HKGCC
Hong Kong General Chamber of Commerce
香港總商會1861

Steering Business for 150 Years
引領商界一百五載

香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

17 June 2011

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

Dear Andrew

Bills Committee on the Competition Bill
Comments on Issues raised at Meeting of 7 June 2011

At the last Bills Committee Meeting on 7 June, a number of fundamental concerns were raised about the scope and nature of the proposed Conduct Rules. In fact, these concerns echo those which the Chamber has previously raised with the Bills Committee and the Administration, and to which we have proposed solutions which we believe will effectively address them.

For your easy reference, those solutions are reiterated in the enclosed. We hope they would be helpful to members.

Thank you very much.

Sincerely yours

Alex Fong
CEO

Competition Bill: the Proposed Conduct Rules

Comments on the Issues raised at the Bills Committee Meeting on 7 June 2011

Submitted by the Hong Kong General Chamber of Commerce

At the last Bills Committee Meeting on 7 June, a number of fundamental concerns were raised about the scope and nature of the proposed Conduct Rules. In fact, these concerns echo those which the Chamber has previously raised with the Bills Committee and the Administration, and to which we have proposed solutions which we believe will effectively address them. We thought it might assist Members if we re-iterate those solutions prior to the next meeting on 21 June, for ease of reference.

1. Can the Conduct Rules or Guidelines be more Specific in identifying the Conduct which will be prohibited?

This concern has been consistently voiced by the Bills Committee members at a number of meetings, most recently at the meeting of 7 June by the Honourable Dr. Leung Ka-Lau, Miriam Lau, Chan Kin-Por and Albert Ho. Members are rightly concerned that businesses should know in advance what conduct is prohibited, so that they can avoid breaching it inadvertently. These are also concerns which have also been expressed on numerous occasions by this Chamber. The Administration's response has also been consistent, namely that clarity will be provided by guidelines which will be issued by the future Commission, and that the Conduct Rules have to be framed generally so as not to "tie the hands" of the future Commission and Tribunal.

With respect to the Administration, these statements are self-contradictory. The Conduct Rules and guidelines cannot at the same time be specific and clear as to which conduct is prohibited, while at the same time giving the Commission and Tribunal maximum flexibility in the future to target any conduct which they believe has a sufficiently negative effect on competition. The purpose of rules and guidelines is precisely to limit administrative discretion, so as to give those subject to them sufficient legal certainty to be able to conduct their business. If such flexibility is to be allowed, both the rules and the

guidelines have to be worded in broad, non-specific terms. This is amply demonstrated by the document produced by the Administration for the meeting of 7 June entitled Guidelines on the First Conduct Rule (the "Guidelines Document") [1]. As Members have pointed out, the Guidelines Document is mostly non-committal in its as to what conduct is prohibited, essentially taking the position that certain types of conduct may or may not infringe the Conduct Rules, depending on their future economic effects. However, businesses are not in a position to predict in advance what the future effects of their conduct will be (except in the most obvious or extreme cases) or *what level* of effects deemed to be "anti-competitive" will trigger an infringement.

The Chamber has proposed two relatively straightforward drafting changes to the Bill in particular which would address this problem of lack of clarity:

(a) the examples in the First Conduct Rule (Clause 6(2)) should be drafted in more specific terms and be limited to conduct which is most commonly regarded as being anti-competitive, namely price-fixing, market-sharing and bid-rigging: so-called "hardcore" conduct. (Agreements to limit output with a view to maintaining or raising prices could also be specified, although the reference to price-fixing could be drafted in such a way as to cover such conduct). The mark-up of the Bill which the Chamber provided to the Committee with its initial submission in November 2010 contained proposed drafting amendments which would achieve this.

