods or services."

5.6 Further, and importantly, the use of the word '*may*' in the first line of clause 5(1) gives the Chief Executive in Council a discretion as to whether to subject statutory bodies falling within the criteria in clause 5(2) to the competition law. For reasons stated above, we do not believe there should be such discretion where the criteria in clause 5(2) are met. It should also not be necessary to satisfy each of the conditions in clause 5(2) for a statutory body to be prima facie subject to the competition law.

The starting point should be that any statutory body engaging in economic activity is subject to the law, but that if a statutory body considers that one or more of the criteria in clause 5(2)(b) to (d) can be made out, then it can apply to the Commission for an appropriate exclusion. Interested parties (including those who might compete with, or potentially be suffering from anticompetitive conduct of the statutory body) should be entitled to be heard. If these decisions are to be made by the Chief Executive in Council, they should at least be amenable to judicial review by affected parties. Any exclusion should be subject to appropriate conditions and limitations (as is the case for private undertakings that seek decisions from the Commission) which should include appropriate sunset clauses. The market, functions and/or scope of activity of statutory bodies may change such that any exclusion should be reviewed from time to time to ensure they are still appropriate.

5.7 If, despite what is said above, the current drafting of clauses 3 and 5 is retained, at the very least, the Government should be called on to place the regulations before the Bills Committee now so that the Bills Committee and Legco more generally can assess the scope of exclusions being proposed. This is necessary in order for Legco to be able to form a view as to whether and to what extent the proposed law is likely to reach and address competition issues in Hong Kong. As noted above, the lack of clarity as to the specified persons/activity exclusion (clauses 4 and 5(1)(b)) is such that it is not possible to provide any meaningful comment on that at present.

Part 2 - The Conduct Rules

Division 1 – Agreements etc. Preventing, Restricting or Distorting Competition

Subdivision 1 – First Conduct Rule

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

6.1 Certainty is obviously an essential element of any law in Hong Kong, particularly where it could have very serious financial or other ramifications. Experience implementing similar competition laws in overseas jurisdictions shows that while some conduct (bid-rigging, cartels/price-fixing and market sharing) is relatively certain, other conduct that might be caught (such as vertical agreements, bundling, discrimination and abuse of dominance/market power) is far less certain. This is no doubt why it was initially proposed that the competition law for Hong Kong would target specified hard core conduct such as price-fixing, bid-rigging and market sharing. .

6.1.2 Canada (which has the oldest competition law) has recently made significant amendments to address this issue, only applying serious penalties to the more certain types of conduct. We query whether Government has considered if such an approach might be desirable for Hong Kong. This could be achieved in the Bill by making minor amendments to retain the prohibition for hard core conduct from the time it occurs but making it clear that other conduct (which parties might quite legitimately not realize the potential anticompetitive implications of) only be prohibited from the time it is declared to be anticompetitive, or that such uncertain conduct be subject to lesser penalties/relief provisions.

6.1.3 The first conduct rule also does not make it clear whether vertical agreements will have a general exclusion. The position regarding vertical agreements should be made clear in the drafting of the conduct rule, rather than being left to the discretion of the Commission and/or Tribunal.

6.1.4 We are of the view that the Bill needs to be clearer that efficiency gains need to be balanced against any lessening of competition. The Canada Competition Act has been amended earlier this year to the effect that except "*hardcore*" agreements e.g. price-fixing cartels, and market sharing), the anti-competitive agreements are no longer automatically prohibited and are subject to a new provision – section 90(1) – whereby they can be reviewed by the Commission and ultimately be subject to an order by the Tribunal either prohibiting any person from doing anything under the agreement or requiring any person to take any other action.

6.1.5 There is also an efficiency exception in section 90(4) of the Competition Act as follows:

> "*The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made*".

With these introductory remarks, we make the following further points as to the drafting of the clause:

6.1.6 The current drafting allows for an effects-based approach to interpretation and provides for more flexibility ((but ultimately also far more discretion in the Commission and Tribunal as to how the provisions will be interpreted) when assessing whether a particular agreement or type of conduct is prohibited under the rules. As we proposed in our February 2007 submissions, a pragmatic purpose based approach, on the other hand, requires a considerable amount of time and effort to go into evaluating the technical construction grounds such as whether a particular action falls within or outside a particular piece of legislation instead of focusing on whether the particular conduct is a type which ought to be subject to the legislation. Nonetheless, as the conduct rule is very broadly drafted, we urge that guidelines be provided to clarify the scope and manner of the application of the rule. As we have seen from the experiences in the UK, EU and Singapore, there needs to be detailed explanations of how the rule will be applied in practice. For example, guidelines are provided to supplement the Singapore Competition Act 2004 explaining the tests and thresholds at which agreements or actions are considered having an object or effect of preventing, restricting or distorting competition.

6.1.7 The drafting should be clarified as the use of "*in particular*" is creating uncertainty and we suggest the use of the words "without limitation" namely:

> "Sub-section (1) applies without limitation to agreements, concerted practices and decisions that ...."

6.2. We agree on having a list of the types of behaviour which should be caught under the first conduct rule. The Law Society notes the debate as to other types of conduct which could also be considered. For example, the UK Competition Act (section 2(2)), EC Treaty (section 81(1)) and Singapore Competition Act 2004 all contain two additional types of behaviour in their respective legislation on top of those examples that are currently being proposed in our Bill: *"...[1] apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and [2] make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

6.3 The current definition of "*undertaking*" seems to suggest that all legal entities are included, regardless of whether such undertakings are related or otherwise. As indicated above (and as suggested in our July 2008 submissions), it is necessary to clarify whether agreements between a parent and its subsidiary company or between two companies which are under the control of a third, will not be treated as agreements covered by the first conduct rule if the subsidiary has no real freedom to determine its course of action on the market and, although being a separate legal entity, enjoys no economic independence.

6.4 It appears that, from the current drafting of the Bill, both horizontal and vertical agreements are covered although the Government has indicated that vertical agreements may be exempt. The area of vertical agreements has been subject to much debate and this can be reflected through the different treatment of these agreements by legislators around the world. The Competition Act in Singapore expressly provides for the exclusion of vertical agreements in the Third Schedule of their Act. It should be noted that this exemption of vertical agreements in Singapore has been premised on public policy concerns, administrative issues and a regulatory philosophy which has been strongly influenced by modern microeconomic theories. In Singapore, vertical agreements are generally less detrimental to competition reflecting the Singapore government's belief that "*there is a general consensus that the majority of vertical agreements have net pro-competitive effect(s)*" (Second Public Consultation on the Draft Competition Bill 26 July 2004). On the other hand, vertical agreements are specifically prohibited in Australia with detailed provisions in their Trade Practices Act 1974. The UK and EU models have adopted a somewhat in-between approach in providing a general prohibition of agreements and conduct which are anti-competitive with guidelines to explicitly address types of vertical agreements or behaviour which will be excluded. Further, a block exemption order in respect of vertical agreements which meet certain conditions has been granted in the EU (Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices).

6.5 Given the size and nature of the Hong Kong market, vertical agreements may not have as great an effect on restricting competition as may otherwise be the case in other parts of the world. Hence, if the general prohibition in the Bill is to be retained as it is currently drafted there should also be the inclusion of exemptions for

particular vertical agreements or conduct which meet certain criteria together with a non-exhaustive list of exemptions in guidelines.

7. "Object" of agreement

7.1 The present wording of the clause seems clumsy. We suggest amending it to: "*If an agreement, concerted practice or decision has more than one object, one of which is to prevent, restrict or distort competition under this Ordinance, it is deemed to have the object to prevent, restrict or distort competition for the purposes of section 6 unless the object which is to prevent, restrict or distort competition is shown to be immaterial in all respects.*"

7.2 It is not clear why this provision does not also address situations in which an agreement, concerted practice or decision may have more than one effect. We suggest that, in the same way this has been clarified in relation to object, it should be clarified in relation to effect.

7.3 Clause 7(2) should be made clear that it can only be inferred that the agreement had an anticompetitive object if, objectively viewed, it is conduct that was or is capable of having an anticompetitive effect if carried to fruition.

We recommend amending clause 7(2) to read as follows:

> "(2) An undertaking may be taken to have made or given effect to an agreement or decision or to have engaged in a converted practice that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference, provided that the inference is reached objectively."

8. Territorial application of first conduct rule

8.1 An extraterritorial application seems to be consistent with the competition laws of other jurisdictions however guidelines should be provided to explain further how the provision applies in practice. As an illustration, the UK has guidelines stating that the equivalent prohibition only applies "*if an agreement is, or is intended to be, implemented in the United Kingdom*".

8.2 This clause does not appear to address notification to parties that may have an interest in such applications. A suitable notice provision will be necessary.

Subdivision 2 - Decisions

9. Application for decision

9.1 We understand that it is an important policy decision on whether the exemption based enhancement of economic efficiency should be determined by focusing on allowing consumers a fair share of the resulting benefit or by taking into account other considerations relating to perceived potential benefits to Hong Kong society as a whole.

9.2 There is no definition of "*services of general economic interest*" (see clause 3 of Schedule 1) although there is case law and guidelines on this issue in other jurisdictions. We, as previously proposed, recommend guidance should be provided

to identify the scope of the exclusion. For instance, there are guidelines in the UK which show how their Office of Fair Trading interprets and applies this exemption.

9.3 As a general observation, for reasons articulated recently by the Hong Kong courts, the case stated procedure is outdated and should not be used. Parties should be allowed a standard appeal right for decisions of the Tribunal. The Tribunal will also be comprised of High Court judges, who by definition are able to make decisions on points of law. A procedure requiring them to state a case to the Court of Appeal on points of law, (potentially during the course of a hearing), will simply add unnecessary cost and delay to the proceedings. This could have particularly serious ramifications for merger issues which are highly time-sensitive.

