

Amendments to the Competition Bill

HKGCC deputation submission

15 November 2011

SME experience in the EU

“As a percentage of annual turnover, European Commission fines punish small, emerging and one-product companies at a much higher rate than major, multinational corporations that enter into illegal cartel activities.”

“The more damaging fines for smaller companies have the potential to hamper a company’s ability to compete, or eliminate competitors altogether, in markets where DG Comp’s decisions are intended to preserve vigorous competition.”

Global Competition Review: *EU Cartel Fines: raw data, patterns and trends*, 1 Nov 2010

Hard core conduct

I am an SME

Does the *de minimis* provision protect me?

No, it does not apply to hard core conduct

Hard core conduct

Will I get a warning notice?

No, this does not apply to hard core conduct

What about an infringement notice?

Perhaps... but the Govt has said these are only for less serious conduct

Hard core conduct

If I get an infringement notice asking me to commit to stop the conduct

Will I be protected from prosecution?

It is not clear

You may be required to admit you broke the law

And you may get sued in a follow-on action

Hard core conduct

What if my agreement is with another SME?

To try to compete with bigger players in the market...

You are still likely to be liable

The Govt (following the EU) says such conduct always harms competition

Hard core conduct

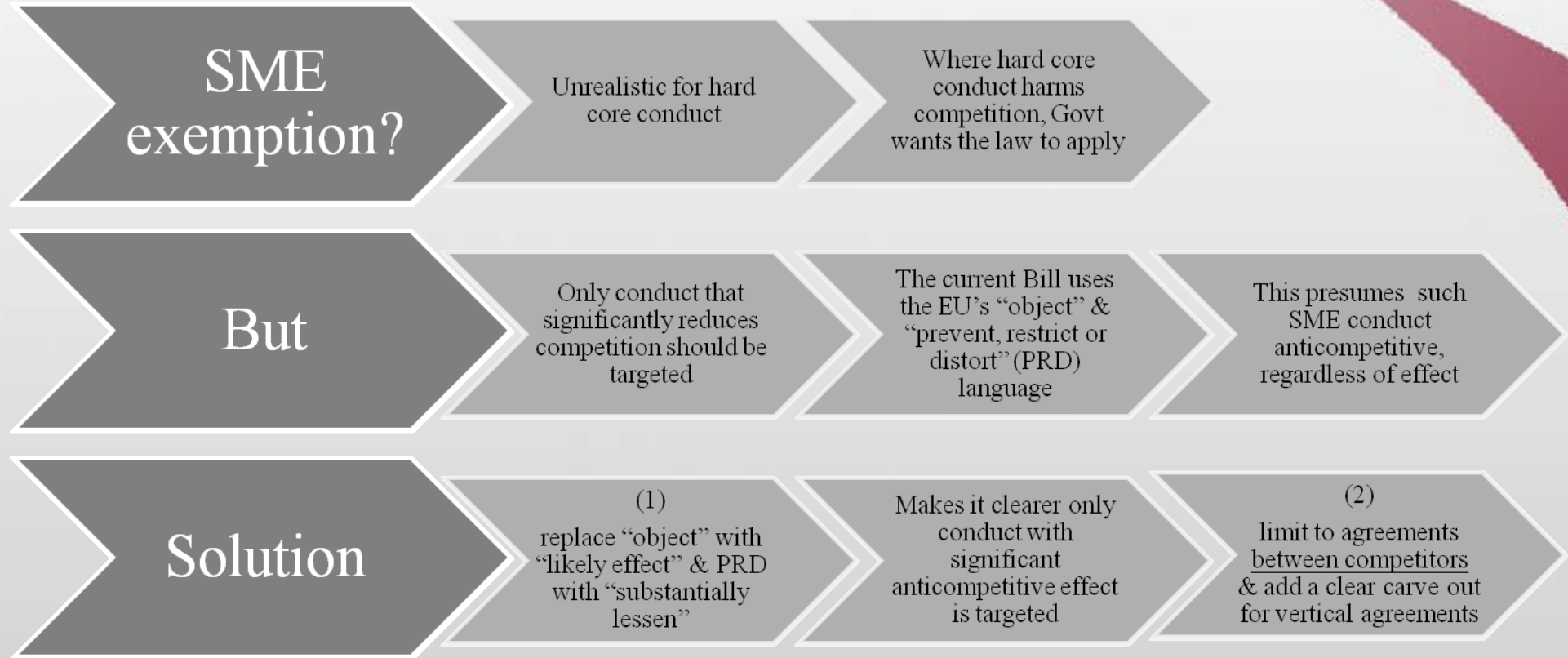
What if my agreement is not with a competitor?

