

The Dairy Farm Company Ltd

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18 November 2010

The Hon Andrew Leung Kwan-yuen, GBS, JP
Chairman
Bills Committee
Legislative Council
8 Jackson Road
Central
Hong Kong

The logo for Dairy Farm, featuring the words "Dairy" and "Farm" in a stylized, outlined font. "Dairy" is positioned above "Farm", and the letters are interconnected.A handwritten signature in black ink, appearing to read "Dear Andrew,".

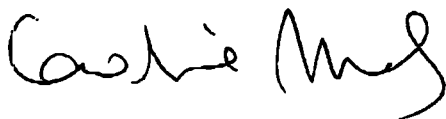
Re: Bills Committee on Competition Bill
Meeting on 29 November 2010
Invitation for Submissions

I refer to your letter dated 4 November on the captioned subject.

Please find the attached comments from The Dairy Farm Group on the Competition Bill for the kind consideration of the Bills Committee.

If you need additional information, please do not hesitate to contact me at 2299 3380. Thank you for your kind attention.

Yours sincerely

A handwritten signature in black ink, appearing to read "Caroline Mak".

Caroline Mak
Regional Director, North Asia &
CEO, Dairy Farm China

A member of The Dairy Farm International Group

Submission to Bills Committee on the Competition Bill
Dairy Farm
19 November 2010

Below for your consideration are Dairy Farm's comments on the draft bill, with proposed recommendations:-

First Conduct Rule

1. Vertical Agreements

The First Conduct Rule should only apply to "horizontal" agreements as previously proposed by the Government in the "Detailed Proposals for a Competition Law", published in May 2008. The wording of the First Conduct Rule is broad enough to cover vertical agreements as well, although only horizontal agreements are provided as illustrations of restricting agreements in Section 6(2). The Government should clearly state its policy intention and improve the drafting to reflect accurately its intention, in order to avoid unintended consequences.

2. Specific Anti-Competitive Behaviours

The examples of anti-competitive agreements provided in Section 6(2) are very vague and could possibly be interpreted in such a way that catch some normal business activities, such as joint purchase practices and agreements. It is preferable that the object of the law be limited to regulating clearly defined anti-competitive behaviours, and that price-fixing, bid-rigging and market-sharing – as an exhaustive list – should be consistently referred to in defining anti-competitive conduct.

Second Conduct Rule

The Government should adopt the EU notion of "dominant position" in the Bill, instead of "a substantial degree of market power". Businesses will find it hard to determine whether they have "a substantial degree of market power", as "market power" in itself is difficult concept. The "market" of a business or a product or service can vary according to different perspectives.

The lack of clarity will give rise to higher compliance costs and excessive litigation.

Merger Rule

The Bill should expressly state that both the First Conduct Rule and the Second Conduct Rule do not apply to mergers, in order to reflect accurately the Government's legislative intent. The Government has publicly stated that its policy is to restrict the application of the merger rule to telecommunications and broadcasting industries only, but there are concerns that the broadly worded First Conduct Rule might catch mergers and acquisitions in other sectors as well.

Penalties and Remedies

In the early stages of implementing the competition law, especially if the legislation and enforcement guidelines remain vague in key aspects, it is possible that some companies may breach the law inadvertently. Thus, penalties should only be imposed where the breach is intentional or negligent.

It is excessive to impose a maximum pecuniary penalty of 10% of global turnover of an undertaking (which can be a subsidiary or a group or the entire group) for each year of contravention. A more reasonable approach is to impose the pecuniary penalty only in relation to the specific product(s) or service(s) concerned in the contravention. The turnover to be considered in imposing a pecuniary penalty should only be turnover obtained locally.

Private Actions

While victims of misconduct should be allowed to take private ("follow-on") actions to recover damages, third parties should not be allowed to take private actions directly to the Tribunal ("stand-alone") without going through the Competition Commission, as this will create further legal uncertainty and excessive litigation.

Regulatory Impact Assessment

The implementation of the Bill will no doubt add significant cost to businesses in different sectors. As the Legislative Council scrutinises the Bill, the Government should conduct a full regulatory impact assessment to ascertain the potential costs to businesses, if it has not already done so. If the Government has already conducted such an assessment, the details should be made public as soon as possible.

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