9.4 In order to avoid the clause 9(2)(c) putting too high an onus on an undertaking when first applying for a decision, this clause should be reworded as follows:

"it is possible to make a decision on the available information on the record"

10. Consideration of application

10.1 A notice published should be published to the public generally as well as to "*those [the Commission] considers likely to be affected by its decision*".

11. Decision by Commission

11.1 If the Commission makes a decision, it should publish its decision to the public as well as bring it to the attention of other affected persons, including the reasons for its decision. However, any information which is confidential information under section 122 should be kept confidential.

12. Effect of decision

12.1 The provision should clarify when the exemption will take effect. Alternatively, a provision should be drafted to empower the Commission with the right to set the date as to when the exemption takes effect when it makes its decision.

12.2 Clause 12(1) provides that once a decision is made by the Commission that a certain agreement is exempted or excluded from the first conduct rule or Part 2 (The Conduct Rules), the relevant undertakings specified in the decision will be immune from any action under the Ordinance. Similar provisions appear in clause 27(1) expanding the effect of a decision on exemption to the Ordinance as a whole.

12.2.1 In our view such immunity to be too broad and may have unintended consequences. As presently drafted, by granting immunity to proceedings under the Ordinance as a whole, the relevant undertaking will, for example, be immune from claims of contravention of the merger rules (as and when the merger rules are adopted). While the application of both the conduct rules and the merger rules can be exempted by the Chief Executive in Council as a result of public policy concerns, they have different exemption standards, as stated in Schedule 1 and paragraph 8 of Schedule 7, respectively. Unless the exclusion provision for the merger rules is amended to be the same as for the conduct rules, the effect of a decision on a conduct rule should be confined to the application of the conduct rules. Clauses 14(7) and 29(7) (Rescission of decision) should be amended accordingly.

12.3 Undertakings not party to a decision should also be able to benefit from the exclusion/exemption if, the Commission subsequently exercises its power under clauses 9(2)(a) or (b) to refuse to hear an application from them for their own decision.

13. Non-compliance with condition or limitation

13.1 We recommend the inclusion of a procedure such as the Commission issuing a formal order or type of notice which will enable an undertaking to confirm whether it is in compliance.

13.2 Under clause 13(2), if an undertaking starts to comply with the condition or limitation, it should be formally notified that it is now in compliance with the relevant decision and thereby exempt from the first conduct rule before proceeding to engage into any conduct which may otherwise be deemed anti-competitive and be in breach of the rules, for example in the UK, a notification process is available where parties to agreements may seek guidance on whether the relevant agreement is likely to be exempt from prohibition, thus it is proposed that Hong Kong should adopt something similar.

14. Rescission of decision

14.1 The Commission should have discretion on (i) whether or not to revoke a decision and (ii) whether such revocation should take effect retroactively. This discretion would allow the Commission to take into account and balance the interests of all affected persons and the circumstances in which the original decision was given.

Subdivision 3 – Block Exemptions

15. Block exemption orders

15.1 The provisions on block exemption orders are similar to those in the UK, EU and Singapore which have been regarded as useful and particularly important to "*self-assessment*" procedures. We suggest redrafting clause 15(4) to clarify that the "*review*" mentioned therein must be "in accordance with the review process in clause 19".

16. Procedures regarding block exemption orders

16.1 As we submitted earlier, block exemptions should be subject to a public consultation process to ensure that all interested and affected parties have an opportunity to express their views. The Bill stipulates that notice needs to be published for no less than 30 days to bring the application to the attention of those that are likely to be affected by a decision. Yet, we still urge that guidelines be drafted as no details have been provided in respect of the analytical framework on how the Commission will assess whether agreements meet the criteria as in Singapore and the UK. For example, guidance on how to determine whether an agreement falls within a particular category of agreement which has been granted a block exemption order and whether there needs to be notice for agreements which fall within the categories of agreements specified in a block exemption order. In Singapore and the UK, notification processes for guidance are provided in their respective competition legislation where parties to agreements may seek guidance on whether the relevant agreement is likely to be exempt from prohibition under a block exemption.

17. Effect of block exemption order

17.1 We recommend drafting the provision to clarify when the exemption will take effect. Alternatively, a provision should be drafted to empower the Commission with the right to set the date as to when the exemption takes effect when it makes its decision.

18. Non-compliance with condition or limitation

18.1 We recommend the inclusion of a procedure such as the Commission issuing a formal order or type of notice which will enable an undertaking to confirm its status. For example, under clause 18(2), if an undertaking starts to comply with the condition or limitation, it should be notified that it is now in compliance with the relevant decision and thereby be exempt from the first conduct rule before proceeding to engage into any conduct which may otherwise be deemed anti-competitive and thereby be in breach of the rules. Likewise, the undertaking should be informed by notice that it has failed to complied with a condition imposed by the block exemption order and that the Commission will cancel the block exemption in respect of the particular agreement.

19. Review of block exemption order

19.1 Since block exemption orders will have an impact on a large number of agreements, we believe that before granting a block exemption order, reviews should be conducted such as publishing details of such order and conducting a public consultation exercise before deciding whether or not the block exemption should be adopted by the Commission. However, it should not be a mandatory process for the Commission thus the section should be drafted in a way so that the Commission maintains discretion as to whether or not to conduct the process before granting block exemption orders.

19.2 The clause should also clarify the review process is in relation to clause 15(4)

20. Variation or revocation of block exemption order

20.1 The current wording seems to suggest that the Commission may only vary or revoke a block exemption order after conducting the review process in clause 19. In other parts of the world (for example Singapore and UK), there is no such condition attached for varying or revoking block exemption orders. The Commission should not be so restricted, but rather, have the flexibility to vary or revoke orders regardless of whether formal review processes are conducted. In addition, we recommend that the Commission be given the power to revoke or amend a block exemption. We therefore propose amending clause 20(1) by deleting of the words "*,after reviewing a block exemption order,*" and changing "*the*" to "*a*" block exemption order.

Division 2 – Abuse of Market Power Subdivision 1 – Second Conduct Rule

21. Abuse of market power

21.1 **Clause 21(1)**

The threshold test of "*substantial degree of market power*" is a lower threshold than "*dominance*". We consider "*dominance*" is a more appropriate threshold given both the small and open nature of Hong Kong's market and its capitalist constitution (which should raise a presumption that regulators and the government should not be intervening in the market except in clear cases where the markets are dominated by a

particular entity that is seeking to foreclose competition from others). A dominance threshold would also be consistent with other significant jurisdictions, including Mainland China's Antimonopoly Act. Having consistency between the tests in Hong Kong and Mainland China will reduce the complexity of cases considering conduct that might straddle both jurisdictions.

21.2 **Clause 21(2)(a)**

It is not clear why the government has proposed that the Commission, *inter alia*, be tasked with targeting predatory pricing behaviour as specified conduct under the unilateral conduct prohibitions. There is a highly controversial debate in economic circles as to whether predatory pricing behaviour is rational economic conduct or can be affectively measured and addressed by competition law enforcement. Unlike the 1st conduct rule in relation to which it is possible to clearly articulate hard core conduct that should be the focus, defining the particular unilateral conduct that should be the focus of enforcement activity in the Bill will be difficult. We recommend this be left to the guidelines that will be issued in due course.

21.2.1 In similar vein, while it is proposed that the existing competition provisions in the Broadcasting Ordinance (BO) and Telecommunications Ordinance (TO) would be repealed when the general competition law comes into force,[7] the Government is proposing that a new prohibition (section 7Q) be introduced into the TO to regulate any conduct that, in the opinion of the Telecommunications Authority (TA), comprises exploitative conduct by a dominant telecommunications licensee.[8] This has been proposed despite rejection of such a concept in the United States[9] - and recognition of the difficulties this issue has presented in European competition law. (see above)[10]

21.2.2 Given Hong Kong's historic faith in markets and reluctance to engage in heavy-handed intervention, these indications from the Hong Kong Government that it wants increased regulatory control over pricing in the markets are surprising. There is also inevitably going to be enormous difficulty trying to determine whether claims of abuse of dominance against telecoms licensees (which will often involve pricing) should be brought in the Telecommunications (Competition Provisions) Appeal Board, under section 7Q of the TO, the Tribunal, under the second conduct rule, or

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[7] Parts 8 and 9 of Schedule 8 to the Bill.

[8] Section 14 of Part 4 of Schedule 8 to the Bill. The Government is proposing that this issue would be regulated by the Telecommunications Authority under the Telecommunications Ordinance with appeals to be taken to the Telecommunications (Competition Provisions) Appeal Board.

[9] *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), 274 n.12 (2d Cir. 1979); *Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995); *Verizon Communications Inc.* v. *Law Offices of Curtis V Trinko* 540 U.S. 398 (2004); See also the earlier case of *United States* v. *American Can Co.*, 230 F. 859 (D. Md. 1916).

[10] The then Director General of DG Competition the EU stated in this regard "...we are obviously aware that in many markets intervention by a competition authority will not be necessary. We are also aware that it is extremely difficult to measure what constitutes an excessive price. In practice, most of our enforcement focuses therefore as in the US on exclusionary abuses, i.e. those which seek to harm consumers indirectly by changing the competitive structure or process of the market.....And in my view, we should continue to prosecute such practices where the abuse is not self correcting, namely in cases where entry barriers are high or even insuperable." Philip Lowe, Director General of DG Competition, "How different is EU anti-trust? A route map for advisors – An overview of EU competition law and policy on commercial practices", ABA 2003 Fall Meeting, 16 October 2003.

both. Maintaining an exploitative conduct prohibition within the TO, which is necessarily predicated on dominance, is, therefore, likely to cause serious and intractable conflicts in jurisdiction between the TA and Telecommunications Appeal Board (TAB), on the one hand, and the Commission and Tribunal, on the other hand, in relation to unilateral conduct cases involving Telecoms licensees.

