



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

29 November 2010

By hand

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

Dear Sir,

Competition Bill

We write further to the letter sent on behalf of your Committee by Ms Diana Wong on 4 November, in which The Real Estate Developers Association of Hong Kong (REDa) was invited to make a submission presenting its views on the Competition Bill.

REDa's position may be summarized as follows:

- If there is to be a Competition Ordinance, it should be technically sound and in line with international best practice;
- There should be a level-playing field between all economic actors; statutory bodies should not be exempted from the scope of the Ordinance;
- The Competition Ordinance should not be so stringent as to deter healthy competition on the markets; sanctions should be reasonable and proportionate, and the threshold for market power should be adapted to the economic structure of Hong Kong.

The above proposals are explained in greater detail below.

*

* *

1 Statutory bodies should not be exempted

1.1 Relevant provisions in the Bill

Section 2 defines "statutory bodies" as follows:

"statutory body" (法定團體) means a body of persons, corporate or unincorporate, established or constituted by or under an Ordinance or appointed under an Ordinance, but does not include —

- (a) a company;
- (b) a corporation of trustees incorporated under the Registered Trustees Incorporation Ordinance (Cap. 306);
- (c) a society registered under the Societies Ordinance (Cap. 151);



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

- (d) a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33); or
- (e) a trade union registered under the Trade Unions Ordinance (Cap. 332);"

Section 3 of the Bill provides as follows:

"3. Application to statutory bodies

- (1) The following provisions do not apply to a statutory body—
 - (a) Part 2 (The conduct rules);
 - (b) Part 4 (Enforcement powers of Commission);
 - (c) Part 6 (Enforcement before Tribunal); and
 - (d) Schedule 7 (Mergers).
- (2) Despite subsection (1), the provisions referred to in that subsection apply to—
 - (a) a specified statutory body; and
 - (b) a statutory body, to the extent that it is engaged in a specified activity.
- (3) In this section—
 - (a) "specified" (指明) means specified in a regulation made for the purpose of this section by the Chief Executive in Council under section 5; and
 - (b) a reference to a statutory body includes an employee or agent of the statutory body, acting in that capacity."

Section 4(1) of the Bill provides as follows:

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

- (1) The provisions referred to in section 3(1) do not apply to—
 - (a) a specified person; or
 - (b) a person, to the extent that the person is engaged in a specified activity."

Section 5 of the Bill provides as follows:

"5. Regulations

- (1) The Chief Executive in Council may, by regulation—
 - (a) apply the provisions referred to in section 3(1) to—
 - (i) any statutory body; or
 - (ii) any statutory body, to the extent that it is engaged in an activity specified in the regulation; and
 - (b) disapply the provisions referred to in section 3(1) to—
 - (i) any person; or
 - (ii) any person, to the extent that the person is engaged in an activity specified in the regulation.
- (2) The Chief Executive in Council may only make a regulation under subsection (1)(a)(i) or (ii) with respect to a statutory body if he or she is satisfied that—
 - (a) the statutory body is engaging in an economic activity in direct competition with another undertaking;
 - (b) the economic activity of the statutory body is affecting the economic efficiency of a specific market;



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

- (c) the economic activity of the statutory body is not directly related to the provision of an essential public service or the implementation of public policy; and
- (d) there are no other exceptional and compelling reasons of public policy against making such a regulation.

(3) In subsection (1), a reference to a statutory body or a person includes an employee or agent of the statutory body or person, acting in that capacity."

Section 9(1)(d) of the Bill provides as follows:

"9. Application for decision

(1) An undertaking that has made or given effect to, is giving effect to or is proposing to make or give effect to an agreement may apply to the Commission for a decision as to whether or not the agreement is—

[...]

- (d) excluded from the application of this Part by virtue of section 3 (Application to statutory bodies) or section 4 (Application to specified persons and persons engaged in specified activities)."

Section 24(1)(c) of the Bill provides as follows:

"24. Application for decision

(1) An undertaking that has engaged in, is engaging in or is proposing to engage in certain conduct may apply to the Commission for a decision as to whether or not the conduct is—

[...]

- (c) excluded from the application of this Part by virtue of section 3 (Application to statutory bodies) or section 4 (Application to specified persons and persons engaged in specified activities)."

Section 11(2)(b)(i) of Schedule 7 to the Bill provides as follows:

"11. Application for decision

[...]

(2) The decision referred to in subsection (1) is a decision as to whether or not the merger is, or the proposed merger would if completed be—

[...]

