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香港總商會
香港金鐘道95號統一中心22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

27 April 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
Issues discussed at Meeting of 13 April 2011

We refer to Members' concerns raised with the Administration at the last meeting on 13 April about the lack of clarity in the proposed Conduct Rules in the Bill, and the Administration's answers to those concerns at the same meeting. The Chamber's proposal put forward to the Administration, as highlighted by The Hon Jeffrey Lam during the meeting, would remove many of these concerns.

We agree with the Committee that businesses need to be told clearly in advance what is permitted and not permitted, so they can know what they need to do to comply. One consequence of the current lack of clarity is that businesses would have to engage specialist lawyers and economists to advise them (even this could give only very vague clarity on what they should do in many instances), which would place a particularly onerous cost burden on SMEs.

The Administration has implicitly conceded that the Conduct Rules are not sufficiently clear in themselves. It has said that the law currently proposed would address this lack of clarity and SME concerns in three ways: the commitments procedure (under Clauses 59 to 64 of the Bill); the proposed *de minimis* approach for SMEs; and guidelines. The Chamber's view is that none of these proposals would give businesses the clarity they need. In this letter, we focus on why the proposed commitments procedure would not provide the necessary clarity, and how the Chamber's proposal would do so. We also show how the Chamber's proposal would not prevent the Government from achieving its objective of stopping conduct which is genuinely harmful in economic terms, and should not prevent the target date of July 2012 for passing the Bill from being achieved.

Commitments

Commitments would not solve the problem of lack of clarity because, by definition, they would only be requested, and given, *after* the business had already embarked on a course of action which may be illegal, and perhaps many years after. They would provide no guidance on whether the business should embark on such conduct in the first place, i.e. whether it would be illegal. And although it would mean that no penalties would be imposed, it would not protect the business from being subject to private actions for damages for having engaged in the conduct. Indeed, the fact that a commitment had been accepted on the basis that there was a potential infringement would provide a clear signal to third parties that it might be worthwhile raising an action for damages in the Tribunal.

Another concern relates to the amount of discretion given to the Commission in accepting commitments. To accept a commitment, the Commission only needs to have "concerns about a possible contravention of a competition rule": it does not even need to have opened an investigation (see Clauses 59(1) and (2)). (Although the threshold for opening an investigation is higher, it is still relatively low i.e. "reasonable cause to suspect"- see Clause 39(2)). Given the very wide-sweeping, vague way in which the conduct rules have been drafted, this would give the Commission an excessive amount of discretion to intervene in a very wide range of commercial arrangements, which would be highly intrusive. Although commitments would be voluntary, many businesses would feel obliged to give them in practice, rather than face the more formal alternatives of infringement notices or Tribunal proceedings- even though they might legitimately disagree with the Commission's concerns.

The Chamber's Proposal

The basic problem with all of the Government's proposals to deal with lack of clarity issue is that they do not alter the fact that the Bill contains prohibitions on business conduct which are wide-sweeping, vague, and unpredictable (because their application depends on future economic effects). Nothing the Commission says in guidelines and no amount of forbearance from enforcement action would alter the legality or otherwise of a business's conduct.

By contrast, the Chamber's proposal avoids these problems, by making a clear distinction between:

- "hardcore" conduct would be specifically defined and prohibited if it substantially lessened competition ;

- "non-hardcore" conduct (i.e. other conduct under the First and Second Conduct Rules) would be prohibited *only if and when* the Tribunal decided (on application by the Commission) that it substantially lessened competition and did not have any countervailing economic benefits.

The crucial difference between the Chamber's proposal and the current Bill is that, for "non-hardcore" conduct, businesses could proceed with their conduct (which in many cases may be

highly competitive or otherwise economically beneficial to Hong Kong) in the safe and certain knowledge that they were not acting illegally in doing so. This would alleviate substantially the compliance burden and costs – a particular benefit for SMEs (greater, we would submit, than the *de minimis* rule and other measures the Government is proposing). There would be no need to flood the Commission with applications for clearance, resulting in a substantial saving of public resources and a much more efficient regime, enabling the Commission to focus on seriously anti-competitive conduct. Where "non-hardcore" conduct was having genuinely harmful effects in the market, the Commission could still intervene, with the same investigative and injunctive powers as currently proposed, and could take the matter to the Tribunal (although we would expect that most cases would be settled informally without going to the Tribunal, resulting in further cost savings and efficiencies for the Hong Kong economy). If the Tribunal did proceed to a final ruling, businesses would then have a clear instruction as to what action to take to comply, instead of having to "second-guess" the economic assessment the authorities might make at some unknown time in the future, as would be the case under the current Bill.

The Government is therefore entirely incorrect in describing its proposed commitments mechanism is "comparable" to the Chamber's proposed mechanism (which is similar to the Canadian approach to non-hardcore conduct).[1] There is a fundamental difference between the two. Under our approach, businesses would have certainty and be able to get on with competing without fear of acting illegally, rather than facing continuous uncertainty from day one as to whether their conduct is or is not illegal, which would be the case under the Government's proposal.

Implementing our proposal would not require a significant amount of re-drafting of the Bill and therefore should not jeopardize the July 2012 target date for passing the Bill. We provided the Administration with a mark-up of the Bill in November 2010, demonstrating the minimal changes which would be required to achieve this result.

If you would find it helpful, we would be pleased to meet you and discuss the above proposal in more detail and/or our comments on the Bill more generally.

Thank you very much.

Sincerely yours

Alex Fong
CEO

cc Ms Debbie Yau, Clerk, Bills Committee on Competition Bill

[1] See CB(1)1868/10-11(01) paragraph 5.