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4 July 2011

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

Dear Andrew

At the last Bills Committee meeting on 21 June, the Administration presented a paper which purportedly responded to certain questions raised by Bills Committee members.[1] The Hong Kong General Chamber of Commerce has looked through the answers given to these questions, and it is clear they are inadequate in a number of respects. The main points on which the answers are inadequate are set out in the attached table, with an explanation of why this is the case. I should be grateful if the Chairman would draw the Administration's attention to this letter and its attachments at the next Bills Committee meeting on 5 July, and request the Administration to respond to these comments at one of the two meetings after that one, namely 20 July or 26 July.

In particular, we have following questions on the Administration's answers on which we would welcome its comments:

1. Legco's Legal Adviser asked why the Conduct Rules use a formulation derived from EU law, i.e. "object or effect …to prevent restrict or distort competition" as opposed to the formulation under the Telecommunications and Broadcasting Ordinances which is "purpose or effect of preventing or substantially restricting competition". In its response, the Administration states that the prohibitions as currently drafted in the Bill "reflect the latest international best practices". However:

   - The formulation "object or effect… to prevent, restrict or distort competition" is not found in the competition laws of Australia, New Zealand, Canada or South Africa. Instead of using the term "prevent, restrict or distort competition" all of these jurisdictions use the term "substantially lessen

[1] CB(1)2420/10-11(02).

competition". We are advised also that the EU Commission itself, in its enforcement practice applies a "substantially lessening competition" test instead of "prevent, restrict or distort competition" (which has been interpreted by the European courts in a different way from "substantially lessening competition").

- The Administration's May 2008 Consultation Paper also proposed the term "substantially lessen competition", and that term is also used in the Merger Rule in the Bill itself.

In these circumstances:

Question 1: what are the reasons for the Administration's view that the formulation drawn from the EU treaty represents "international best practice"?

Question 2: why did Administration decide to drop the formulation originally proposed in May 2008?

2. In response to the question as to whether "object and effect" should be used instead of "object or effect", the Administration stated that if the EU terminology was altered in this way, this "would entail the disadvantage of loss of application of a large pool of relevant case law and existing jurisprudence, thereby creating uncertainty for the business sector".[2] More generally, Mr Greg So has said in briefings with businesses that one of the advantages or reasons for choosing the EU terminology as the basis for the Bill was that a large body of existing EU case law could be relied on.

However, one of the messages which came out clearly from an international conference on competition law held in Hong Kong on 23 June (at which some Government officials and Legco members, amongst many others, were present) was that EU case law is unclear in many areas, including what the term "object" means. The point was also made that much of EU competition case law is based on the EU's primary policy objective, namely to create a single market, an objective which is not relevant to Hong Kong. This point has also been made by our own Telecommunications (Competition Provisions) Appeal Board – see the Appendix to the attached table.

Question 3: In these circumstances, how can the Administration imply, as it has done, that EU case law would provide businesses with more legal certainty than, say, the laws of Canada, Australia or New Zealand?

3. The Administration was asked whether bid-rigging or the type at issue in the Tai Po Hui Market case would have constituted a breach of the first conduct rule. The Administration's answer is ambiguous. On the one hand it says that this kind of practice "will, by its very nature, be regarded as restricting competition appreciably" but then it goes on to say, on the other hand, that there is only a "*prima facie* case"

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[2] N1 above paragraph 2.

that it "could have" fallen within the prohibition.[3] Similar ambiguity appears in the guidelines document the Administration has produced: on the one hand it states that there are "**no automatic breaches**" and that everything depends on the facts, on the other it states that bid-rigging will, **by very its nature**, restrict competition appreciably.[4]

Question 4 : Could the Administration please explain this apparent contradiction?

Question 5 : Would bid-rigging be automatically prohibited, i.e. prohibited just by virtue of the fact that it has taken place, irrespective of any effect on competition?

Question 6: Are there any other practices which would be automatically be prohibited in this sense?

Question 7: In particular, would the practices listed in Clause 6(2) of the Bill be automatically prohibited in this sense?

4. Finally, although not a question included in the paper presented to the last meeting, the Hon Jeffrey Lam raised in his letter of 8 April to Ms Linda Lai of the Commerce and Economic Development Bureau whether the Canadian approach to non-hardcore conduct [5] would be appropriate for Hong Kong. At the recent international conference referred to above, we heard a very clear account from the Canadian Commissioner for Competition herself as how it was felt necessary in Canada to draw a clearer distinction between hardcore and non-hardcore conduct, and how the lighter touch approach to non-hardcore conduct (which HKGCC has advocated for Hong Kong) works in practice. We remain convinced that this is the right approach for treating non-hardcore conduct in Hong Kong. I understand that Mr Lam has not so far received a reply to his letter of 8 April.