21.3 **Clause 21(2)(b)**
Again, it needs to be clear that the second conduct rule addresses exclusionary, rather than exploitative, conduct.

21.4 **Test for "substantial degree of market power"**
In absence of an indicative threshold, it is difficult to quantify and qualify "*substantial degree of market power*" and the current draft leaves much room for uncertainty. Most overseas jurisdictions adopt the "dominance" test[11] to invoke the second conduct rule and have suggested various factors, including different levels of market share[12], as indicative benchmarks. The introduction of a proper test or guidelines will be helpful for the market's reference.

21.5 **Subject of the second conduct rule**
While in some overseas jurisdictions such prohibition applies to abuse by "*one or more undertakings*", the existing provision of the second conduct rule only targets market power abuse by "*[a]n undertaking*". The current draft legislation therefore fails to deal with the position where a number of undertakings, which individually do not have a substantial market power, abuse their collective substantial degree of market power. An amendment to the second conduct rule to encompass "*one or more undertakings*" is necessary.

22. "Object" of conduct

22.1 Please see our comments on clause 7 above.

23. Territorial application of second conduct rule

23.1 Please see our comments on clause 8 above.

Subdivision 2 – Decisions

24. Application for decision

24.1 We repeat our comments mutatis mutandis from clauses 9 to 14 above.

24.2 **Clause 24(3)**
It is not clear where the dividing line will be between "*hypothetical*" conduct and conduct an undertaking is "*proposing to engage in*" (clause 24(1)). Parties will often contemplate conduct but not propose to engage in it unless they can obtain

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[11] Such as Singapore, the UK and the EU, see section 47 (Abuse of dominant position) of the Singapore Competition Act (cap 50B), section 18 (Abuse of dominant position) of the UK Competition Act 1998 and article 82 of the EC Treaty.

[12] According to the "CCS Guidelines on the Section 47 Prohibition", CCS will consider a market share above 60% as likely to indicate dominant market power, while, under its guidelines on "Abuse of a dominant position", the OFT considers an undertaking unlikely to be dominant in a market if its share of the market is below 40%. At the same time, European courts have stated that dominance can be presumed with a persistent market share above 50% in the absence of contrary evidence (C62/86, *AKZO Chemie BV v Commission* [1993] 5 CMLR 215).

regulatory certainty that it is not anti-competitive. They should not be forced to commit to a course of potentially anticompetitive conduct (which may then expose them to prosecution under the law) before they can seek a decision. In order to remove the uncertainty that attaches to the word "*hypothetical*" this could be reworded to say that the Commission is not obliged to entertain frivolous *or vexatious* requests for a decision.

25. Consideration of application

25.1 Please refer to our comments under clause 10 above.

26. Decision by Commission

26.1 Please refer to our comments under clause 11 above.

27. Effect of decision

27.1 Please refer to our comments under clause 12 above.

28. Non-compliance with condition or limitation

28.1 Please refer to our comments under clause 13 above.

29. Rescission of decision

29.1 Please refer to our comments under clause 14 above.

Division 3 – Exclusions and Exemptions

Subdivision 1 – Exclusions from Conduct Rules

30. Exclusions

30.1 The drafting should be revisited as the use of double negatives makes it very difficult to extract the meaning of the provision.

Subdivision 2 – Exemptions from conduct Rules

31. Exemptions on public policy grounds

31.1 We agree in having exemptions on grounds of public policy and conflict with international obligations. We also agree that power should be vested in the Chief Executive in Council to decide by order whether to exclude an undertaking on these grounds, as this is consistent with the EU, UK and Singaporean approaches. Moreover, the current wording of "*satisfied that there are exceptional and compelling reasons of public policy*" are more appropriate than the previously proposed "considers that there are sound reasons of public policy" and "overriding public policy considerations" as this has narrowed the scope of the provision.

31.2 However, the powers given to the Chief Executive in Council are very extensive and are exercised by order published in the *Gazette* rather than by a regulation (c.f. clause 5). Although there would be greater transparency to have the exemption by regulation, we can understand the need for flexibility under this clause since the exemption may only be for a limited period, the power should therefore only be exercised after consultation with the Competition Commission. Accordingly, we suggest the addition at the beginning of clause 31(1) the following words:

"Following consultation with and written advice from the Competition Commission ..."

This consultation is particularly necessary in the light of the retrospective nature of clause 31(5).

31.3 As noted earlier, there is no definition of "*services of general economic interest*" though there are cases and guidelines on this issue in other jurisdictions. As previously proposed, guidance is required in order to better identify the scope of the exclusion. For instance, there are guidelines in the UK which show how its Office of Fair Trading interprets and applies this exemption.

32. Exemption to avoid conflict with International obligations

32.1 No comment except to note the retrospective effect of clause 32(6).

33. Orders to be published and placed before Legislative Council

33.1 We recommend redrafting sub clause (1) by deleting the opening two lines and substitute them by:-

"(1) The Chief Executive shall arrange for every order made under sections 31 or 32 together with the advice tendered to the Chief Executive and forming respectively under Section 31 the satisfaction that there are exceptional and compelling reasons of public policy and in respect of Section 32 that it is appropriate to do so to be - .....".

34. Register of decisions and block exemption orders

No comments.

35. Guidelines

35.1 We recommend clause 35(3) be deleted and substituted with:

"Guidelines issued under this section, and any amendments made to them, shall be published in the Gazette and on the website maintained by the Commission and may be published in any further manner that the Commission considers appropriate".

35.2 We note the Ordinance will rely extensively on guidelines to be issued by the Commission. As a general statement it would reduce uncertainty if any matters which could be dealt with in the Ordinance are set out in the legislation rather than being dealt with in guidelines.

36. Amendment of Schedule 1

36.1 As already noted the provisions of Schedule 1 go to the heart of the conduct rules and in our view, the Chief Executive in Council should only be able to amend the provisions of Schedule 1 after consultation with the Commission. Accordingly, we suggest the addition at the beginning of clause 36(1) of the words:

"Following consultation with and written advice from the Competition Commission ..."

Part 3 Complaints and Investigations

Division 1 - Complaints

37. Complaints

37.1 As a general principle, it is appropriate for there to be guidelines to be issued indicating the manner and form in which complaints are to be made. This would assist in streamlining the process and giving structure to the way complaints are received.

37.2 However, any such guidelines must be such that in seeking to facilitate the work of the Commission, they do not have the effect of deterring potential complainants by adding unnecessary layers of bureaucracy and formality in the process.

37.3 Further, the complaints procedures set out in these guidelines should not be such that it effectively becomes a general policy rule that any complaints that are not lodged in line with the guidelines may not be investigated by the Commission. We therefore propose that the words "*in accordance with guidelines issued under section 38*" be deleted from clause 37(1).

38. Guidelines regarding complaints

See comments to clause 37 above.

39. Power to conduct investigations

No comments.

Division 2 – Investigations

40. Guidelines regarding investigations

40.1 Sub clause 40(a) provides guidelines must be issued on the procedures that the Commission will follow in deciding whether or not to conduct an investigation. Clause 37 sets out broad conditions for when the Commission may decide not to investigate a complaint. In line with this, clause 40 (or, alternatively, clause 38) should, rather than being focused purely on processes, require guidelines to be issued on the criteria by which the Commission will consider a complaint to be "*trivial, frivolous or vexatious*", or "*misconceived or lacking in substance*".

41. Powers to obtain documents and information

41.1. Notices under both clauses 41 and 42 require the subject matter and purpose of an investigation to be set out. However, this may not make sufficiently clear to the recipient of a notice whether he/she/it is merely assisting with an investigation or a subject of it.[13] In the interests of natural justice, provisions should be in place to require the Commission to make clear whether, at the time when a notice is issued (it is acknowledged that a person's status in an investigation may change over time), the intended recipient of a notice is in fact a person under investigation.

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[13] C.f. section 183 of the Securities and Futures Ordinance, which sets to distinguish between a "person under investigation" and "a person whom the investigator has reasonable cause to believe has in his possession any record or document which contains, or which is likely to contain, information relevant to an investigation."

42. Persons may be required to attend before Commission

See our comments to clause 41 above.

43. Statutory declaration regarding evidence

43.1 **Clause 43(2)**

We note the this sub clause states "*any member of the Commission may administer an oath or affirmation*", yet Schedule 8 makes no reference to consequential amendments to the Oaths and Declarations Ordinance (Cap.11).

44. Immunity

44.1 The words "*Subject to section 45*" should be added at the start of subsection (1), as clause 45 is clearly an exception to clause 44.

45. Self-incrimination

45.1 We generally welcome the fact that this clause, unlike section 187 of the Securities and Futures Ordinance (SFO), does not require a person to take any positive steps to claim privilege against self-incrimination before it is applicable.

45.2 In addition, we welcome the fact that, in light of the Court of Final Appeal's decision in *Koon Wing Yee v Insider Dealing Tribunal*[14] as regards the limits on "*civil*" penalties that can be handed down by a tribunal, the protections under clause 45(3) extend to pecuniary and financial penalties pursuant to clauses 91 and 168 of the Bill.

45.3 Nonetheless, we note that on the current wording of clause 45(2), if the person who provided the information/answers wishes to use the evidence he/she/it gave for, say, mitigation purposes, he/she/it may not be able to do so. Thus, clause 45(2) should be amended to give a person providing the information/answers the right to adduce and have such information/answers admitted if that person/undertaking chooses to do so.

