Hong Kong General Chamber of Commerce:
Key points on Interpretation under Section 2 of the Competition Bill

11 February 2011

1. The Bill currently lacks definitions for key terms in the interpretation section (s.2), making the application of the competition rules vague and uncertain. Some key terms which potentially give rise to major uncertainties should be replaced by more certain alternative concepts.

2. Key examples:

    a. Competition law should not prohibit *any* conduct that *affects the market* (perfectly healthy actions by competitors do this all the time).

    b. But as EU experience shows, this is precisely the potential effect of the lack of appropriate definitions and the *"prevent, restrict or distort"* [1]language in the 1st & 2nd conduct rules. It has been used to challenge a wide range of normal business conduct such as exclusive purchase and supply obligations, joint purchasing, restrictions on selling outside specific territories to give effect to distribution and licensing arrangements, and trade association arrangements between SMEs - regardless of whether competition is actually lessened substantially.

    c. It is only conduct that *substantially or significantly lessens competition* ("SLC") *in the market* that should be targeted. Under the 2nd Conduct Rule, it is SLC caused by *foreclosing* competition which should be targeted.

    d. On the current drafting, the Merger Rule (referring to SLC[2]) gets it right, but the Conduct Rules get it wrong.

    e. The use of *"substantial degree of market power"* ("SDMP") instead of "dominant position" in the 2nd Conduct Rule causes further problems. It sets the threshold too low (many companies including SMEs have SDMP, at least temporarily) and "dominant position", as in other competition law jurisdictions, is more objective.

    f. There is no rational reason for the difference in the Merger and Conduct Rules, the use of "substantial degree of market power", or the lack of clear definitions.

3. Solutions:

    a. In the interpretation section, give a clear definition of "competition" and other important related definitions (set out in the attached).

    b. Align Conduct and Merger Rules to refer to "substantially lessening competition".

    c. Use "dominant position" instead of "substantial degree of market power" in the Second Conduct Rule.

[1] Relevant language in Part 2, section 6(1) for First Conduct Rule; Part 2, section 21(1) for Second Conduct Rule

[2] Schedule 7, section 3(1) and section 6

Appendix

Definitions for inclusion in section 2 of the Bill, Interpretation:

…
"competition" means workable (as opposed to perfect) competition and is a process of rivalry or potential for rivalry whereby undertakings seek to discover new and more efficient ways of offering goods and services.

…
“dominant position” means an ability to conduct business in a way which is over the medium to long term to a large degree unconstrained by the actions or reactions of competitors and/or customers.

…
"foreclosing" means pushing competitors out of a market or blocking entry in the medium to long term.

…
“substantially lessen competition” means lessen the degree or intensity of competition to the extent that most consumers as a result of such lessening are, or are likely to be, adversely affected.

…
"workable" means reasonable in the circumstances of the particular industry under consideration.