- (b) excluded from the application of this Schedule by virtue of—
 - (i) section 3 (Application to statutory bodies); or
 - (ii) section 4 (Application to specified persons and persons engaged in specified activities)."

1.2 Recommendation

Proposal

REDA suggests that statutory bodies engaged in an economic activity should be subject to the Competition Ordinance, in so far as its provisions do not obstruct the performance



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

of any services of general economic interest which may have been entrusted to them. Accordingly, REDA suggests the following amendments:

- delete the definition of statutory body in section 2 of the Bill;
- delete sections 3 and 5 of the Bill;
- amend section 4(1) of the Bill as follows:
 - "4. Application to specified persons and persons engaged in specified activities**
 - (1) The following provisions ~~referred to in section 3(1)~~ do not apply to—
 - (a) Part 2 (The conduct rules);
 - (b) Part 4 (Enforcement powers of Commission);
 - (c) Part 6 (Enforcement before Tribunal); and
 - (d) Schedule 7 (Mergers).do not apply to—
 - (a) a specified person; or
 - (b) a person, to the extent that the person is engaged in a specified activity.
 - (2) In this section—
 - (a) "specified" (指明) means specified in a regulation made for the purpose of this section by the Chief Executive in Council ~~under section 5~~; and
 - (b) a reference to a person includes an employee or agent of the person, acting in that capacity"
- amend section 9(1)(d) of the Bill as follows:
 - "9. Application for decision**
 - (1) An undertaking that has engaged in, is engaging in or is proposing to engage in certain conduct may apply to the Commission for a decision as to whether or not the conduct is—
 - [...]
 - (d) excluded from the application of this Part by virtue of ~~section 3 (Application to statutory bodies)~~ or section 4 (Application to specified persons and persons engaged in specified activities)."
- amend section 24(1)(c) of the Bill as follows:
 - "24. Application for decision**
 - (1) An undertaking that has made or given effect to, is giving effect to or is proposing to make or give effect to an agreement may apply to the Commission for a decision as to whether or not the agreement is—
 - [...]
 - (c) excluded from the application of this Part by virtue of ~~section 3 (Application to statutory bodies)~~ or section 4 (Application to specified persons and persons engaged in specified activities)."



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

- amend Section 11(2)(b)(i) of Schedule 7 to the Bill as follows:

"11. Application for decision

[...]

(2) The decision referred to in subsection (1) is a decision as to whether or not the merger is, or the proposed merger would if completed be—

[...]

(b) excluded from the application of this Schedule by virtue of

(i) ~~section 3 (Application to statutory bodies); or~~

(ii) ~~section 4 (Application to specified persons and persons engaged in specified activities)"~~

Justification

The proposed exemption is rigid and inadequate. Under the Competition Bill, the Government contemplates exempting all "statutory bodies" unless they are specified in a separate regulation to be adopted by the Chief Executive in Council. The proposed exemption in the Bill for statutory bodies is rigid, ill-suited to an evolving situation, and would seem likely to result in considerable genuinely commercial activity falling permanently outside the scope of the competition law.

REDA suggests that a more case-by-case functional approach - based on the nature of the activity - would be more appropriate. The flexibility of this framework is attractive and ensures a level-playing field as regards the application of competition law provisions to public- and private-sector economic operators.

The proposed exemption is likely to significantly affect the property markets. The question is of some significance to REDA as economic activity carried out by statutory bodies has a substantial impact on property markets in Hong Kong. These include, for instance, the Hong Kong Housing Authority (HA), which owns public rental housing units in which a large part of the Hong Kong population is currently living.

REDA's proposal is reasonable and limited to certain economic activities of statutory bodies. REDA's proposal to remove the express exemption for statutory bodies does not mean that all of their activities will become subject to the Competition Ordinance. The Ordinance will only apply to statutory bodies when they act as commercial undertakings (an "undertaking" is defined in section 2 as any entity engaged in economic activity) and, when they are entrusted with the operation of services of general economic interest, only in so far as applying the Ordinance would not obstruct the performance of these services (this protection is provided for in section 3 of schedule 1 to the Bill). In addition, under REDA's proposal, the Chief Executive in Council retains the right to exempt specified persons and persons engaged in specified activities pursuant to section 4 of the Bill, which remains substantially unchanged under REDA's proposal.



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

- 2 The relevant threshold for the second conduct rule should be dominance and not a substantial degree of market power

2.1 Relevant provision in the Bill

Section 21(1) of the Bill provides as follows:

"21. Abuse of market power

(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong."