Question 8: Could the Administration please answer the points raised in Mr Lam's letter of 8 April, or indicate when they will be in a position to do so?

We would be most grateful if you could draw the Administration's attention to the above questions and facilitate discussions over those questions.

Sincerely yours,

Alex Fong
CEO

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[3] N1 above paragraph 11.
[4] CB(1)2336/10-11(01) paragraphs 4.2 and 4.10.
[5] i.e. non-hardcore agreements under the First Conduct Rule and unilateral conduct under the Second Conduct Rule.

Bills Committee on Competition Bill- Meeting of 5 July 2011
HKGCC's comments on Administration's Responses to follow-up questions arising from previous meetings (CB(1)2420/10-11(02))

Para. number	Government Responses (emphasis added)	HKGCC's Comments
2	**"When the test of "*object or effect of preventing, restricting or distorting competition*" is applied, case law and regulatory guidelines in these jurisdictions suggest that only conduct that has an appreciable adverse effect on competition would be caught under the competition law.** It is therefore not necessary to change the formulation from "*object or effect*" to "*object and effect*" in order to bring out the effect-based approach. Moving away from the formulation commonly adopted abroad would entail the disadvantage of loss of application of a large pool of relevant case law and existing jurisprudence, **thereby creating uncertainty for the business sector."** (Para 2).	- This statement appears to ignore the "object" concept, by treating only "effect" as relevant. But this contradicts the Administration's *Guidelines on the First Conduct Rule* ("the Guidelines") which treat object and effect as different concepts. - The Guidelines define object as "the objective purpose of the agreement considered in the economic context in which it is to be applied".[1] But this test conflicts with the test under the EU law in *T-Mobile* case, where object was defined as meaning "the **potential** to have a negative impact on competition".[2] - In fact, the concept of "object" under EU law in practice remains unclear, [3] so removing the EU formulation would **not** necessarily create uncertainty: that uncertainty already exists.
3	"The materiality threshold for the first conduct rule is whether a conduct has an appreciable adverse effect on competition. **This is essentially the same as the test of "*preventing or substantially restricting competition*" in section 7K(1) of the Telecommunications**	These statements beg the question why the EU language has been preferred to the language in the two existing Ordinances. The Government's standard answer is that using EU language means that EU cases can be used for guidance (for example, the Government has

[1] CB(1)2336/10-11(01) paras 3.3, 3.7 and 3.8.
[2] Case C-8/08 at para 31.
[3] As was pointed out by one of the experts at the conference *Designing the Right Competition Law for Hong Kong* on 23 June 2011.

	Ordinance …and section 13(1) of the Broadcasting Ordinance." **"The prohibitions as currently provided under the Bill reflect the latest international best practice".**	used this answer to justify using the term "object or effect"- see above). But: - EU case law is notoriously unclear in many areas; - those drafting the competition provisions in the two other Ordinances chose not to use EU language or cases. - the Telecommunications (Competition Provisions) Appeal Board has already warned of the dangers of importing EU cases into Hong Kong competition law, because of EU law's different policy and legislative background- see Appendix). - this is blatantly incorrect: the term "substantially lessening competition" (SLC) reflects current international best practice, and should be used in the Conduct Rules, as in Australia, NZ, Canada, South Africa, and the EU Commission itself in practice. SLC is even used in the Merger Rule in the Bill itself.
4	"Guidelines have the advantage of providing practical and, in more details, up-to-date guidance on how the principle-based competition law would be interpreted and implemented, in order to facilitate compliance with the law amid changing market circumstances. Issuing guidelines as subsidiary legislation would limit the ability of the competition authority in responding swiftly to changing market".	As HKGCC has repeatedly explained, guidelines are not the answer to providing legal certainty: - they are not binding on the Tribunal, or even the Commission itself; - using them as a substitute for more precise legislative drafting amounts a transfer of power from Legco to the future competition authorities;

