Competition Bill: Comments on the Second Conduct Rule ("CR2")
Hong Kong General Chamber of Commerce

The Second Conduct Rule (CR2) of the Competition Bill should aim at preventing unilateral conduct of dominant market players that has the effect of substantially lessening competition. But the CR2 as it is drafted in the Competition Bill before the Legislative Council (Legco) has caused concerns among SMEs that they would be inadvertently caught. The Chamber's view is that SMEs might indeed face such a risk. On the other hand, the lack of clear indication in the Bill as to what type of conduct is prohibited by CR2 has wider implications not just for SMEs but all businesses, especially businesses which compete efficiently and eliminate less competitive players from the market in the course of gaining market share, simply because the former have more superior competitive performance.

In the following the Chamber will highlight the key issues with CR2 and provide recommendations on improving the drafting of clauses 21 and 22, so as to protect SMEs and other businesses while at the same time achieving the Government's objective.

"Dominant Position" vs "Substantial Degree of Market Power"

1. The term "dominant position" should replace "substantial degree of market power" (SMP). Dominant position, a clearer concept, would establish a threshold to establish a case for potential regulatory intervention that is consistent with international best practice and economic theory. It would also give SMEs greater comfort that their everyday activities would not be challenged under CR2. Such comfort is particularly important, given the relatively low *de minimis* thresholds which the Government has proposed. Other stakeholders such as The Law Society of Hong Kong have also made this recommendation. There is no obvious reason why the Government should introduce a law that potentially allows the regulator to intervene in markets where the firms in the market lack dominance – by definition, without dominance a firm would be unable to substantially lessen competition. This is all the more important in smaller markets such as Hong Kong where natural market concentrations are higher. A law that targets non-dominant firms would be undermining the natural efficiencies of the market.

2. If the Government insists on using SMP, Legco must ask the Government to explain what it means by "market power", and under what circumstances it will be regarded as "substantial". This issue should not be left to the future Competition Commission. Could a market share of 10% be sufficient? Or 15%? Or 20%? This is particularly important, since the Government has mentioned (without any analysis of markets or other justification and contrary to international best practice) that in light of Hong Kong's circumstances, firms with market shares lower than 50% could be regarded as having SMP that should be susceptible to challenge by the regulator. Under such an interpretation of SMP, many SMEs will be potentially caught by CR2, even though their conduct is efficiency enhancing and benefits consumers. The Government must, if it is to go down this road, justify in a fully reasoned way why Hong Kong needs a lower market power threshold for regulating anti-competitive unilateral conduct. The best approach would be to adopt the dominance standard. Drawing on international experience, it can then be left to the Commission to determine in each case whether that threshold is met.

Adopting the "Substantially Lessening Competition" Test

3. In determining whether a dominant firm's conduct should be regulated, the test should be whether the conduct has the "effect or likely effect of substantially lessening competition (SLC)"[1], instead of whether it has "as object or effect the prevention, restriction or distortion of competition (PRDC)" as it is drafted. "Object" is unclear as a concept and has proved problematic in EU case law. It should be deleted and replaced with "likely effect", which is far clearer as it states in unambiguous terms that the focus should be on the effect or likely effects of the conduct. Adopting the SLC test rather than the PRDC test is in line with the Government's original proposal of May 2008, and international best practice (including the EU's enforcement practice). Again this amendment would give SMEs greater comfort that their activities are not likely to be challenged under CR2 unless they are dominant and have engaged in conduct that significantly lessens competition.

[1] The same amendment about adopting the SLC test should be made to the First Conduct Rule.

Core Definition Needed

4. There is no clear indication in the Bill as to what type of conduct is prohibited by CR2, other than the vague and non-exhaustive list of examples in Clause 21(2). There needs to be a core definition of the nature of the conduct which is prohibited. A business can lessen the degree of competition simply by competing effectively and efficiently, and eliminating less efficient competitors. It is widely accepted that such a market result is to be allowed. It is also widely accepted that competition law should encourage such vigorous competition because it is good for the economy and consumers. So it is *the way in which* competition is reduced, i.e. *the type of conduct and its effect*, which counts.