2.2 Recommendation

Proposal

The Competition Ordinance should refer to the notion of dominant position rather than to the notion of substantial degree of market power for purposes of the second conduct rule. Accordingly, REDA suggests the following amendment:

"21. Abuse of dominant position

(1) An undertaking that has a ~~substantial degree of market power~~ **dominant position** in a market must not abuse that ~~power~~ **position** by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong."

Justification

The Government considers that the two notions are different. REDA is aware that some commentators, including the Under Secretary for Commerce and Economic Development Mr Gregory So, contend that the notion of "substantial degree of market power" proposed in the Bill is interchangeable with the notion of "dominant position". Mr. So made his position clear orally at several events,¹ but to REDA's knowledge neither Mr. So nor the Government has gone on record to confirm this view. On the contrary, the formal Government position on the topic is that the two notions are different. Paragraphs 11 through 13 of the *Detailed Proposals for a Competition Law - A Public Consultation Paper* issued by the Commerce and Economic Development Bureau in May 2008 make it very clear that, in the opinion of the Government, the concept of "substantial degree of market power" entails a lesser degree of market power than the concept of dominance:

"The difference between "dominance" and "substantial market power" relates to the degree of market power of a firm that would render it liable to possible charges of abusive conduct. Some systems proceed on the basis of abuse of dominance, for example, the EU law, where there is a presumption of dominance at 50% of market share. The USA uses the concept of "monopolization", which may be taken to mean more than 70% of the market.²⁰ [Footnote 20: Australia and New Zealand adopt a "substantial market power" standard.] In

¹ Including at an event organized by the Hong Kong General Chamber of Commerce on 8 October 2010 and at an event organized by Lingnan University and the Hong Kong Polytechnic University on 17 June 2010.



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈 1403 室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

addition to the market share of an undertaking, other factors including the market shares of its competitors, the ease of entry into the market, and the bargaining power of the buyers (generally related to the number and size of the buyers), would also be considered in determining whether that undertaking possesses substantial market power.

12. In a geographically concentrated economy such as Hong Kong's, it is not unusual for a small number of firms to dominate certain markets. In such cases, the conduct of a firm with a significant market share, albeit short of the 50% presumption for "dominance" could have a major effect on competition. We therefore propose that rather than a test of "dominance", the threshold for investigating possible abuse should be "substantial market power", i.e., a market share of about 40%.

13. Adopting a "substantial market power" test would allow the future Competition Commission to investigate possible abuse in markets that are not subject to monopoly, but that are highly concentrated." (emphasis added)

The substantial market power test is inconsistent with international practice and with the rest of China. Many Hong Kong-based firms are active in numerous countries and most of the competition law regimes they are exposed to (not least the Mainland China regime under the Antimonopoly Law) apply the higher dominance threshold. Introducing the lower threshold of substantial market power in Hong Kong would entail an additional regulatory burden for firms active across multiple jurisdictions or simply for those active across the Pearl River Delta. The adoption of a dominance threshold on the other hand would allow the Competition Commission to have regard to clear guidance in well-established European case law as well as precedents adopted in most other jurisdictions, including Mainland China. The opportunity to rely on clear foreign precedents when interpreting the Competition Ordinance would be lost if another test than dominance were to be used.

The substantial market power test is inappropriate for the Hong Kong economy. REDA is concerned that substantial market power is too low a threshold to adopt in the specific context of Hong Kong's economy - especially considering that Hong Kong's geographically concentrated economy naturally leads to higher concentration levels than in larger economies. The Bill is therefore misguided in proposing the lower threshold of substantial market power rather than market dominance. This lower threshold will cause Hong Kong's competition law to be too wide in scope and overly burdensome for the business community and the proposed Competition Commission - to the detriment of effective competition and ultimately to the detriment of consumers.

Legal certainty requires the use of the "dominance" concept. There has been significant uncertainty as to the meaning of "substantial degree of market power" in the handful of countries which apply this test. REDA does not dispute the benefits of referring in the Bill to concepts which have been interpreted by foreign regulators and courts. However, the interpretation of the concept of "dominance" is much better established and less controversial than that of "substantial degree of market power". Whereas the 2008 consultation paper quoted above indicates that the latter concept may be interpreted as referring to a market share of about 40 per cent, the Government's own interpretation does not appear to be universally accepted. In Australia, one of the few jurisdictions which use the test, courts have in the past decided that a market share of



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈 1403 室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

just 16 per cent could amount to substantial market power.² Although that holding appears to have been reversed on appeal by the Federal Court of Australia,³ the circumstance that the test proposed in the Bill could lend itself to such an interpretation is cause for concern.