		- they cannot in any event be drafted with sufficient precision to provide reliable guidance for businesses, as the Guidelines amply demonstrate.
5	"In the area of competition law, academics **are a particularly valuable source of expertise** and in fact Members of the Bills Committee have also reminded the Administration to seek their advice. In preparing the paper on guidelines on the first conduct rule, we have sought comments from academics specializing in competition law and practices."	See HKGCC's critique of the joint submission by those academics who support the Bill in its current form, which is available on Legco's website.
7	"It is our policy intent that only merger activities in relation to carrier licences issued under the TO would be regulated by Schedule 7 to the Bill. We will consider the need for amendments to clarify the scope of application of clause 6(1) so as to give effect to our policy objective on mergers."	Since mergers are **not** to be covered by the Bill (except for carrier licensees under Schedule 7) there needs to be a clear and simple exclusion of mergers from the Conduct Rules, as in Singapore and Jersey. Certain simple amendments also need to be made to Schedule 7 itself.
10	"Bid rigging occurs when tenders are submitted by undertakings as a result of collusion or cooperation between tenderers; **it will, by its very nature, be regarded as restricting competition appreciably** and is commonly prohibited by competition laws in major overseas jurisdictions… Based on the information available to us, **there is a *prima facie* case** that the conduct of the stall-holders in the Tai Po Hui Market case **could have fallen within the prohibition imposed by the first conduct rule."**	If bid-rigging <u>by its very nature</u> will be regarded as restricting competition, it is difficult to see why the Administration's response has to be so qualified. It could have said that if bid-rigging occurs, it <u>will</u> infringe the First Conduct Rule, instead of saying only that there is a "*prima facie*" case that it "could have" done so. This may be a reflection of the fact that the Government itself does not seem clear on this issue. As HKGCC has pointed out, the Guidelines are self-contradictory in this respect: on the one hand they

		indicate that bid-rigging is prohibited **in itself**, while on the other they say there are **"no automatic breaches"** and that everything depends on the facts of each case.[4] The Administration needs to clarify the answer to this simple question, to eliminate uncertainty, particularly for SMEs, It also needs to clarify whether the types of conduct listed in Clause 6(2) are prohibited in themselves, or only if they have the relevant effect on competition.
13	"Competition is a generic term, referring to the process of rivalry. In most overseas jurisdictions, the term "competition" is not defined in the competition law. It should be given its ordinary meaning and applied in the context of economic analysis as far as competition law is concerned."	There is no ordinary meaning of "competition" in the context of competition law: the "process of rivalry" referred to here is only one possibility. The US judge and competition expert Robert Bork famously listed five possible definitions of competition, of which the "process of rivalry" was only one.[5] If this is the preferred meaning, it should be defined properly in the Bill. The fact that competition statutes in other jurisdictions may not define "competition" is not an excuse for not doing so in Hong Kong, particularly when there is case law (in Australia for example) providing readily available definitions of competition.

[4] Note 1 above: contrast paragraph 4.10 (prohibited "by their very nature") with paragraph 4.2 ("no automatic breaches").

[5] *The Antitrust Paradox: a Policy at War with Itself* The Free Press 1993 58-61.

APPENDIX

Extracts from Judgment of Telecommunications (Competition Provisions) Appeal Board in Appeal No.4 of 2002 *PCCW-HKT and The Telecommunications Authority*

"The Board has had cited to it by the Appellant and by the TA some dozen cases drawn in particular from the European Court but also from some other jurisdictions. **They deal primarily with the competition law and policy of the European Community.** They are enlightening as to how the European Court of Justice has developed concepts some of which do feature in the relevant provisions of the Ordinance – such as "abuse of dominance" in general, and the practice of "price discrimination" in particular – and to that extent are helpful to us. **But we have to bear in mind that what is said is against the legislative background of the relevant provisions of the Treaty of Rome.** Consequently many of the citations though of interest are not necessarily useful in the interpretation of the particular competition provisions of the Ordinance relevant to the present appeal. **The wholesale adoption of that case law would not be appropriate** without first ensuring that the legal and regulatory framework in question in a particular case were the same in both jurisdictions." [6] (emphasis added).

"The case of Hoffman-La Roche v. Commission (1979) ECR 461 which does address the issue of discriminatory pricing, is nevertheless also in the Board's opinion not on point. The case deals with secondary line injury under the then Article 86 of the European Community Treaty (now article 82). **Under the relevant provisions of the Hong Kong statutory scheme at issue in this appeal, again the focus is on the effect of the conduct on competition in the relevant market as a whole, rather than the harm inflicted on trading parties at various levels of trade, which seems to be, by itself, a very important consideration under Article 82."** [7] (emphasis added).

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[6] Judgment of 15 August 2003 paragraph 21.
[7] At paragraph 23.