46. Obligation of confidence

46.1 Although it is noted that confidentiality does not excuse disclosure of information or documents to the Commission, this should not in any event apply to any information or document to which litigation or legal professional privilege applies.

Division 3 – Search and Seizure

47. Appointment of authorised officers

No comments.

48. Warrant to enter and search premises

48.1 In our submissions dated 13 February 2007 in response to the Government's Consultation Paper "*Promoting Competition – Maintaining our Economic Drive*", we expressed support for powers to be vested in the Commission to enter premises with a warrant.

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[14] [2008] 3 HKLRD 372.

48.2 However, we note that clauses 41 to 43 already provide the Commission with powers to demand documents or information. This is unlike, say, the police, where the use of a search warrant is their primary method for obtaining documents such that there is a relatively low threshold for obtaining a warrant.[15] Clauses 41 to 43 are also backed by clauses 52 and 53. They create criminal liability for non-compliance with the Commission's exercise of clauses 41 to 43 powers, or destroying documents required pursuant to a 'clause 41 notice'. In addition, one should take into account Article 29 of the Basic Law, which states that "*[t]he homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited.*"

48.3 Taking the above factors together, we consider the "*reasonable grounds to suspect*" threshold for obtaining a warrant under clause 48 is therefore *too low*. This section should be amended so that a warrant is only granted where:

> "a person has already failed to comply with one or more of the requirements in clauses 41 to 43;
>
> despite reasonable attempts by the Commission, it has not been able to ascertain the person who has possession of the premises in question such that a clause 41 notice cannot otherwise be issued; or
>
> where the Commission satisfies the Court that in the circumstances of the investigation in question, it is not feasible for the Commission to rely instead on one or more of its powers under clauses 41 to 43."

49. Duty to produce evidence of authority

No comments.

50. Powers conferred by warrant

50.1 The powers outlined under this clause are broadly in line with the practical needs of executing any search warrant. Nonetheless, this power is also subject to clause 45 (i.e. issues associated with self-incrimination), given that clause 50 also provides for the compulsory obtaining of information/documents.

50.2 We consider these powers of compulsion should be subject to the proviso that these powers do not require the production of documents/information that are subject to legal professional privilege.[16]

Division 4 – Offences in Relation to Investigations

51. Interpretation

No comments.

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[15] See section 50(7), Police Force Ordinance, which provides for the grant of a search warrant by a Magistrate where there is "*reasonable cause to believe*" that materials of likely value to an investigation is on a site.

[16] Cf section 2(18) of the Organised and Serious Crimes Ordinance.

52. Failure to comply with requirement or prohibition
No comments.

53. Destroying or falsifying documents
No comments.

54. Obstruction of search
No comments.

55. Providing false or misleading documents or information
No comments.

Division 5 - Miscellaneous

56. Retention of property
No comments.

57. Disposal of property
57.1 As regards clause 57(4), there should be a requirement that an order for sale or retention by the Tribunal be advertised in the Government Gazette, one Chinese and one English newspaper of general circulation within, say, 21 days of the relevant order. Consequently, the 6-month period outlined in sub clause (4)(b) should be from the date of the last of the advertising as regards the order.

58. Guidelines
58.1 We repeat our comments mutatis mutandis in relation to clauses 37, 38, and 40 above.

Part 4 Enforcement Powers of Commission

Division 1 - Commitments

59. Commitments
59.1 We recommend the following definition of "*Commitment*" be included in clause 2 of the Bill:-

> "Commitment" (承諾) means 'a promise to be bound constituted by and recorded in an agreement in writing by any person with the Commission for the purposes set out in section 59.'

59.2 We recommend deletion of the words "*that the Commission considers appropriate to ....*" and substitute by "*where the Commission has reasonable cause to believe that a contravention of a conduct rule has occurred in order to .....*".

59.2.1 Furthermore, provision should be made for the Commission to publish Performance Pledges in line with those required of the SFC on when an acceptance of a Commitment will be given.

59.3 We recommend deletion of the following words in sub-clause (4)(b) "are not subject to the" and substituted by the words "have not made a....."

59.4 We recommend deletion of the words in sub-clause (5) "*as soon as practicable after accepting*" and substituted by the words "*within 15 days after the acceptance by the Commission of ....*"

60. Withdrawal of acceptance of commitment

60.1 We note there is no formal procedure laid down for the giving of "*notice in writing*" nor for the meaning of the word "*material*". These provisions should be subject to an express obligation by the Commission to issue guidelines.

60.2 **Clause 60(1)(a)**

. We have reservations with respect to the inclusion of clause 60(1)(a) which could be viewed as unfair to the person whose commitment is withdrawn specifically where the circumstances are not of the person's making and the person has acted to its detriment in giving its commitment under section 59.

60.2.1. The identity of what is, or is not "*material change*" should be published by the Commission as Guidelines.

61. Variation, substitution and release of commitment

61.1 In the event of acceptance by the Commission of a variation of, or a substitution for, an accepted commitment, no such variation or substitution shall have retroactive effect.

61.2 There is a concern over the lack of transparency in the process and results of the acceptance by the Commission. Accordingly, the accepted variation of a commitment or substitution of a new commitment should be published.

61.3 **Clause 61(2)**

We recommend this clause be re-drafted by inserting the words "*all or part of*" after the word "*from*" in line 1 as this will give the Commission more flexibility.

61.4 With reference to clause 61(2)(a), if the Commission releases any person (upon request by that person), there should be an express saving of the power of the Commission to reinstate, commence or proceed with any of the actions which it is empowered to institute under the Ordinance.

62. Enforcement of commitment

62.1 In clause 62(2) the Tribunal should have a stated power to revoke or vary a commitment and a new clause 62(2)(d) would read as follows :-

"(d) an order to revoke or vary the commitment."

62.1.2 Existing clause 62(2)(d) should be renumbered as (e).

63. Register of commitments

63.1 We propose an amendment to clause 63(2) to the effect that *with respect to any entry in the register, the Commission shall omit any confidential information*

relating to the undertaking concerned; and where such confidential information has been omitted, that fact must be disclosed on the register.

64. Procedural requirements regarding commitments
No comments.

Division 2 – Infringement Notices

65. Interpretation
65.1 **"compliance period"**
The "*compliance period*" should be subject to a time cap rather than the open ended structure as presently drafted.

66. Commission may issue infringement notice
66.1 Since an infringement notice to be issued pursuant to clause 66 is always subject to the issue of a pre-notification under clause 69, clause 66(2) should be made expressly subject to clause 69.

66.2 There is no set procedure for the "*issue*" of an infringement notice. We accept that clause 166 provides for the service of documents other than on the Commission but this does not expressly take account of the "issue" of the notice. We are aware that the current practice of the SFC is to issue notices is non statutory but which is followed as a matter of practice. We recommend that the Competition Commission should adopt "issue" practices along the lines of those followed by the SFC and should provide information on such practices to any interested party.

67. Person not obliged to make commitment
No comments.

68. Contents of infringement notice
No comments

69. Notice of proposal to issue infringement notice
69.1 A maximum period should also be set out in clause 69(2)(c).

70. Decision not to issue infringement notice
70.1 If the Commission decides not to issue an infringement notice, this decision must be specified as being without prejudice to :-

(i) any subsequent decision by the Commission to issue a notice under clause 69;
(ii) any future decision by the Commission to issue an infringement notice;
(iii) any decision by the Commission to bring proceedings in the Tribunal.

71. Effect of issue of infringement notice
No comments.

72. Withdrawal of infringement notice
72.1 The withdrawal should be expressly without prejudice to:-

(i) any subsequent decision by the Commission to issue a notice under section 69;
(ii) any future decision by the Commission to issue an infringement notice;
(iii)any decision by the Commission to bring proceedings in the Tribunal.

73. Extension of compliance period

73.1 Although we feel that there is a danger that the extension powers of the Commission could be unlimited we do not see a practical alternative to the present drafting.

74. Effect of commitment to comply with requirements of infringement notice

No comments.

75. Failure to comply with requirements of infringement notice

No comments.

76. Registration of commitments

No comments

77. Publication of infringement notices

77.1 We have doubts about the utility or fair dealing of a power in the Commission to publish the clause 68(d) identification of evidence or other materials that the Commission relies on in support of its allegations. In our view this should be qualified or deleted consistent with our comments in clause 63(2) on confidential information, provided always that in making such publication, the Commission shall omit any confidential information relating to the undertaking concerned.

Division 3 – Leniency

78. Interpretation

No comments.

79. Commission may make leniency agreements

79.1 The leniency provisions should be drafted with exceptional care to prevent excess of judgment in either direction. We note the Prevention of Bribery Ordinance has no provision for leniency for informers.

79.2 Under Section 380 of the SFO limited exemption from civil liability is conferred in respect of any act or omission done or made by reason of good faith performance of any of the functions of the SFC under Section 5.

79.3 Furthermore, a person who is or was an auditor of the listed corporation or any associated corporation thereof is afforded immunity from civil liability under Section 3.8.1 of the SFO if that person communicates in good faith to the SFC any information or opinion on the matter of which he becomes or became aware as such auditor and which in his opinion suggests a listed number of particular situations relating to fraudulent or unlawful or similar activity. There is no reasonableness qualification provided for acceptance of such by the SFC so that any matter which in the opinion of the informer suggests any of the offending activities can qualify him for immunity.

79.4 However, this provision is not of great assistance in relation to clause 79 but a reasonableness standard should be required to qualify the commission's consideration of what is "*appropriate*" for granting of leniency. In order to examine the possible introduction of such a "reasonableness" requirement in relation to the "appropriate" consideration by the commission of the making of a leniency agreement in exchange for cooperation of the whistle blower we would suggest that comprehensive reference be made to legislated competition provisions enacted in other jurisdictions and that provision be made for this in published guidelines.