In addition, the Bill itself suggests the continued use of the dominance threshold in the telecommunications sector. Section 14 of schedule 8 of the Bill provides for the introduction of a new provision on the Telecommunications Ordinance as follows: "7Q. Exploitative conduct - (1) A licensee in a dominant position in a telecommunications market must not engage in conduct that in the opinion of the Authority is exploitative."

In view of the above, REDA submits that the Legislative Council should refer to the concept of dominance in section 21(1) of the Ordinance in the interest of legal certainty.

3 The sanctions regime should be proportionate

3.1 Relevant provision in the Bill

Section 91(3) of the Bill provides as follows:

"91. Tribunal may impose pecuniary penalty

(3) [t]he amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total: (a) 10% of the turnover of the undertaking concerned, for the year in which the contravention occurred; or (b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in which the contravention has continued."

3.2 Recommendation

Proposal

The maximum amount of pecuniary penalties should be limited to 10 per cent of the total turnover achieved by the infringing party during the course of the preceding business year. Accordingly, REDA suggests the following amendment:

"91. Tribunal may impose pecuniary penalty

(3) [t]he amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total: ~~(a) 10% of the turnover of the undertaking concerned, for in the preceding business year in which the contravention occurred; or (b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in which the contravention has continued.~~

² *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* [2001] FCA 1800 (Hill J, 14 December 2001).

³ *Universal Music Australia Pty Ltd v Australian Competition & Consumer Commission* [2003] FCAFC 193 (Wilcox, French and Gyles JJ, 22 August 2003).



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

Justification

The maximum fine should be proportionate and in line with international practice.

The current proposal sets the maximum amount at "10% of the turnover of the undertaking concerned, for each year in which the contravention has continued". Such statutory limit is not consistent with international standards where maximum fines are usually calculated based on a single reference year only. Adopting a higher threshold would make the Competition Ordinance the most repressive competition law in the world, which would not sit well with a newly introduced competition regime and may harm Hong Kong's broader business interests.

4 No financial penalties should be imposed on individuals

4.1 Relevant provisions in the Bill

Sections 90(1) and 91(1) of the Bill respectively provide as follows:

"90. Commission may apply for pecuniary penalty

(1) If, after carrying out such investigation as it considers appropriate, the Commission considers it appropriate to do so, it may apply to the Tribunal for a pecuniary penalty to be imposed on any person it has reasonable cause to believe (a) has contravened a competition rule; or (b) has been involved in a contravention of a competition rule."

"91. Tribunal may impose pecuniary penalty

(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate."

4.2 Recommendation

Proposal

The above sections provide for the possibility to impose pecuniary penalties upon any person - undertakings or individuals - involved in a contravention of a competition rule. The Competition Ordinance should not provide for pecuniary penalties to be imposed on individuals unless they qualify as undertakings. Accordingly, REDA suggests the following amendments:

"90. Commission may apply for pecuniary penalty

(1) If, after carrying out such investigation as it considers appropriate, the Commission considers it appropriate to do so, it may apply to the Tribunal for a pecuniary penalty to be imposed on any ~~person~~ **undertaking** it has reasonable cause to believe (a) has contravened a competition rule; or (b) has been involved in a contravention of a competition rule."

"91. Tribunal may impose pecuniary penalty

(1) If the Tribunal is satisfied, on application by the Commission under section 90, that ~~a person~~ **an undertaking** has contravened or been involved in a contravention of a



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

competition rule, it may order that **person undertaking** to pay to the Government a pecuniary penalty of any amount it considers appropriate."

In line with these amendments, any other reference to "person" in Division 2 of the Bill should be also replaced by "undertaking."

Justification

Imposing fines on individuals poses a risk of over deterrence. Including financial penalties against individuals within the array of possible sanctions would be inefficient, disproportionate and counterproductive. Excessive fines may result in over deterrence by providing incentives to engage in excessive monitoring and compliance expenditures or to refrain from engaging in risky but overall competitive projects. It can also create conflicting interests between individuals and undertakings in the context of leniency or commitment procedures. Finally, it would single out Hong Kong as one of the most severe competition law regimes in the world, which might harm Hong Kong's broader business interests.

5 The director disqualification regime should be consistent with the existing Hong Kong legal framework

5.1 Relevant provisions in the Bill

Section 2 provides for a definition of "director" and of "shadow director" as follows:

"director" (董事) includes any person occupying the position of director or involved in the management of a company, by whatever name called, and includes a shadow director;

[...]