Other Major Proposals

5. The Chamber's proposals to increase the clarity of Clause 21 of the Bill include:

- Removing the word "abuse", since other jurisdictions (e.g. EU) have tried for many years to find an adequate definition of this term, without success.
- Clearly identifying the conduct that has the effect or likely effect of pushing or keeping competitors or potential competitors out of the market with the effect of foreclosing competition, by means which are not justified by economic rationale. (Businesses eliminating less efficient competitors simply because of their superior performance should not be punished.)
- Introducing a mechanism similar to the Government's proposed "Warning Notice" (but with due process built in for its issuance and the Competition Tribunal's involvement in the process)[2] to deal with conduct covered by CR2.

Please refer to the Appendix for an amended version of the relevant section of the Bill.

[2] The Chamber is of the view that its proposed mechanism represents an enhancement of, or better alternative to, the "Warning Notices" as proposed by the Government, and should be applied also to non-hardcore activities covered by the First Conduct Rule. Please refer to the Appendix for the detailed provisions drafted for the Chamber's proposed mechanism for enforcing the Second Conduct Rule.

Appendix

Division 2—Unilateral Conduct Substantially Lessening Competition

Subdivision 1—Second Conduct Rule

21. Prohibition of anti-competitive unilateral conduct[i]

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

(a) If, after carrying out such investigation as it considers appropriate, the Commission considers it appropriate to do so, it may apply to the Tribunal for on order prohibiting conduct of that undertaking which it has reasonable cause to believe is having the effect or likely effect of substantially lessening competition in Hong Kong;

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

(c) The Tribunal may, on application by the Commission or any party to an order made under subsection (b), rescind or vary such order where the Tribunal is satisfied that it is appropriate to do so because circumstances have changed;

(d) An undertaking must not continue to give effect to conduct in breach of an order made by the Tribunal under subsection (b) or any variation to such order under subsection (c);

(e) The Tribunal shall not have the power to make an order under subsection (b) or (c) with retrospective effect, but retains the power to make interim orders in relation to such conduct pursuant to section 91.

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

(3) The prohibition imposed by subsection (1)(d) is referred to in this Ordinance as the "second conduct rule".

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[i] Clause 21 of this mark-up version proposed by the Chamber replaces Clauses 21 and 22 of the Government's Bill.

香港總商會有關《競爭條例草案》第二行爲守則的建議

《競爭條例草案》的第二行爲守則，應該只針對那些在市場有支配力量的個別企業，以及該等企業導致“大幅削弱競爭”效果的行爲。然而，現行的條例草案，卻令中小企憂慮誤墮法網，擔心即使自己沒有能力大幅削弱市場競爭，也同樣會被針對。香港總商會認爲，中小企確實面對這種風險。

現行條例草案沒有清楚寫出那些是第二行爲守則將會禁制的行爲。這問題影響的不單是中小企，而是所有企業。假如條例在這方面不清晰，即使一家經營有道的公司單純因爲具備競爭力而淘汰對手，搶佔了更大市場份額，但仍可能面對觸犯競爭法的風險。

總商會以下將集中討論第二行爲守則的重點問題，並就政府草案中的第 21 及 22 條提出改善建議，讓中小企及其他企業得到適當保障，同時達到政府推行競爭法的目標。

“支配地位”與“相當程度的市場權勢”

1 第二行爲守則的關鍵概念是“相當程度的市場權勢”（“substantial degree of market power”）。總商會認爲應採用“支配地位”（“dominant position”）取代。按“支配地位”的概念訂出的上限，在國際上較通用，也較符合主流經濟理論。如一家企業擁有超過上限的市場支配地位，當出現可能產生反競爭效果的行爲時，監管當局才有理據介入調查。這將為中小企提供較大保障，不用擔心日常營商活動會受質疑。這點尤其重要，因爲按政府提出的“低額”模式，建議中的營業額上限金額較低，對中小企保障不足。其他持份者，包括香港律師會，也贊成第二行爲守則採用支配地位的概念。監管當局沒有理由要干預缺乏支配地位的企業。缺乏市場支配地位的企業，按定義沒可能大幅削弱競爭。特別在香港這類細小經濟體，市場自然地較爲集中。如果法例針對那些沒有市場支配地位的公司，勢將影響市場效率。