(b) All other types of conduct ("non-hardcore" conduct) should not be prohibited in the Bill itself on the basis of their future economic effects, since these cannot be predicted with sufficient certainty. Instead, at most, such conduct should only be prohibited if and when the Tribunal finds, on application by the Commission, that such conduct substantially lessens competition and does not have any countervailing economic benefits. If the Tribunal makes such a finding, it could issue a cease and desist order to prohibit such conduct, (unless the party or parties had voluntarily ceased the conduct before then) and illegality and sanctions would only arise if the

[1] CB(1)2336/10-11(01).

order was breached. The Chamber believes that this a much fairer and proportionate way of addressing conduct on the basis of its economic effects. It has pointed out that Hong Kong would not be alone in adopting this approach to "non-hardcore" conduct: Canada adopts a similar approach.

2. Will bid-rigging be automatically prohibited, irrespective of whether it involves SMEs, or its effects on competition?

The Hon. Regina Ip raised the question of whether "bid-rigging", of the kind at issue in the Tai Po market case, would be prohibited under the Bill, even if it was only SMEs which were involved. The Administration's response was "very likely". In other words, it would not be prohibited *automatically*. But the circumstances in which it would be prohibited remain unclear. However, the Administration subsequently appeared to state that the examples in Clause 6(2) were indeed automatically prohibited, regardless of effects on competition.

The Guidelines Document is not clear on this matter either, and in fact is also self-contradictory. It states that there are no automatic breaches of the First Conduct Rule, and lists bid-rigging as an example of conduct which **"may breach the First Conduct Rule, depending on the circumstances"**. [2] This is consistent with the policy statement in the Government's May 2008 Consultation Document that there should be no *per se* infringements (i.e. automatic infringements, regardless of effects on competition). However, in the same document, a few paragraphs later, it directly contradicts this by stating that bid-rigging arrangements **"will, by their very nature, be regarded as restricting competition appreciably"**.[3]

Members may wish to ask the Administration to confirm whether its May 2008 proposal that there be no *per se* prohibitions still stands, and if so whether any amendments should be made to the Bill to put this matter beyond doubt.

---

[2] Paragraph 4.2.
[3] Paragraph 4.10.

3. Is there a difference between "prevent, restrict or distort" (as used in the Conduct Rules) and "substantially restricting" (as used in the Telecommunications and Broadcasting Ordinances), or "substantially lessening" (as used in the Merger Rule) If so, what is it? Why have different tests been used?

These issues were raised at the last meeting by Mr Timothy Tso, Legco's Assistant Legal Adviser, and the Hon. Ronny Tong SC. With respect, the Administration did not give a satisfactory response to these questions at the meeting on 7 June, and they have been asked to address this subject again at the next meeting on 21 June.

The Administration said that the concept of "preventing, restricting or distorting competition" (PRDC) had been used in the Conduct Rules, because it was a concept drawn from EU competition law, which had a "richer" body of case law interpreting it. However, this response omitted to mention the following major points:

- The EU case law interpreting the PRDC concept is extremely unclear. As one leading commentator has remarked:

  "While it is easy to say what the Courts have not done, it is less easy to provide an explanation of how they have interpreted the notion of a restriction on competition, because the case law is very opaque, and recent cases often restate bland pronouncements from earlier cases without adding any substance to them".[4]

- What is clear is that the EU courts have interpreted a restriction of competition as being a restriction on a business's commercial freedom in the market,[5] which arguably virtually every commercial contract contains, not a substantial lessening of the intensity of competition in the market, a completely different

[4] G. Monti *EC Competition Law* Cambridge University Press, 2007 at 31.
[5] For a discussion of the EU approach see Monti, n4 above pp 22-29.

and less intrusive concept. It is therefore incorrect for the Administration to state that they are "not inconsistent" with each other. Clearly, a court would be entitled to take the view that if the PRDC concept and the SLC concept are used in the same statute, they must have been intended to mean different things.