"shadow director" (幕後董事), in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act, but a person is not to be regarded as a shadow director by reason only that the directors act on advice given by that person in a professional capacity;"

Sections 99 to 101 of the Bill provide as follows:

"99. Disqualification order

(1) In the circumstances specified in section 100, the Tribunal may, on application by the Commission, make a disqualification order against a person.

(2) A disqualification order is an order that a person may not, without the leave of the Tribunal--

- (a) be, or continue to be, a director of a company;
- (b) be a liquidator of a company;
- (c) be a receiver or manager of a company's property; or
- (d) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company,

for a specified period, not exceeding 5 years, beginning with the date of the order.



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

- (3) In this section--
"specified" (指明) means specified in the disqualification order.

100. Circumstances in which disqualification order may be made

The Tribunal may only make a disqualification order against a person if both of the following conditions are satisfied in relation to that person--

- (a) it has determined that a company of which the person is a director has contravened a competition rule; and
- (b) it considers that the person's conduct as a director makes the person unfit to be concerned in the management of a company.

101. Unfitness to be concerned in management of company

- (1) For the purpose of deciding under section 100(b) whether a person is unfit to be concerned in the management of a company, the Tribunal --

- (a) must have regard to whether subsection (2) applies to the person; and
- (b) may have regard to the conduct of the person as the director of a company, in connection with any other contravention of a competition rule.

- (2) This subsection applies to a person if as a director of the company--

- (a) the person's conduct contributed to the contravention of the competition rule;
- (b) the conduct of the person did not contribute to the contravention, but the person had reasonable grounds to suspect that the conduct of the company constituted the contravention and took no steps to prevent it; or
- (c) the person did not know but ought to have known that the conduct of the company constituted the contravention."

5.2 Recommendation

Proposal

REDA suggests that the current definition of "director" in section 2 of the Bill be amended as follows:

"“director” (董事) includes any person occupying the position of director or involved in the management of a company, by whatever name called, and includes a shadow director"

Justification

The definition of "director" is too broad. The current definition of "director" in section 2 would cause the director disqualification regime provided for in sections 99 to 101 of the Bill to be unnecessarily far-reaching in terms both of the range of people affected and of the scope of work one would be disqualified from doing.

Read together with sections 99(2)(a) and 100(a) of the Bill, the definition of "director" as it now stands would effectively subject everyone in the infringing company except for junior staff (who do not have any subordinate to manage) to a potential prohibition of performing any work beyond that of a junior staff for a maximum of 5 years. This cannot be the real legislative intention, considering that a disqualification order is generally



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

considered a very severe civil sanction⁴ (and perhaps even penal in nature).⁵ It would therefore be logical and legitimate to keep the scope of application of the director disqualification regime focused on persons in a real position of power to influence the conduct of the company. This is particularly relevant in view of the fact that the imposition of individual sanctions is relatively novel in foreign competition laws.

The definition of "director" in the Competition Ordinance should be consistent with Hong Kong and foreign precedents. With a view to ensure a coherent legislative framework in Hong Kong, the definition of "director" and the application of the disqualification regime should be consistent with similar provisions under (1) the Companies Ordinance (Cap.32)⁶ and (2) the Securities and Futures Ordinance (Cap.571).⁷ This would also bring consistency with (3) the UK Company Directors Disqualification Act.⁸

None of these statutes would deem a person a director simply by reason of his or her involvement in managing a company. The notion of *de facto* directorship denotes the power to control the conduct of company affairs. This is already achieved by the proposed definition of "shadow director" under section 2 of the Bill. Defining "directors" on the basis of their mere involvement in managing a company goes beyond the well-accepted concept of *de facto* director.

The proposed definition of "director" in the Bill creates confusion with the notion of "officer", also defined in the Bill. The current definition proposed in the Bill creates confusion with the broader notion of "officer" defined in section 78 of the Bill. "Officer" is a distinct concept which includes not only directors but also managers and company secretaries etc. Including a reference to a person's involvement in the management of the company in the definition of "director" blurs the distinction between the two notions.

6 Need for materiality threshold in the Ordinance

6.1 Relevant provisions in the Bill

Section 6(1) of the Bill provides as follows:

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

- (1) An undertaking must not—
- (a) make or give effect to an agreement;
 - (b) engage in a concerted practice; or
 - (c) as a member of an association of undertakings, make or give effect to a decision of the association,

⁴ *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKRD 114, paragraph 56.