80. Termination of leniency agreement

80.1 **Clause 81(1)(b)**

The term "*material particular*" is ambiguous although difficult to define and therefore recommend guidelines on what is or is not "material" must be issued by the Commission to clarify.

80.2 **Clause 81(2)**

We repeat our observation about the "*giving*" of notice in clause 69(1)(2) above.

Part 5 - Review by Tribunal

We note that the powers of the Tribunal are more particularly set out in Part 10. It seems that these do not extend to any review of the exercise of the Commission's powers to investigate, search and seize under Part 3, failure to comply with which constitutes a criminal offence. Presumably this is because such powers may be challenged by judicial review or in the case where a warrant is issued in the court issuing the warrant.

81. Interpretation

81.1 The definition of "*reviewable determination*" ought to be expanded to include two new sub-clauses (to be inserted between current sub-clauses (d) and (e)) as follows:

> "*(a) a decision relating to the acceptance of a commitment, made by the Commission under section 59;*
>
> *(b) a decision relating to the withdrawal of acceptance of a commitment, made by the Commission under section 60;*"

This will allow interested third parties to raise an objection to the acceptance of a commitment by the Commission where its interests might be affected, and to allow parties to raise an objection to the withdrawal of a commitment where the Commission has previously accepted a commitment and now proposes to withdraw that acceptance.

81.2 In the former case it seems appropriate for affected third parties to have the right to seek to challenge a decision of the Commission to accept a commitment if that affected third party feels that the commitment does not, in fact, properly address concerns as to the possible contravention of a competition rule. This will, for example, assist small and medium sized enterprises in seeking redress.

81.3 In the latter case it seems equally appropriate that a party should be entitled to challenge a decision of the Commission to withdraw an acceptance of a commitment, given the damage that that withdrawal might cause to a party.

82. Review of reviewable determination

82.1 If the right of review is only to be exercisable with leave of the Tribunal, then the Law Society believes that the threshold for obtaining leave should not be set too high.

82.2 In this regard, the Law Society suggests that if an applicant shows that he has a sufficient interest in the matter to which the application relates (which is covered by the next section in the Bill) then leave should normally be granted unless the grounds of appeal have "no realistic prospects of success" (following the test applied, in cases where leave is required, to appeal a decision of the Court of First Instance (CFI) to the Court of Appeal (CA)). Sub clause (3) of clause 82 needs to be revised to reflect this, along the following lines:

> "(3) Leave will be granted under subsection (2) –
>
> (a) unless the Tribunal is satisfied that the review has no realistic prospects of success; or
> (b) if there is some other reason in the interests of justice why the review should be heard."

82.3 The Law Society considers that there is no justification in the proposed *"reasonable prospect of success"* test, which is too high a threshold to be applied and may hinder the Tribunal in discharging the important role it has to play in relation to protecting the interests of consumers and others in the competition field. For example, the Law Society can readily see affected third parties who might otherwise wish to seek redress by making an application to the Tribunal deciding not to do so because of the difficulties they might face, and time and costs that they might have to incur, in satisfying the *"reasonable prospects of success"* test at a very early stage of the process.

82.4 The Law Society believes that the balance should be fairly drawn so that hopeless cases are not brought to the Tribunal, which can be achieved by use of the proposed leave requirement, but to allow cases that are arguable to proceed, which can be achieved by the revised test suggested by the Law Society above.

83. Who may apply for review

No comments.

84. Tribunal may state case for Court of Appeal

84.1 Given that members of the Tribunal will be taken from the pool of High Court Judges, the Law Society doubts the usefulness of the proposed *"case stated"* procedure. The case stated procedure is cumbersome, and is potentially very disruptive to the smooth and expeditious running of a hearing/case creating delay and expense that might well be unnecessary and/or unwarranted. Delay in competition cases can be particularly invidious, with serious potential ramifications. The case stated procedures have been the subject of strong criticism in the Hong

Kong Courts as being outdated: see the comments of the Court of Final Appeal in *Lee Yee Shing v CIR* (FACV 14/2007), in particular those of Mr. Justice McHugh NPJ, who noted that the "*Case Stated procedure arose out of circumstance that have long gone*", called it "*an anachronism*" and raised the question as to whether costs, efficiency and the interests of justice might be better served by abandoning that procedure and substituting an appeal on questions of law.

84.2 These outdated procedures should not be imported into a modern procedural framework for deciding on competition cases.

84.3 The Law Society therefore considers that the proposed case stated procedure should be removed. Appeals from decisions of the Tribunal (on law and otherwise) are dealt with under clause 153, and so the Law Society suggests that this clause, applying the "*Case Stated procedure*", should simply be removed.

85. Decision of Tribunal on application for review

85.1 From the use of the word "*may*", it is not clear whether the Tribunal exercises its full powers under Part 10 on a review or must in every case where it sets aside a determination (in whole or in part) refer the matter back to the Commission.

86. Time limit for applying for review

86.1 Since leave must first be obtained, it should be made clear whether the 30 days includes a leave application or whether upon leave being granted the application may be further developed.

87. Stay of execution of reviewable determination

No comments.

Part 6 Enforcement Before Tribunal

Division 1 - Introductory

88. Interpretation

88.1 No comments.

89. Persons involved in contravention of competition rule

89.1 Sub clause (d) could be cross-referenced with sub clause (a) as the clause is attempting to cover those "involved" and it appears the provision is attempting to cover those involved in a conspiracy.

Division 2 – Pecuniary Penalty

90. Commission may apply for pecuniary penalty

No comments.

91. Tribunal may impose pecuniary penalty

91.1 **Far-reaching power to impose pecuniary penalty to persons involved in a breach**

While some overseas regimes confine penalties to an undertaking intentionally or negligently infringing the competition rules[17], the existing provision of clause 91(1) empowers the Tribunal, upon application by the Commission, to order any person that has contravened or *been involved* in a contravention of a competition rule to pay a pecuniary penalty of any amount it considers appropriate (subject to the limitation in sub-section (3)). A person so involved in a contravention may be a legal person or a natural person, therefore any senior management and board members of an undertaking may be subject to such far-reaching financial penalties if his/her direct or indirect involvement of conduct rule contravention is proved. The maximum penalty of 10% of the worldwide turnover of the undertaking concerned for each year in which the contravention has continued is also higher than a number of other jurisdictions.[18] We also note the meaning of "undertaking" may extend to related companies.

91.2 Clause 91(3)

91.1 Turnover is referenced here. However, the provision needs to be clear as to what the position is regarding individuals who might be employees of a company targeted for anticompetitive conduct: they would not normally be regarded as having 'turnover'. Clause 79 suggests pecuniary penalties might be ordered against natural persons, adding to the potential for confusion.

Division 3 – Other Orders

92. Other orders of Tribunal

92.1 **Clause 92(1)**

Other provisions in this part are predicated on an application having been made by the Commission who might be employees of a company targeted for anticompetitive conduct. The drafting in this section, however, suggests that the Tribunal is being granted powers to make "other orders" of its own motion.

92.2 **Clause 92(2)**

The time limits specified here do not seem to have been picked up in the equivalent private action provisions (clauses 110-113).

93. Interim orders

93.1 **Clause 93(2)**

We suggest redrafting this clause to: "No person other than the Commission is entitled to make an application for interim orders under subsection (1) by reason that a person is engaged in or is proposing to engage in conduct that contravenes or would contravene the merger rule."

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[17] Sections 69(2)(d) and (3) of the Singapore Competition Act 2004 and section 36 of the UK Competition Act 1988.

[18] Section 69(4) of the Singapore Competition Act 2004 provides that the financial penalty should not exceed 10% of the undertaking's turnover in Singapore for each year of infringement and up to a maximum of three years. Section 36(8) of the UK competition Act 1988 fixes the ceiling of the penalty as 10% of the undertaking's turnover. Although section 76 of the Australian Trade Practices Act 1974 allows pecuniary penalty on a person involved in a contravention, it also provides a specific maximum amount for such penalty payable by a person other than a body corporate.

94. Order to pay costs of Commission investigation

94.1 Compare the existing telecoms regime, where the regulator is exposed to costs orders.

Division 4 – Contravention of merger Rule

Subdivision 1 – Anticipated Mergers

95. Proceedings in relation to anticipated mergers

No comments.

96. Interim orders

No comments.

Subdivision 2 - Mergers

97. Application to Tribunal for order

No comments.

98. Proceedings in relation to mergers

98.1 **Clause 98(1)**

It would increase clarity if sub clause (1) stated that the Tribunal can only "*make any order permitted by Schedule 4*" that is considered appropriate, rather than the current language which states the Tribunal can make "*any order*".

99. Disqualification order

99.1 Leniency does not apparently cover potential use of the disqualification power. This will seriously undermine the appeal of the leniency procedure for senior management.

100. Circumstances in which disqualification order may be made

No comments.

101. Unfitness to be concerned in management of company

101.1 A definition of "management" should be included, to make it clear what this concept entails and that it will look at the substance of the person's role, rather than mere titles.

102. Applications for disqualification order and for leave under an order

No comments.

103 Contravention of disqualification order

No comments.

Part 7 Private Actions

Division 1 - General

104. Interpretation

No comments.

105. Persons involved in contravention of conduct rule

105.1 We note that clause 05 does not apply to the Merger Rule. We support this position.

106. No proceedings independent of this Ordinance

106.1 Clause106 prohibits any person from initiating any proceeding in Hong Kong independently of the Ordinance if the cause of action is the defendant's contravention, or involvement in contravention, of a conduct rule. With the current draft, it is uncertain whether any person can bring proceedings independently of the Ordinance if (a) the action is not a pure competition proceeding and instead is a composite claim or (b) the cause of action is an infringement of the merger rule, as the merger rule is not encompassed within the terms "*conduct rule*" under the Bill.

