

The Toys Manufacturers Association of Hong Kong

The Competition Bill: SME concerns about the Lack of Clarity, Excessive Sanctions and excluding some of the Statutory Bodies from the exempted list

Lack of Clarity

1. SMEs are extremely concerned about the lack of clarity in the proposed Conduct Rules in the Bill. The First Conduct Rule does not prohibit specific, clearly defined types of arrangement, but prohibits any arrangement which ‘prevents, restricts or distorts competition’ (unless an exemption or exclusion applies). But the Bill **does not define** what this concept means. If it means some kind of future reduction of competition in the market place, how will SMEs know whether this will be the effect of their agreement, and how will such reduction be measured?
2. Far from giving guidance, the **list of illustrative examples** of ‘anti-competitive’ agreements is too vague to be of any assistance. Indeed, the wording is alarming because it seems broad enough to cover normal commercial arrangements between SMEs, such as the formation of joint buying groups to negotiate better terms from suppliers, enabling them to pass on cost savings to consumers (these may be regarded as fixing purchase conditions under example (a) and/or sharing sources of supply under example (d)). The fact that the Government has indicated that the law will not be enforced against arrangements where the parties’ combined **market share** is less than 25% is of little comfort, not least because of the difficulties of defining the “market”, and the fact that competition authorities normally take a narrow approach to “market” definition.
3. Assuming the parties were able to conclude that the arrangement will ‘prevent, restrict or distort competition’, they will then need to check whether an exemption or exclusion applies. Clearly the one which is likely to be most relevant in practice is the one for agreements which ‘**enhance overall economic efficiency**’ (Schedule 1 paragraph 1). But it is not clear what has to be done to show that this exclusion applies. For example, what will be regarded as an ‘improvement’ in production or distribution, or a ‘promotion’ of technical or economic progress? These appear to be matters of **subjective judgment**, and therefore SMEs will be unable to predict whether the authorities will share the same view. If some sort of balancing between economic efficiencies, and the economic effects of the reduction of competition, is required (as under the Merger Rule), how can SMEs be expected to conduct such economic exercises, and get them right? (At least in the sense of coinciding with the authorities’ views, since again these exercises are to a large extent **subjective**).
4. The Government has said that the future Competition Commission will issue “guidelines” to assist with compliance. But it is difficult to see how “guidelines” will help, given that whether the competition test is satisfied, and if so whether an exclusion applies, depends very much on the facts of each case. Moreover, the

- “guidelines” will not be legally-binding on the Commission or Tribunal. In any event, it should be left for the Legco to determine what the legislation means, not the future Commission. It is impossible for SMEs to support a Bill when its full details and implications are **unknown**. The details should be provided as soon as possible, and certainly before Legco decides to approve the Bill.
5. The Bill provides a facility for applying to the Commission for a decision as to whether an exemption or exclusion applies. But in our view this is also not a viable solution. Given the potentially broad sweep of the prohibition, and the uncertainty as to whether it, and/or an exclusion applies to a particular agreement, it is likely that business would grind to a halt in Hong Kong while parties to most commercial agreements sought to obtain a decision from the Commission. This is entirely **contrary to the objective of the Bill** i.e. to encourage competition for the benefit of consumers. The fact that the criteria in Clause 9(2) have been drafted tightly, so that the Commission is only required to consider applications in limited circumstances, gives scant comfort, since it only means that the businesses which are turned away will be left with the uncertainty which led to the application in the first place.
 6. Finally there is the question of costs. It is clear that the applicability of the Conduct Rules in their current form will depend very much on issues about **economic effects** and **economic efficiencies**. These matters are outside the competence of most businesses (not just SMEs) and therefore businesses will have to engage **specialist economists** as well as **competition lawyers** if they wish to minimize the risk of breaching the law inadvertently. While large businesses can afford to incur such costs, SMEs cannot. Moreover, vague rules like this give more scope for speculative (as opposed to vexatious or frivolous) complaints and litigation, thereby causing further disruption and cost.
 7. The only logical way of avoiding the above uncertainties, and the only fair solution for all businesses (not just SMEs) is that the Bill should only prohibit clearly-defined, specific types of conduct. This will meet SMEs’ concerns about the lack of legal certainty and the corresponding costs of compliance. The Government should not be proposing conduct rules whose applicability depends on future economic effects since these are too uncertain. If it feels it needs to intervene in the market place to rectify some sort of market failure, it should use other regulatory tools, not effectively hold businesses liable retrospectively for failing to predict market outcomes.

Excessive Sanctions

8. We are concerned that the sanctions which the Tribunal can impose seem excessively draconian, particularly at the beginning of a new competition law. We understand that the sanctions go further even than other more established regimes such as the EU. For example, the Government’s proposed cap of 10% of consolidated turnover in all products or services for all years in which the

infringement took place could produce a figure which is a multiple of what the EU Commission can impose, and could put many companies (particularly SMEs) out of business. The Government has said it is 'only a maximum' but if the level is set too high, there will inevitably be public pressure to impose ever-increasing penalties moving up towards the maximum.

9. The effect on foreign investment should also be considered. An excessive cap could deter businesses from engaging in transactions or conducts which might be good for the market and consumers, for fear of breaching the rules, and therefore defeat the objective of the Bill. We do not believe it is right to use a climate of fear and uncertainty to encourage compliance.
10. It was more alarming that in the first meeting of the Bill Committee, the legal advisor of the Government confirmed that under certain circumstances the sanction might include the global turnover of the holding company which may have other businesses unrelated to the anti-competitive conduct.
11. It is also not appropriate to position the Competition Tribunal at High Court level. It should start off at District Court level. The potential costs and liabilities will be too high for the SMEs. The independent private action is also a threat to the SMEs. Most of the SMEs may not want to start a private action of their own because of the high costs involved.

Excluding some of the Statutory Bodies from the exempted list

12. For many years, the SMEs are relying on the Government for supports in order to survive in the difficult times. Very often, the Government provides such supports through a number of semi-governmental statutory bodies. These bodies may have certain kind of advantages over the other commercial undertakings. However their primary objective is to help the SMEs as an extension of the Government. These advantages are necessary in order to make the system works. In the eyes of the SMEs, these functions should be performed by the Government itself. Examples of these statutory bodies include:
 - a) Hong Kong Export and Credit Insurance Corporation
 - b) Hong Kong Productivity Council
 - c) Hong Kong Trade Development Council
 - d) Vocational Training Council