⁵ See *Rich v Australian Securities and Investments Commission* [2004] HCA 42 (case note available at <http://www.hcourt.gov.au/media/Rich%20and%20Silbermann%20v%20ASIC.pdf>), and Law No.5 of 1999 concerning the Ban on Monopolistic Practices and Unfair Business Competition of Indonesia which reserves the director disqualification order as a criminal penalty.

⁶ According to section 2 of the Companies Ordinance: "'director" includes any person occupying the position of director by whatever name called."

⁷ According to section 1 of Schedule 1 to the Securities and Futures Ordinance: "'director" includes a shadow director and any person occupying the position of director by whatever name called."

⁸ According to section 22 of the Company Directors Disqualification Act: "'director" includes any person occupying the position of director, by whatever name called."



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

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

Section 7 of the Bill provides as follows:

“7. “Object” of agreement

(1) If an agreement, concerted practice or decision has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.

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

Section 8 of the Bill provides as follows:

“8. Territorial application of first conduct rule

The first conduct rule applies to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if—

- (a) the agreement or decision is made or given effect to outside Hong Kong;
- (b) the concerted practice is engaged in outside Hong Kong;
- (c) any party to the agreement or concerted practice is outside Hong Kong; or
- (d) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.”

Section 21(1) of the Bill provides as follows:

“21. Abuse of market power

(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.”

Section 22 of the Bill provides as follows:

“22. “Object” of conduct

(1) If conduct has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.

(2) An undertaking may be taken to have engaged in conduct that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.”

Section 23 of the Bill provides as follows:

“23. Territorial application of second conduct rule



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

The second conduct rule applies to conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong even if—

- (a) the undertaking engaging in the conduct is outside Hong Kong; or
- (b) the conduct is engaged in outside Hong Kong.”

6.2 Recommendation

Proposal

REDA suggests to insert a materiality threshold in the conduct rules.

Section 6(1) of the Bill should be amended as follows:

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

- (1) An undertaking must not—
 - (a) make or give effect to an agreement;
 - (b) engage in a concerted practice; or
 - (c) as a member of an association of undertakings, make or give effect to a decision of the association,if the object or effect of the agreement, concerted practice or decision is to **appreciably** prevent, restrict or distort competition in Hong Kong.”

Section 7 of the Bill should be amended as follows:

“7. “Object” of agreement

- (1) If an agreement, concerted practice or decision has more than one object, it has the object of **appreciably** preventing, restricting or distorting competition under this Ordinance if one of its objects is **appreciably** to prevent, restrict or distort competition.”
- (2) An undertaking may be taken to have made or given effect to an agreement or decision or to have engaged in a concerted practice that has as its object the **appreciable** prevention, restriction or distortion of competition even if that object can be ascertained only by inference.”

Section 8 of the Bill should be amended as follows:

“8. Territorial application of first conduct rule

The first conduct rule applies to an agreement, concerted practice or decision that has the object or effect of **appreciably** preventing, restricting or distorting competition in Hong Kong even if—

- (a) the agreement or decision is made or given effect to outside Hong Kong;
- (b) the concerted practice is engaged in outside Hong Kong;
- (c) any party to the agreement or concerted practice is outside Hong Kong; or
- (d) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.”

Section 21(1) of the Bill should be amended as follows:

“21. Abuse of dominant position



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

(1) An undertaking that has a ~~substantial degree of market power~~ **dominant position** in a market must not abuse that ~~power position~~ by engaging in conduct that has as its object or effect the **appreciable** prevention, restriction or distortion of competition in Hong Kong."

Section 22 of the Bill should be amended as follows:

"22. "Object" of conduct

(1) If conduct has more than one object, it has the object of **appreciably** preventing, restricting or distorting competition under this Ordinance if one of its objects is **appreciably** to prevent, restrict or distort competition.

(2) An undertaking may be taken to have engaged in conduct that has as its object the **appreciable** prevention, restriction or distortion of competition even if that object can be ascertained only by inference."

Section 23 of the Bill should be amended as follows:

"23. Territorial application of second conduct rule

The second conduct rule applies to conduct that has as its object or effect the **appreciable** prevention, restriction or distortion of competition in Hong Kong even if—

- (a) the undertaking engaging in the conduct is outside Hong Kong; or
- (b) the conduct is engaged in outside Hong Kong."

Justification

A materiality threshold allows the competition authorities to focus on real competition concerns and alleviate the compliance burden of businesses involved in conduct of minor importance. The introduction of a materiality threshold will reduce the compliance burden for companies and will allow the Commission and the Competition Tribunal to concentrate on more problematic agreements.