- Notwithstanding the EU courts' case law, the EU Commission's enforcement practice is to tackle only those cases where a substantial lessening of market competition involved, [6] in line with its "more economic" approach to competition law, and the laws of countries such as Canada, Australia and New Zealand (where a substantial body of case law does exist).. Since the EU Commission is the decision-maker under EU competition law, this means that this is the test which will be applied in practice. However, the situation is completely different in Hong Kong, where it is the Tribunal which will make decisions. If the law uses a term taken from EU competition law, the Tribunal may feel bound to follow the precedents of the EU courts, not the enforcement practice of the Commission- indeed the Administration has indicated that this is the policy intention. The result may therefore well be the "importation" of case law into Hong Kong which is not only unclear, but is also over-intrusive, antiquated, and out-of-step with international best practice.

- The Administration has not explained the reason for its significant shift from "purpose or effect of substantially lessening competition" (as initially proposed in its May 2008 Consultation Paper) to "object or effect of preventing, restricting or distorting competition" (the test used in the Bill).

4. <u>Should Mergers be excluded from the Conduct Rules?</u>

---

[6] See for example *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, European Commission OJ C11 2001 p 1 paragraphs 27-28.

Mr. Timothy Tso, Legco's Assistant Legal Adviser, raised the question of whether mergers would be covered by Clause 6(1) of the Bill (the First Conduct Rule), and if so, whether the Government should consider explicitly excluding such agreements from the application of Clause 6(1).

The Administration conceded at the meeting that mergers could be covered by the First Conduct Rule, if they were formed by an agreement between undertakings and had the object or effect of "preventing restricting or distorting competition". (The Administration might have added that they could be caught by the Second Conduct too, which is the case under the equivalent provision in EU competition law).

In other words, the Bill as currently drafted does not meet the Government's stated policy objective. The Government has consistently stated publicly that only mergers involving carrier licensees under the Telecommunications Ordinance would be covered by the competition law in the first instance, in line with the recommendations of the Competition Policy Review Committee in 2006.[7]

To bring the Bill into line with the Government's policy, a short and simple insertion should be made in the First and Second Conduct Rules to exclude mergers from their scope, as in Singapore and Jersey. Simple amendments also need to be made to Schedule 7 to bring it into line with that policy, since currently Schedule 7 would catch a merger affecting <u>any</u> sector, as long as one of the parties happened to have an affiliated company which was a carrier licensee. Draft amendments to this effect were provided to the Bills Committee along with the Chamber's submission in November 2010.

5. <u>Should "competition", "substantial lessening of competition" etc. be defined?</u>

Dr. Leung Ka-Lau pointed out that certain key concepts such as "competition" were not defined and raised the issue of whether they should be.

[7] See for example CB(1)372/08-09(03) at paragraph 10.

The Government's response was that these concepts were not defined in the competition laws of other jurisdictions, and that by seeking to insert definitions, this might undermine the Hong Kong court's ability to rely on precedents in other jurisdictions.

The Chamber believes that, rather than seeking to rely on foreign case law, it is much more satisfactory, in the interests of clarity, to define these concepts in the Bill itself. This is because there is no certainty as to whether, and if so to what extent, the Hong Kong courts will be guided by foreign precedents (and if so, which ones), and as noted above EU case law (at least) is unclear. There is also the risk (as noted above) that the result will be the importation of an over-intrusive regime which is out-of-step with international best practice.

It is not a complex task to define these terms, and the Chamber provided suggested definitions with its mark-up of the Bill in November 2010.

6. Should vertical agreements be excluded from the Bill?

Whether vertical agreements are included or excluded will significantly affect the scope of the legislation, and the resources required to administer it, given the substantial number of such agreements in any market economy. The current general consensus internationally is that vertical agreements are not potentially problematic, unless they involve companies which are dominant, or (perhaps) they involve resale price maintenance ("RPM"). It is therefore appropriate to exclude vertical agreements from the scope of the First Conduct Rule (as in Singapore). Where dominance is involved, vertical agreements would be caught by the Second Conduct Rule anyway, if they had requisite adverse effect on competition. In the case of RPM, this could easily be dealt with through an exception to the exclusion for RPM, if it was felt necessary to retain the ability to examine RPM on a case-by-case basis.

****

Submitted by Hong Kong General Chamber of Commerce

17 June 2011