106.2 It is understood that according to the Bill, no private action may be taken for infringement of the merger rule. However, the Commission may investigate and bring public enforcement action regarding a breach of the merger rule. Pursuant to the Interpretation and General Clauses Ordinance, the notion of "*person*" includes any public body and accordingly, clause 106 applies to the Commission as well. We suggest that:

(a) the title of this section be amended to "*No pure competition proceedings independent of this Ordinance*", and

(b) the provision be amended to "No person other than the Commission may bring any proceeding under this Part independently of this Ordinance, whether under any rule of law or any enactment, in any court in Hong Kong, if the cause of action is only the defendant's contravention, or involvement in a contravention, of a conduct rule".

(c) We recommend that mixed claims could only be brought before the Court of First Instance (CFI) with the leave of the CFI to avoid the risk of conflicting outcomes and the incurrence of additional costs.

107. Pure competition proceedings not to be brought in Court of First Instance

No comments.

Division 2 – Follow-on Action

108. Follow-on right of action

108.1 **Jurisdiction of the Court of First Instance**

As the CFI has non-exclusive jurisdiction to adjudicate a composite claim, on both the competition law part and the non-competition law part, for the purpose of clause 108(1), if the CFI should also have the jurisdiction to determine whether or not a claim falls within its jurisdiction. Clauses 108(4)(a) and (b) should be amended accordingly.

108.2 The word "*and*" between clauses 108(4)(c) and 108(4)(d) should be changed to "***or***".

109. Commencement of follow-on actions
No comments.

110. Tribunal orders in follow-on actions
No comments

Division 3 – Stand-alone Action

111. Stand-alone right of action
No comments.

112 Commencement of stand-alone actions
No comments.

113 Tribunal orders in stand-alone actions
No comments.

Division 4 - Procedure

114 Tribunals may adjourn proceedings pending completion of Commission investigation
No comments.

115. Transfer of proceedings from Court of First Instance to Tribunal
No comments.

116. Costs in transferred proceedings
No comments.

117. Reference by Court of First Instance to Commission for investigation

117.1 As both the CFI and the Tribunal have the right to refer proceedings to the Commission for investigation, the title of clause 117 should be amended to "Reference by Court of First Instance or the Tribunal to Commission for investigation". Logically, *clause 117 should appear before clause 114*: "Tribunal may adjourn proceedings pending completion of commission investigation".

117.2 More fundamentally, however, we note that clause 117 provides for the CFI to exercise *what is in essence an executive, rather than judicial power.* The Law Society has concerns this may be contrary to the principle of separation of judicial power under Articles 81 and 85 of the *Basic Law.* Moreover, to the extent the CFI is asked to exercise such a power of referral, it calls into question the Court's ability to adjudicate independently and free from any reasonable apprehension of bias on issues that are the subject of its referral.

118. Findings of contravention of conduct rules
No comments.

119. Intervention by Commission

No comments.

120. Commission may participate in proceedings

No comments.

Part 8 Disclosure of Information

121. Interpretation

121.1 **Scope of "specified person"**

The concept of the "*specified person*" is introduced to be charged with a strict confidentiality obligation with respect to the information provided to or obtained by the Commission. The scope of the definition of the "*specified person*" needs to be broad enough to include all such persons who may possess or have access to confidential information in performance of the competition regulators' relevant functions. We propose the amendment of clause 121(i) to encompass any person appointed to assist any person referred to in clauses 121(a) to (h), instead of limiting them to the persons appointed to the competition regulators by the Commission in the exercise of its powers. As an example, the committees established under the BA should fall into the category of specified person while they are not established by the Commission under Part 3.

121.2 Section 378(15) of the SFO regarding secrecy, conflict of interests and immunity provides a broader scope of definition of "*specified person*" to include a wide range of persons involved in the performance and assistance in performing the SFC's function under the SFO.[19] As similar definition for specified persons and secrecy provision can also be found in the Singapore Competition Act.[20]

122. Confidential information

122.1 The scope of the definition of "*confidential information*" should be extended to include information that has been provided to or obtained by "*the specified persons*" rather than just by "*the Commission*", so that information obtained by specified persons other than the Commission is treated as confidential before it is

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[19] Section 378(15) of the SFO provides that "specified person" means-

(a) Securities and Futures Commission,

(b) any person who is or was a member, an employee, or a consultant, agent or adviser, of the Securities and Futures Commission; or

(c) any person who is or was-

(i) a person appointed under any of the relevant provisions;

(ii) a person performing any function under or carrying into effect any of the relevant provisions; or

(iii) a person assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions.

[20] Section 89(8) of the Singapore Competition Act provides that "specified person" means a person who is or has been –

(a) a member, an officer, an employee or an agent of the Competition Commission;

(b) a member of a committee of the Competition Commission or any person authorised, appointed or employed to assist the Competition Commission;

(c) an inspector or a person authorised, appointed or employed to assist an inspector; or

(d) a member of the Competition Appeal Board or any person authorised, appointed or employed to assist the Competition Appeal Board.

communicated to the Commission as it will not be covered under clause 127. Similar provisions can be found in section 378 of the SFO[21].

122.2 In practice, a person who provides information to the Commission may request confidential treatment of such information under clause 122(1)(b). We query whether a person other than the person who provides the information may assess the confidentiality with respect to the information submitted.

123. Duty to establish and maintain safeguards
No comments.

124. Preservation of confidentiality
No comments.

125. Disclosure with lawful authority

125.1 **Disclosure of information to a complainant**
Under clause 125(1)(b), a specified person may disclose confidential information in the performance of the Commission's function or in doing anything authorised by the Ordinance, as long as the specified person has regard to public interest as well as the legitimate business interest and private affairs of the person to whom the information relates

125.2 Disclosure of confidential information in the performance of any function of the Commission or doing anything authorized by this Ordinance is considered as being made "*with lawful authority*" under clause 125(1)(b) if made in accordance with clause 125 (3). This is an extremely broad provision and the safeguards provided for in clause 125(3) are currently quite inadequate because they permit a judgment to be made by an official who may not be sufficiently aware or informed of the importance of certain confidential information to a particular business. In our view, the provisions of clause 125 (3) should be considerably tightened to protect the legitimate interests of businesses in protecting their business secrets. We recommend that clause 125(3) be redrafted as follows (changes underlined):

> "(3) In deciding whether or not to disclose confidential information, where disclosure is <u>to be made</u> under subsection (1) (b), the specified person must consider and have regard to-

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[21] Section 378(1) of the SFO provides that except in the performance of a function under, or for the purpose of carrying into effect or doing anything required or authorized under, any of the relevant provisions, a specified person-
(a) shall preserve and aid in preserving secrecy with regard to any matter coming to his knowledge by virtue of his appointment under any of the relevant provisions, or in the performance of any function under or in carrying into effect any of the relevant provisions, or in the course of assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions;
(b) shall not communicate 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 possession by virtue of the appointment, or the performance of any such function under or the carrying into effect of any such provisions, or the assistance to the other person in the performance of any such function under or in carrying into effect any such provisions.

(a) the obligation to exclude as far as is practical from such disclosure-

..... (ii) the business secrets and confidential information of the undertakings concerned so as to protect the legitimate business interests of the undertakings or persons to whom it relates; and"

125.3 **Clauses 125(1)(d) and (f) Immunity and privilege before the Commission and the Tribunal**

Under clauses 125(1)(d) and (f), disclosure of confidential information by a specified person is regarded as lawful if the disclosure is made in connection with judicial proceedings arising under this Ordinance or with a view to bringing any criminal proceedings or any investigation under Hong Kong laws in Hong Kong. However, the Bill is silent as to whether such lawful disclosure of confidential information affects the privilege against self-incrimination.

125.3.1 We recommend this be clarified by adding "*Notwithstanding any other provisions of this Ordinance*" at the beginning of section 45(2) of the Bill[22], which addresses the rules on the admission of evidence against self-incrimination regarding information obtained during the course of an investigation by the Commission. In addition, as regards clause 125(1)(f), any disclosures for the purposes of information should be restricted to information provided under the Ordinance which is not covered by the privilege against self-incrimination. This is because the ability for other law enforcement/regulatory agencies to use such otherwise privileged materials for intelligence gathering purposes potentially undermines the privilege itself.[23]

125.4 **Clause 125(1)(h)**

Clause 125(1)(h) permits the disclosure of confidential information "*by one competition regulator to another*". This is very far-reaching. This provision should also be made "*subject to sub-section (3)*"in its amended version. Not all competition regulators around the world protect the disclosure of confidential business information to the same standards.

125.5 We note clause 44 provides a person with the same privileges and immunities as are available in civil proceedings in the CFI. However, under clause 146, the Tribunal is not bound by the rules of evidence in a court of law except when the Commission applies for an order under clauses 91 or 168. Accordingly, except proceedings in which the Commission applies for an order under clauses 91 or 168, the Tribunal may admit any evidence it deems appropriate and disregard any immunity or privilege to which a person may otherwise be entitled in a civil proceeding. Since clause 127(2)(d) creates a channel for the Commission to provide information to the Tribunal in any competition proceedings, the same degree of immunity and privilege to which a person is entitled during the Commission's investigation under clause 44 should also be available in proceedings before the Tribunal with respect to such information disclosed under clause 127. As such, it is submitted that a clear statement should be made as to the extent to which such immunities and privileges will be available in a proceeding before the Tribunal.

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[22] Sections 166, 187 and 220 of the SFO have wordings of similar effect for the use of incriminating evidence in proceedings.