7 Need for greater legal certainty through guidelines

7.1 Relevant provisions in the Bill

Under the current text of the Bill, the Competition Commission is required to issue the following guidelines:

- guidelines regarding the manner and form in which complaints are to be made (section 38);
- guidelines indicating (a) the procedures it will follow in deciding whether or not to conduct investigations and (b) the procedures it will follow in conducting such investigations (section 40); and
- guidelines (a) indicating the manner in which it expects to interpret and give effect to the conduct rules, (b) regarding the manner and form in which it will receive applications for a decision or block exemption order and (c) indicating how it expects to exercise its power to make a decision or grant block exemptions (section 35).



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

7.2 Recommendation

Proposal

The Competition Ordinance should expressly require the Competition Commission to issue more detailed guidance indicating the manner in which it expects to give effect to its enforcement powers as well as its powers to apply to the Tribunal for pecuniary sanctions. This is particularly relevant concerning market definition, horizontal cooperation and joint ventures, financial and other penalties, and leniency agreements.

Accordingly, REDA suggests the following amendment in section 35(1):

"35. Guidelines

- (1) The Commission must issue guidelines--
 - (a) indicating the manner in which it expects to interpret and give effect to the conduct rules, in particular how it expects to define relevant markets, assess agreements of minor importance and assess joint ventures and joint bidding situations."

REDA also suggests adding a new provision following section 80, providing for a requirement to issue guidelines on leniency agreements and infringement notices:

"81. Guidelines

- (1) The Commission must issue guidelines indicating the manner in which it expects to interpret and give effect to its powers under this Part, in particular--
 - (a) indicating the manner in which and the cases in which it expects to accept commitments;
 - (b) indicating the manner in which and the cases for which it expects to issue infringement notices; and
 - (c) indicating the conditions required for and the procedure to be eligible to benefit from leniency agreements.

- (2) Section 58 also applies to the guidelines issued under this Part."

Finally, REDA recommends adding the following new provision after section 104, providing for a requirement to issue guidelines on pecuniary penalties and disqualification orders:

"105. Guidelines

- (1) The Commission must issue guidelines indicating the manner in which it expects to interpret and give effect to its powers under this Part, in particular--
 - (a) providing guidance on the cases in which it will seek the imposition of pecuniary penalties and indicating its proposed methodology when setting the level of pecuniary penalties it will seek from the Competition Tribunal;
 - (b) providing guidance on the cases in which it will seek the imposition of disqualification orders and indicating its proposed methodology when determining the scope and nature of the orders it will seek from the Competition Tribunal.



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈 1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

(4) **Section 58 also applies to the guidelines issued under this Part."**

Justification

The adoption of additional guidance on the enforcement powers of the Competition Commission would greatly improve the predictability and transparency of the enforcement regime, which would in turn increase the overall effectiveness of the Competition Ordinance.

In most established jurisdictions - including those where Courts play a prominent role in adjudicating competition law cases - specific guidelines usually exist on the following matters:

- (a) **Market definition.** Market definition is an important preliminary step in analyzing competition law issues under all competition regimes. This is obviously so in the case of the prohibition on abuse of market power (in order to assess whether an undertaking has a substantial market position), but it is also relevant when applying the prohibition on anticompetitive agreements (as only when the market is correctly defined can the effect of an agreement or conduct on the market be properly assessed). See for instance the European Commission's *Notice on the definition of the relevant market for the purposes of EC competition law* and the *Guidelines on market definition* issued by the Singapore Competition Commission.
- (b) **Agreements of minor importance.** By defining when agreements between companies are not prohibited by the Competition Ordinance, the guidelines will reduce the compliance burden for companies, especially smaller companies. At the same time the Commission will be better able to avoid examining cases which have no interest from a competition policy point of view and will thus be able to concentrate on more problematic agreements. See for instance the European Commission's *Notice on agreements of minor importance which do not appreciably restrict*.
- (c) **Horizontal cooperation guidelines, including on joint ventures and joint bidding situations.** Joint ventures (and horizontal agreements more generally) are an area where enforcement guidelines are particularly valuable in terms of enhancing compliance with competition law. Although cooperation agreements between rivals in a concentrated market can raise competition concerns, these arrangements can also lead to substantial economic benefit. With respect to consortium bidding and joint ventures, it is acknowledged that these arrangements, in certain circumstances, can significantly improve the efficiency and effectiveness of the tender process (share risk, save costs, pool know-how, etc.), facilitate the introduction of new companies into the market and allow small companies to participate successfully in the bidding process. See for instance, the European Commission's *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*.
- (d) **Guidelines on financial penalties and disqualification orders.** Such guidelines limit the risk of (perceived) arbitrary sentencing decisions and are often adopted on the principles of optimal deterrence of infringements. Clear and fair guidelines in this respect can also be instrumental for the successful implementation of related commitment or leniency regimes: the incentives to apply for leniency or to propose a commitment may be reduced if parties cannot roughly assess the expected sanctions they may face. See for instance the *US*