It may still be a hard core agreement

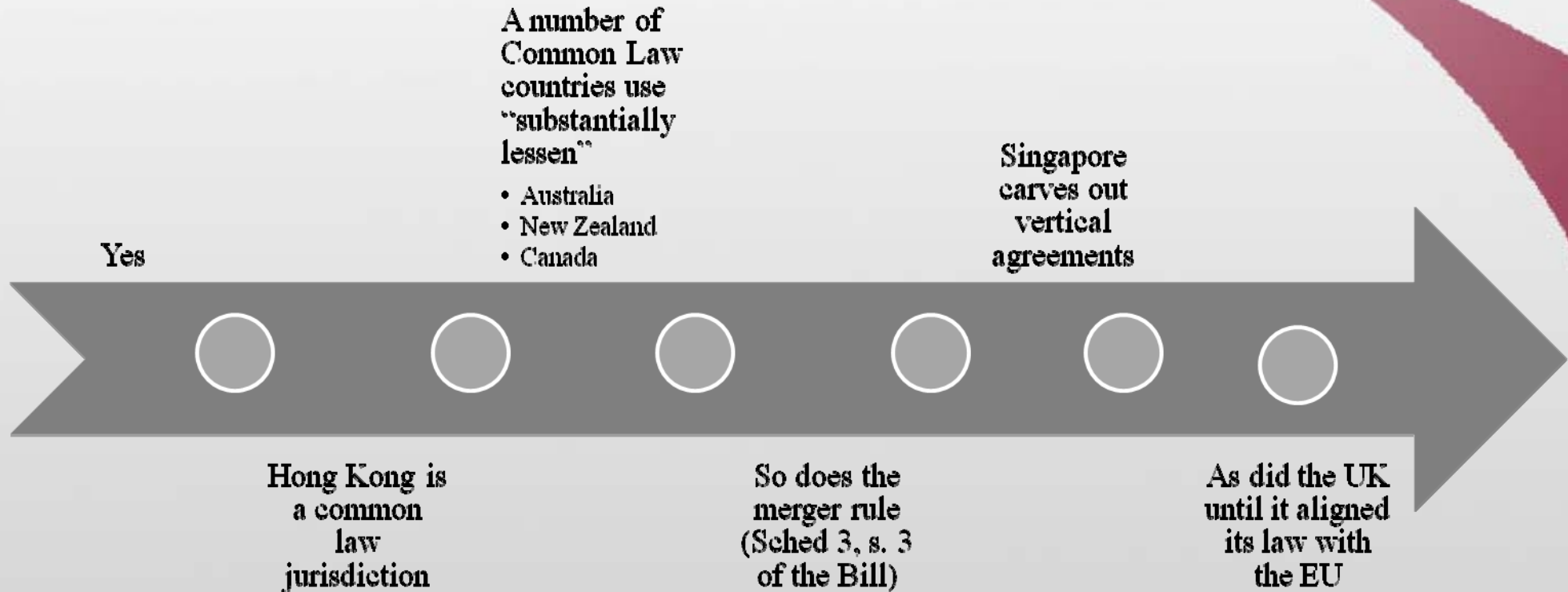
The Bill does not carve out vertical agreements

And EU law treats vertical price agreements as hard core

What is the solution?



But is there international precedent for this?



Non-hard core conduct

Does the
warning
notice protect
me?

From
prosecution
for conduct
prior to the
notice – yes

But not from
having
inadvertently
breached the
law

Or for
continuing
agreements

Or if private
stand-alone
actions are
introduced in
the future

Non-hard core conduct

What if I just stop
the conduct?

You might get
sued by other
parties to the
agreement for
breach of contract

Doesn't the law
protect me from
that?

There is no
obvious protection
written into the
Bill

Non-hard core conduct

How much time
will I get?

The Commission is
only required to
give time sufficient
to stop the conduct

This could be a
very short period,
e.g. a few days

Non-hard core conduct

How much information will be in the warning notice?

Will I get all of the Commission's market analysis and economic evidence?

It is not clear how much detail must be in the notice

Non-hard core conduct

What if I
dispute the
notice?

There is no
mechanism
for this

It is a 'take it
or leave it'
notice

What is the solution

The Commission should provide affected parties with full evidence and market analysis so warning notices can be properly assessed

There should be a procedure for disputed notices

To avoid undue concentration of power in the Commission, the Tribunal should rule on disputes - on an interim basis if urgent, followed by a fair hearing

Use of market power

Does the warning notice provision apply?

No, it only applies to non-hard core agreements

Does the *de minimis* provision apply?

Yes, but only if turnover is less than \$11m

Use of market power

How do I know if I have market power?

It is not clear

The Govt says any company with turnover over \$11m could have market power

Use of market power

How do I know if I have abused my market power?

It is not clear

This is a very complex area of law and economics

You will not know for sure until you get a ruling from the Tribunal

What is the solution?

Warning notice mechanism

Extend this mechanism to the second conduct rule

Add other protections highlighted above to this warning mechanism

Clarify key wording in CR2

Change “substantial degree of market power” to “dominance”

Remove “abuse” – test should be “foreclose competition”

“substantially lessen” not PRD and “likely effect” not “object”

Clear efficiency exemption

Increase the *de minimis* threshold

Hong Kong needs a threshold that recognises the limited ability of SMEs to foreclose competition

Note higher thresholds in other jurisdictions e.g. those highlighted in CEDB’s March 2011 paper CB(1)1523/10-11(02)