[23] Notwithstanding the Court of Final Appeal's ruling in *HKSAR v Lee Ming Tee* [2001] 1 HKLRD 599.

126. Notice of proposed disclosure

126.1 In the normal course, it is fair and reasonable for "*any person who is, in the opinion of the specified person, likely to be affected by the disclosure*" to be notified of a proposed disclosure under section 125(1)(a). However, this requirement must be subject to "*tipping off*" issues, namely that such notification should not be required where, in the opinion of the specified person, there is a real risk (as opposed to only a possibility) that disclosures to such persons would prejudice any investigation under the Ordinance.

127. Obligation of third party not to disclose confidential information

127.1 We recommend that sub clauses (a) and (b) can be combined: "*has, directly or indirectly, received confidential information from a specified person*".

127.2 The exemption set out in section 127(2)(c) should be extended to disclosure for the purpose of (i) obtaining advice from professional or technical advisers (ii) for insurance purposes.

127.3 We note with respect to clause 127(2), the language in clause 125(1)(f) (regarding disclosure 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) should be added to the list of exemptions where disclosure of confidential information by a third party is authorized.

127.4 The Commission should be required to issue guidelines on the recognition and treatment of information which is confidential information under section 122.

Part 9 Competition Commission
Division 1 – Establishment, Functions and Powers

128. Establishment of Commission

128.1 **Clause 128(2)**

Please refer to our comments on Schedule 5 below.

129. Functions of Commission

129.1 A competition agency is to be judged by its actions, and provisions in the competition law that lay out the institutional frameworks necessary are only the first step in ensuring a truly competitive environment where the competition agency acts as a facilitator of competitive market places as opposed to a "*regulator*" with a regulator's bias for ex ante regulation and market ordering. Clause 129 rightly stresses the importance of competition advocacy -- where the competition body's primordial function is to advocate for pro-competitive solutions with the public as well as with other branches of government. For a new competition agency, in particular, it is very important that this function is taken seriously. The priority of a new agency should be competition advocacy, followed by local cartels. Only after these issues have been addressed should the focus move to unilateral conduct and merger control. Indeed in a small market, this prioritization is especially true. To this end, the provision in the legislation for market studies is commendable, as this is an excellent way of conducting competition advocacy. It is worth exploring in the

context of regulations under the competition bill, how new regulations can be rendered as pro-competitive as possible. One way of achieving this is to give the Commission some (discretionary) role in evaluating the competition effects of new regulations, just as is done in the UK, by way of example.

129.2 Will the Commission have the power to issue codes of practice and/or guidelines in such areas as it sees fit? The Bill would also benefit from a provision requiring members of the Commission to be independent from any particular business being investigated and to be required to disclose any possible interest in such a business or any other business that may be affected by an investigation. In a situation of conflict, the member should be required to remove him or herself from the investigation.

130. Powers of Commission
No comments.

Division 2 – Relationship to Government

131. Commission not servant or agent of Government
No comments.

132. Personal immunity of members of Commission etc.
No comments.

Part 10 Competition Tribunal

Division 1 - Constitution

133. Establishment of Tribunal
No comments.

134. Constitution of Tribunal
No comments.

Subdivision 1 – President and Deputy President

135. President
No comments.

136. Deputy President
No comments.

137. Acting President
No comments.

138. Resignation as President or Deputy President
No comments.

139. Vacancy in office of President or Deputy President
No comments.

Subdivision 2 - Assessors

140. Assessors
No comments.

Division 2 – Jurisdiction and Powers

141. Jurisdiction of Tribunal

141.1 With respect to clause 141(1)(d), we recommend adding the words "*pursuant to section 57*" at the end of the paragraph.

141.2 With respect to clause 141(1)(e), we recommend adding the words "*pursuant to section 62*" at the end of the paragraph.

142. Powers of Tribunal
No comments.

Division 3 – Practice and Procedure

143. Procedures

143.1 It is noted that the Tribunal may decide its own procedures and that the civil procedures of the CFI may be adopted. Since the Tribunal is to be a superior court of record, we consider that the Rules of the CFI should normally apply. Moreover, it is not clear what rights of audience will apply, for example with regard to the parties' legal representatives (including solicitors) and whether corporate parties would be allowed to act in person generally; and if not, under what circumstances would they be so allowed; and with or without leave. There would need to be a strong and compelling reason advanced to justify departing form the normal rules that ensure fairness and justice to parties to legal proceedings before the courts in Hong Kong.

144. Hearing and determination of applications
No comments.

145. Absence of member during course of proceedings
No comments.

146. Rules of evidence
No comments.

147. Evidence that might tend to incriminate
No comments.

148. Findings of fact by Tribunal
No comments.

149. Findings of fact by Court of First Instance
No comments.

150. Order not to disclose material

No comments.

151. Decisions of Tribunal

151.1 There is no time limit for giving reasons in writing. Time limit for appeal should be tied to time when a decision in writing with reasons is delivered. We recommend a time limit of six months. It should also be clarified that a written decision should omit any information which is confidential information under clause 122.

152. Orders of Tribunal

No comments.

153. Appeal to Court of Appeal

153.1 Given that the Tribunal is to be (essentially) a division of the CFI, the Law Society sees no justification for applying a different test for the grant of leave against decisions of the Tribunal to the Court of Appeal as that applied (where leave is required) for decisions of the CFI to the Court of Appeal. It could legitimately be argued that there should be no leave requirement (as this will inevitably add to the time and costs of the proceedings in some cases), but, if there is to be a leave requirement, then the Law Society suggests that it should be the same as that which applies in cases where leave is required for an appeal from the CFI to the Court of Appeal, and not higher (as would currently be the case if the proposed "reasonable prospects of success" test were to be adopted – which will inevitably involve a substantial determination of the legal issues at the leave stage, adding significantly to the time and expense of proceedings). The Law Society suggests therefore that the appropriate test (if a leave requirement is to be imposed) would be that leave should normally be granted unless the grounds of appeal have "*no realistic prospects of success*".

153.2 Accordingly, subsection (3) of Section 153 of the Bill should be revised to reflect this, along the following lines:

> (3) Leave to appeal will be granted under subsection 2(b) –
>
> (a) unless the Tribunal is satisfied that the appeal has no realistic prospects of success; or
> (b) if there is some other reason in the interests of justice why the appeal should be heard.

Division 4 - Miscellaneous

154. Registrar and other staff of Tribunal

No comments.

155. Seal of Tribunal

No comments.

156. Tribunal rules

No comments.

Part 11 - Concurrent Jurisdiction Relating to Telecommunications and Broadcasting

157. Interpretation

157.1 We suggest amending the wording in this clause from "*of the 2 competition regulators*" to read "*of 2 or more of the competition regulators*".

158. Concurrent jurisdiction with Telecommunications Authority

No comments.

159. Concurrent jurisdiction with Broadcasting Authority

No comments.

160. Transfer of competition matter between competition regulators

160.1 In respect of clause 160(1), we presume the mechanism, guidelines and procedures for the transfer of competition matters between the Commission, the BA and the TA under their sharing of the concurrent jurisdiction will be fully set out in the Memorandum of Understanding (MOU) - see our comments on clause 161 below - and, if necessary, further guidelines issued jointly by the Commission, the BA and the TA.

160.2 Potentially, all three regulators may have a claim to concurrent jurisdiction; the wording of clause 160(1) ought to be refined to deal with this possibility.

161. Memorandum of Understanding

161.1 The MOU is a key document which will set out in detail the framework, procedures and guidelines as to the manner in which the Commission, the BA and the TA will interact with each other in the context of their sharing of concurrent jurisdiction under the proposed Competition Ordinance. In this regard, in respect of clause 161(2), the word "*may*" should be deleted and replaced with the word "*shall*" as all of the matters set out in Schedule 6 of the Bill should be addressed in the MOU.

161.2 In respect of Section 161(3), the word "*jointly*" should be added between the words "*may*" and "*amend*".

Part 12 Miscellaneous

Division 1 – General

162. Merger

162.1 The Bill does not provide for a general cross sector merger control. At present, merger control only applies to merger activities in the telecommunications sector by way of Schedule 7.[24]

162.2 Whilst we appreciate the issue of merger control is difficult, and it is often argued that it is irrelevant given Hong Kong's small geographical size and open market economy, it is nevertheless submitted that a cross sector merger control should be a fundamental feature of the future Competition Ordinance. That said, a cross sector merger control will be in nature complex and the Government may need to conduct a further consultation process on this issue (i.e. to ascertain whether Schedule 7, as it currently stands, can be applied in an economy-wide context).

162.3 We note that Schedule 7 does not appear to provide for specific percentage thresholds (for changes in control in the target company).[25] This would seem to be intentional on the part of the drafters, as the thresholds used by the TA may not be appropriate thresholds for merger activities in the general economy. However, it would appear that the current determining factors/requirements set out in clause 5 of Schedule 7 are too vague and may need to be further addressed by future guidelines issued by the Commission and/or the TA.

162.4 If the position is maintained that there will not be a general merger regime in the first instance, then it is also imperative that it be made clear that the conduct rules will not apply to agreements and other conduct undertaken in anticipation of, or to give effect to, a merger. EU experience shows that failing to clarify this from the outset will result in considerable uncertainty and unnecessary litigation, both of which are undesirable and would undermine the Government's stated policy objectives in introducing this law. 1

163. Fees

No comments.

164. Personal immunity of public officers

No comments.