2 假如政府堅持使用“相當程度的市場權勢”的概念，立法會一定要追問政府，所謂“市場權勢”是甚麼意思，在什麼情況下才算擁有“相當程度”的“市場權勢”？ 10% 市場佔有率算不算? 15%又如何? 還是 20%? 這關鍵問題不應留待未來的競爭事務委員會解決。政府官員多次表示，因爲香港的情況，市場佔有率少於 50%的企業，可能因爲被視爲擁有“相當程度的市場權勢”而被監管當局調查。然而，當局這說法與國際慣例不同，官員也從無提出市場分析支持其論據。但政府這種演繹市場力量的方法，將可能令很多中小企受到第二行爲守則規管，即使他們的行爲是具備效率，並惠及消費者，也可能要面對規管。政府必須解釋，爲何香港要採納較低的市場力量上限，作爲監管當局決定干預與否的指標。總商會認爲，最佳方案是採用“支配地位”的概念，而界定具體市場佔有率的工作，則交予未來的競委會。

較佳準則-"大幅削弱競爭"（substantially lessen competition）

3 在第二行為守則下，要衡量個別具備市場支配地位的企業的行爲是否應受規管，準則應是有關行爲是否有"大幅削弱競爭"的效果，而非現行草案所提出，禁止那些"妨礙、限制或扭曲競爭"（prevent, restrict or distort competition）的行爲。此外，草案提出規管行爲的"目的或效果"。但"目的"並非清晰的法律概念，其實法例應針對行爲造成的效果或可能的效果，故此應以較清晰的"可能的效果"取代"目的"。採納"大幅削弱競爭"為準則，與政府在 2005 年咨詢時提出的原來建議相符，也符合國際慣例（包括歐盟的執法慣例）。這修訂也將可讓中小企放心，因爲只要沒有支配市場地位，沒有"大幅削弱競爭"行爲，中小企受第二行爲守則挑戰的機會不大。

核心定義

4 條例草案沒有清楚寫出那些是第二行爲守則將要禁制的行爲，只在第 21（2）條列出了一些例子，但那並非一張包含全部被禁制行爲的清單。關於被禁制行爲的性質，仍然未釐清，但這屬於核心定義的問題，實在非常重要。個別企業可以單純因爲具備競爭力而淘汰對手，從而減低了市場競爭。普遍認爲，這是應該容許的，而且競爭法亦應該鼓勵企業激烈競爭，因爲這對整體經濟及消費者有利。故此，關鍵是究竟相關企業**如何**減低市場競爭，換句話說，重點應是企業的**具體行爲類型**，**及其所產生的效果**。

其他主要建議

5 總商會就改善條例草案第 21 條提出的其他改善建議包括：

- 刪除"濫用"一詞，原因是其他司法管轄區經多年嘗試，都未能為"濫用"釐定清晰定義。
- 條例明確地針對那些把對手排擠出市場的行爲，或防止競爭對手或潛在對手進入市場的行爲，前提是有關行爲產生妨礙競爭的效果，或可能產生妨礙競爭的效果，而涉及相關行爲的企業並無任何經濟理據可作解釋。（但任何企業若單純因爲營運效益高而淘汰對手，則不應受罰。）
- 引入類似政府提出的"告誡通知"的機制，處理第二行爲守則覆蓋的行爲。（跟政府的"告誡通知"不同，總商會建議的機制包含了嚴謹的程序，並有競爭事務審裁處的參與）。

附件載有條例草案第 21 條根據總商會的建議修訂後的版本。總商會建議修訂版本的第 21 條取代了政府草案中的第 21 及 22 條（只提供英文版本）。

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香港總商會
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