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

Sentencing Guidelines last amended in November 2009 (which apply in the context of a judicial enforcement regime, as in Hong Kong), the European Commission's *Guidelines on the method of setting fines* and the *Guidelines on the appropriate amount of penalty* issued by the Singapore Competition Commission.

- (e) **Leniency guidelines.** In addition to clear guidelines on penalties, procedural transparency, legal certainty - in particular as regards the benefits of leniency cooperation - and adequate protection of confidentiality are key elements for a successful leniency regime. In most jurisdictions, these key elements are addressed in detailed leniency guidelines. See for instance, the European Commission's *Notice on immunity from fines and reduction of fines in cartel cases* or the Canadian *Draft Information Bulletin on sentencing and leniency in cartel cases*.

8 A Competition Advisory Committee shall be established

8.1 Relevant provision in the Bill

Section 28 of schedule 5 to the Bill provides as follows:

"28. Commission may establish committees

- (1) The Commission may establish one or more committees—
 - (a) to advise the Commission on such matters (within the scope of the Commission's functions) as the Commission refers to it; and
 - (b) to perform such functions of the Commission as the Commission delegates to it.
- (2) A committee may consist of such persons, whether members of the Commission or not, as the Commission determines
- (3) The Commission may appoint one member of a committee to be the chairperson of that committee.
- (4) When the Commission establishes a committee under this section, it must specify, in writing, its terms of reference.
- (5) The Commission may, by notice in writing, amend the terms of reference of a committee.
- (6) A committee is subject to the control of the Commission and may be discharged or reconstituted at any time by the Commission.
- (7) Subject to any directions that may be given by the Commission, a committee may regulate its own procedure, including the determination of its quorum."

8.2 Recommendation

Proposal

The Competition Commission should be required to seek guidance from an independent Advisory Committee before making policy decisions. Accordingly, REDA suggests the following amendment:



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈 1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

"28. Commission may shall consult—~~establish~~ the Competition Advisory Committees

(1) The Commission may shall consult ~~establish one or more the Competition Advisory Committees (a)~~ to assist the Commission in adopting implementing measures for competition law. ~~such matters (within the scope of the Commission's functions) as the Commission refer to it; and~~

~~(b) to perform such functions of the Commission as the Commission delegates to it.~~

(2) The Commission shall take the account of the opinion delivered by the Competition Advisory Committee. It shall inform the Competition Advisory Committee of the manner in which its opinion has been taken into account.

(3) The Competition Advisory Committee shall consist of 21 members appointed by the Chief Executive. Members shall come from a wide range of academic and industrial backgrounds, as well as representing other societal interests.

~~(2) A committee may consist of such persons, whether members of the Commission or not, as the Commission determines~~

(4) The Chief Executive Commission may appoint one member of the Competition Advisory a-Committee to be the chairperson of ~~that the~~ Committee.

(5) ~~When (The Chief Executive Commission establishes a committee under this section, it must specify, in writing, the its terms of reference of the Competition Advisory Committee.~~

(6) The Chief Executive Commission may, by notice in writing, amend the terms of reference of ~~a committee the~~ Competition Advisory Committee.

~~(6) A committee is subject to the control of the Commission and may be discharged or reconstituted at any time by the Commission.~~

(7) Subject to any directions that may be given by the Chief Executive Commission, the Competition Advisory Committee shall ~~committee may~~ regulate its own procedure, including the determination of its quorum."

Justification

The establishment of an independent Competition Advisory Committee will assist the Competition Commission with matters which require specific expertise and guidance from the community. This pool of expertise will increase the efficient conduct of the Competition Commission's business, on the model of the Advisory Council on the Environment.

*
* *
*



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

We trust you would find the above helpful. Please do not hesitate to contact me should you wish to discuss.

Yours sincerely

Louis Loong
Secretary General

c.c. Ms Debbie Siu
Clerk to the Bills Committee on Competition Bill
Legislative Council Building
8 Jackson Road
Central, Hong Kong