



19 August 2011

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邱何恩德

Mr Greg So, JP  
Secretary for Commerce and Economic Development  
Commerce and Economic Development Bureau  
The Government of HKSAR  
2/F Murray Building  
Garden Road  
Hong Kong

Dear Mr So,

**Re: Hong Kong Competition Bill 2010**

It was a great pleasure meeting you in the Dinner Talk held on 10 March 2011 whereby you delivered a most eloquent and convincing speech on the captioned topic to our Members.

Our Association now has the pleasure to submit its Position Paper regarding the captioned Bill. Enclosed please find a copy for your review.

Should there be any clarifications required, please do not hesitate to contact the undersigned on 2524 8996.

Yours sincerely,

Christine KOO

Solicitor, HKSAR

Chairperson

Legal Committee of HKWPEA



**POSITION PAPER**  
**HONG KONG WOMEN PROFESSIONALS &**  
**ENTREPRENEURS ASSOCIATION LIMITED (“HKWPEA”)**

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**on**

**HONG KONG COMPETITION BILL 2010**

(to be submitted by HKWPEA)

**I) Views and Opinions of WPEA**

In principle, we agree that Hong Kong should have a law to prohibit any conduct that tends to lessen competition in Hong Kong. Therefore, we support the spirit of the Competition Bill.

However, comments from our Members (whom as you know, are mostly professionals and entrepreneurs and they came from a wide spectrum of the general public), suggest that the Bill in its current form tends to open a Pandora box of litigations as a result of insufficient certainty in respect of concepts and terminologies. Our Members' comments are that in some areas, it covers too much too wide with far reaching consequences. The bill resembles closely to the anti-competition legislations of the EU which may not fit a small jurisdiction such as Hong Kong. In other areas, it provides easy escapes by the big players.

Generally speaking, we find the Bill suffering from the following problems:

- a. Definitions of key terms
- b. The conduct rules are excessively broad The conduct rules are excessively broad
- c. It does not differentiate between substantive enterprises and small and medium enterprises (“SMEs”)
- d. Mergers of SMEs are subject to same conduct rules
- e. Allowing the Commission wide discretion to determine its rules which may affect Hong Kong's economic policy

## a. Definitions of key terms

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**Undertaking** In clause 2, the definition is particularly wide as it covers “any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity”. This theoretically covers everyone running or connected to a business, including employees. This is certainly not what HK people expect.

**Market** It has not clarified the area of “Market” as to either the entire Hong Kong or a district. We consider that the difference of the area of “Market” will cause grave concern in the course of decision making by entrepreneurs. It should be made clear as to how far the “Market” is suppose to mean.

We understand that there has been quite a no. of decided European cases on the meaning of market. While HK may not be able to strictly adopt EU case laws, we do expect the government to make use of the relevant cases to clarify the meaning of Market.

## b. The conduct rules are excessively broad

### First Conduct Rule

- **Prohibition** Whilst hardcore conducts such as bid-rigging, cartels/price-fixing and market sharing are relatively certain, other softcore conducts such as vertical agreements, bundling, discrimination and abuse of dominance/market power are not. The current provisions do not differentiate between the two conducts and their respective penalties are disproportionate. We believe this is one of the major areas that cause uncertainty and thus concern.

- **Exclusions** We agree on having exemptions for certain statutory bodies, but a general blanket exemption involves risks of abuse as many practices of statutory bodies are likely to fall within the current definition.



### Second Conduct Rule

- **Substantial degree of Market Power** The current draft legislation fails to deal with the position where a number of undertakings, which individually does not have a substantial market power, can abuse their “collective substantial degree of market power”.

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We propose to add in a mechanism to prevent the situation so that the threshold is suited to the small and open nature of Hong Kong’s market and its status as a financial centre.

#### **c. Differentiation of Substantive Enterprises and SMEs**

We believe the Bill can and should set out which provisions target at which size of the “Undertakings”. As such, it will take away a lot of concerns. If the size of mergers that might be caught by the Conduct Rules are not clearly spelt out, the concerns would not be eliminated, and the on-going battle would remain.

Its is quite sarcastic that the intention of the government to prohibit conducts that prevent, prohibit and restrict competition by targeting at mergers of large enterprises should ended up facing intense oppositions from SMEs.

#### **d. Merger Rule - Schedule 7**

- “Mergers Rule” At present, only telecommunications sector is controlled by Schedule 7. This leaves other mergers to be potentially governed by the current provisions of the conduct rules.

It is our view that this is a waste of Schedule 7 – Merger Rule which provides a clear and succinct guideline on mergers which can and should be used for all mergers of a certain size and dominance.

#### **e. Wide discretion of the Commission**

- **Commission’s Powers** Commission has discretion whether to give clearance of certain conducts, save in exceptional circumstances. The power to investigate, making decision and enforcement meant the Commission has de facto control of the economic policy of Hong Kong, if, (again), the size of the “Undertaking” that are subject to certain Rules are not spelt out.

## II. Self-incrimination

We congratulate the law draftsman and support the part of the Bill on Self-incrimination. We believe s.45 is an effective tool to deter hardcore anti-competitive activities, as the risk of defending any allegations under the Bill with artificial data is severe. In terms of protection, a person will not be prejudiced with an offence, as the breach will not be brought under trial (s.170).

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## III. Our Proposal

We propose to add a section whereby the SMEs (with appropriate definition) are clearly and unequivocally exempted from certain Rules of the Bill. While its is often emphasised by the current Secretary for Commerce and Economic Development that SMEs do not have to worry as the Bill by definition will have no effect on them. However, lawyers who advise on the Bill, apparently think otherwise. That is exactly where the difficulties lie. Enterprises have only lawyers to consult, not the government.

## IV. Summary

We believe Hong Kong should have a Competition Law to prohibit conducts that are detrimental to our open market. As it stands, our main concerns are with the scope that the provisions cover and the indiscriminate effect it has on big and small enterprises.

Dated the 18<sup>th</sup> day of August, 2011

Submitted By:

  
Christine KOO

Solicitor, HKSAR

Chairperson

Legal Committee of HKWPEA

If there is any queries, please do not hesitate to contact Mrs Christine Koo of Christine M. Koo & Ip, Solicitors & Notaries on 2524 8996 or christinekoo@cmkoo.com.hk