Division 2 – Service of Documents

165. Service of documents on Commission

165.1 In respect of clauses 165(2) (b), (c) and (d), we see no justification for service to be deemed to have occurred "*the day after*" the leaving or transmission of the notice or document, and suggests that it is more appropriate that service be deemed to have occurred on the day during its working hours that the notice or document was left at or transmitted to the Commission (as the case may be). We also note that deeming

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[24] Merger control in the telecommunications sector is currently controlled by the TA under Section 7P of the TO. Section 7P of the TO, along with the other anti-competition provisions in the TO, will be repealed in accordance with Schedule 8 of the draft Competition Bill. The legal requirements as to what constitutes a merger which substantially lessens competition set out in Schedule 7 are different from those set out in Section 7P of the TO and the "Guidelines on Mergers and Acquisitions in Hong Kong Telecommunications Markets" issued by the TA on 3 May 2004. In this regard, we assume that the TA will issue a fresh set of guidelines which will elaborate on the approach taken in Schedule 7.

[25] As opposed to the 15%, 30% and 50% thresholds set out in the "Guidelines on Mergers and Acquisitions in the Hong Kong Telecommunications Markets" issued by the TA on 3 May 2004.

service to have been made "the day after" has the effect of shortening notice periods by at least one calendar day. We consider such artificial shortening to be unfair.

166. Service of documents other than on Commission
No comments.

Division 3 – Indemnities

167. Certain indemnities of officers, employees or agents void
167.1 It should be clarified that third party insurance is permitted (similar to Directors and Officers insurance).

168. Financial penalty for contravention of Section 167
No comments.

169. Provision of funds for indemnity for defending proceedings
169.1 We are concerned at the possible limitation to access to justice by virtue of the provision that funds extended to a person against whom proceedings are brought for contravention of a competition rule to defend himself against those allegations must be repaid in the event that he is found to have contravened those rules. This seems to go beyond what is required to ensure the proper functioning of the rules, and potentially to impinge on the right of a person to defend himself against allegations made against him by a statutory body with far reaching and wide ranging powers. The "non-indemnification" provisions in clause 167 above should suffice as a deterrent.

Division 4 – Offences

170. Criminal proceedings not to be brought in Tribunal
No comments.

171. Provision of false information
No comments.

172. Employees not to suffer termination etc. for assisting Commission
No comments.

173. Obstruction of specified persons
No comments.

174. Offences by bodies corporate and partners
No comments.

Division 5 – Consequential, Related, Transitional and Savings Provisions

175. Consequential and related amendments.
No comments.

176. Transitional and savings provisions in relation to amendments made by this Ordinance

No comments.

SCHEDULE 1 – General exclusions from the Conduct Rules

1.1. The exclusions set forth in Schedule 1 are of such a general nature they should have been included in the main body of the Bill: for example, immediately after clauses 6 and 21, because these exclusions are, in effect, provisos to the first and second conduct rules. It is strange to relegate such fundamental provisions to a Schedule. At the very least, a reference to the provisions of Schedule 1 should be made in clauses 6 and 21 to indicate these provisions and Schedule 1 should be considered to have equal importance in the Bill and should be read together.

Paragraph 1: No comments.

1.2 Paragraph 2: Compliance with legal requirements.

In considering whether any undertaking has made an agreement or engaged in any conduct "for the purpose of complying with a legal requirement", any contemporaneous legal advice that the undertaking may have obtained at or about the relevant time should be a relevant factor that the Commission or the Tribunal should take into account in assessing the particular conduct and that where any infringement of either of the conduct rules has occurred, reliance in good faith on contemporaneous legal advice should be regarded as an element of mitigation.

Paragraph 3: No comments.

SCHEDULE 2 - Commitments

Part 1 – Procedural requirements for acceptance and variation of commitments

1. Application

No comments.

2. Notice

2.1 **Clause 2(1)(a)**

The notice should be specifically required to be given to the person who made the commitments in addition to those who the Commission considers likely to be affected by the commitment.

3 Clause 3

3.1 The clause does not clarify to whom the Commission must give this "*notice of decision not to accept*". This should be given to the persons to whom the Commission has given notice under clause 2(1)(a).

4 Clause 4.

4.1 As we have observed under clause 63(2) above that the publication of the commitment should omit confidential information, it will be appropriate to include the same restriction in this clause.

4.1.2 Furthermore, we believe that the obligation of the Commission to publish pursuant to this clause is similar to and should have the same time limit which we have indicated in clause 59(5) above.

5 Clause 5.

5.1 We refer to our comments to clause 2(3) above and note it will be consistent to amend line 2 of clause 5(a) as follows :-

> "..... Commission shall have considered as likely to be affected by the matter to ....."

6. Notice of decision not to accept

No comments.

7. Manner of giving notice

No comments.

PART 2: Procedural requirements for withdrawal of acceptance of commitments

1.1 We repeat our observations made in respect of PART 1 of Schedule 2 above.

PART 3: Procedural requirements for the release of commitments

1.1 We repeat our observations made in respect of Part 1 of Schedule 2 above.

1.2 **Clause 14(a).**

In order to be consistent with our observations on giving notice in Parts 1 and 2 above, we recommend notification of any release must be given to those who the Commission considers likely to be affected by it.

SCHEDULE 3: Orders that may be made by Tribunal in relation to contraventions of Conduct Rules

1.1 The drafting of clauses 1(p) and (q) should be reviewed as the use of the word "or" could result in representations to the Tribunal that the intent of the legislation is to limit it to only one remedy. We recommend deletion of the word "or".

SCHEDULE 4: Provisions that may be contained in Orders made by Tribunal in Relation to Anticipated Mergers and Mergers

No comments.

SCHEDULE 5: Competition Commission

1.1 For the most part, the Schedule adequately addresses basic matters regarding the Commission. The statute rightly provides insulation for the Commission from the Government. It is imperative that competition agencies are truly independent from political influence. Many of the sectors where the competition agency will become

active are precisely those sectors where political influence will likely be brought to bear against them.

1.2 However, the Schedule 5 provision that terms are not to exceed 3 years does provide a very short (by international standards) term. In the case of the Federal Trade Commission in the US, FTC Commissioner the terms are staggered to overlap with the 4-year Presidential term, and are set for a 7-year period. This is intentional so that the FTC commissioners who are appointed by one party are not immediately removed when the government changes. Political influences are thus minimized. It is doubtful that a term as short as three years will lead to the same level of protection as that in place under the US system.

1.3 The subject of independence is difficult. In some jurisdictions, independence from the executive power can give rise to true independence. In others the executive power itself protects the Commission from other undue political influences. It all depends on how entrenched political powers influence the governance structure in Hong Kong. If most lobbying is at the door of the Chief Executive, then that is the body from which the Commission should be made independent.

1.4 It shall benefit the Commission if there are more specific requirements on the members of the Commission relating to their qualifications or experience. Under the New Zealand Commerce Act 1986, the Commission must contain at least one "*barrister and solicitor of at least 5 years' standing*". As lawyers are admitted as both barristers and solicitors in New Zealand, an alternative for Hong Kong would be to require at least one barrister and one solicitor of at least 5 years' post qualification experience. This would ensure that the Commission contains members with legal knowledge and training.

SCHEDULE 6: Matters that may be Provided for in Memorandum of Understanding

No comments.

SCHEDULE 7 – Mergers

1.1 In relation to Schedule 7, Part 4, Division 2, there is high degree of concern at the extreme breadth of the exemption from the merger rule granted by these provisions. The Chief Executive is given extensive powers to exempt from the application of the merger rule any proposed merger on broad grounds of "*public policy*", even if the proposed merger would be likely to result in a "substantial lessening of competition in Hong Kong".

1.2 It is hard to see the justification for such overriding powers with very few checks and balances.

1.3 The starting point should be that all mergers should be reviewed against the same criteria. Where any proposed merger is prohibited as being likely to result in "*a substantial lessening of competition in Hong Kong*", the Chief Executive should be empowered to consider the negative effects of the proposed merger and weigh them

against any overriding considerations of "public policy" and invite and take into consideration the views of any interested parties, before making a decision.

1.4 Where the Chief Executive decides that the proposed merger should be allowed on grounds of "*exceptional and compelling reasons of public policy*", he should be obliged to make a reasoned decision which should be published in the Gazette and which would become effective only after a period of two months. Any interested party would then be entitled to apply to the Tribunal for judicial review of the Chief Executive's decision within the two month period.

SCHEDULE 8 – Consequential and Related Amendments

1.1 While it is proposed that the existing competition provisions in the BO and TO would be repealed when the general competition law comes into force, it is proposed section 7Q be introduced into the TO to regulate any conduct that, in the opinion of the TA, comprises exploitative conduct by a dominant telecommunications licensee.

1.2 There is inevitably going to be enormous difficulty trying to determine whether claims of abuse of dominance against telecoms licensees (which will often involve pricing) should be brought in the Telecommunications (Competition Provisions) Appeal Board, under section 7Q of the TO, the Tribunal, under the second conduct rule, or both.

1.3 Maintaining an exploitative conduct prohibition within the TO, which is necessarily predicated on dominance, is, therefore, likely to cause serious and intractable conflicts in jurisdiction between the TA and TAB, on the one hand, and the Commission and Tribunal, on the other hand, in relation to unilateral conduct cases involving Telecoms licensees.

SCHEDULE 9 – Transitional and Savings Provisions

1.1 In relation to paragraph 3 it should be made clear that the Commission may not initiate an investigation or take action under the Competition Ordinance in respect of conduct which has been investigated under the pre-amended TO and continued under that Ordinance or that is or becomes the subject of an appeal to the Appeal Board under the pre-amended TO to avoid the possibility of double jeopardy.

1.2 In relation to paragraph 4, similar clear provision should be made in respect of investigations and appeals under the pre-existing Broadcasting Authority Ordinance and pre-existing BO for similar reasons.

The Law Society of Hong Kong
Competition Law Committee
1 February 2011
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