HKGCC Submission to Bills Committee on Competition Bill
19th November 2010

Summary

It is important to spell out at the outset that competition regulations are all about promoting market competition and weeding out hard-core anti-competitive behaviours, such as, price fixing and bid rigging. However, the Competition Bill, as it is drafted, seems to diverge from the original intent. The Bill is interventionist in tone and seems to target market structure, with provisions that may result in highly intrusive regulatory operations. The fundamental questions of what kind of competition regime that Hong Kong wants, and needs, must, therefore, be reconsidered.

The Hong Kong General Chamber of Commerce (the "Chamber") has always supported the introduction of a good competition law for Hong Kong, on the premises that the approach is minimalist, and that the regime will ensure fairness, transparency and certainty. We do not want to see overly intrusive laws that impose unnecessary costs to companies, consumers, as well as the overall economy. More fundamentally, the Bill eventually put in place should serve to enhance Hong Kong's attractiveness as a vibrant business hub.

Keeping to Hong Kong's transparent system of legal certainty, we deem it crucial for the Bill to lay out which previously accepted behaviours are now prohibited. Moreover, to address public concern over passing the Bill without the benefit of vetting the detailed implementation guidelines, discussions on the guidelines must go hand in hand with the current legislative process.

With a view to enhance legal certainty, we recommend amending the object clause, the two Conduct Rules, Merger Rule and exclusion provisions. Efforts should be made to put limits to private actions, and be more specific about the proposed penalties and the structural relief measures. We also see the need for the Legislative Council Bills Committee to tackle these issues as a matter of priority.

Experts in the Chamber's competition law working group have gathered thoughts on the ways to improve the draft legislation substantially, without a complete overhaul. A marked-up version of selected parts of the Bill is attached in the Annex as an illustration. The Chamber's working group is prepared to provide further recommendations on possible amendments as the Bills Committee proceeds to the section-by-section, clause-by-clause study of the Bill.

Detailed Comments

Object: "economic efficiency" must be included

1. The Government has consistently said (for example, in its May 2008 consultation document) that the objective of the competition law should be economic efficiency. Competition is a means to that end, not an end in itself. This is consistent with the fact that, under the Bill itself, agreements and mergers will not be prohibited if they result in economic efficiencies which outweigh the harm to competition. Yet the objects clause of the Bill does not mention economic efficiency, only competition. A reference to economic efficiency as the primary objective should be inserted. It is critical that the precise objectives of the law

are discussed and agreed at the outset, since these will determine how the Conduct Rules are drafted, and interpreted by the Commission and the courts. For this reason we are concerned that the proposed workplan which the Government has produced for the Bills Committee does not contain any reference to a discussion of the objects at all, far less at the outset of the Committee's deliberations.

Legco workplan: "Conduct Rules" should be the priority

2. We have reservations about the proposed plan to discuss the institutional structures prior to the Conduct Rules. The Conduct Rules form the crux of the Bill for all stakeholders, and the discussion of the rules and what they mean for businesses which will have to comply with them should take priority, after the objectives. This is logical, since the rules flow from the objectives. This is also consistent with the order in which these matters appear in the Bill itself. The discussions on the institutional structures should take place towards the end, at Component 9 of the workplan, since the Conduct rules, investigation powers, sanctions, etc. may all have a bearing on the structure and composition of the bodies appointed to administer the law.

Enhancing certainty

3. Several key terms are not defined in the Bill, such as 'competition' and 'substantially lessen competition'. These terms must be defined, otherwise the Commission will be given too much discretion to interpret them, and will effectively act as legislator rather than enforcer.

4. Under the Bill as drafted, whether agreements or conduct are prohibited will depend on their future economic effects, which by definition are uncertain. Businesses will find it difficult in many cases to predict whether a proposed arrangement or course of action will be prohibited. This means that they will have to either (a) go ahead, and take the risk of being found guilty and penalized, (b) refrain from transactions or conduct which may actually benefit competition and consumers, or (c) ask the Commission for clearance before proceeding (but the Commission has a discretion whether or not to give a view, and even if it does the process involves delay). None of these options is satisfactory. Irrespective of how other jurisdictions may have approached the matter, we do not believe that it is fair or reasonable in a Hong Kong context that businesses be expected to make such economic assessments (which substantially increases compliance costs), or that they are placed in the position of having acted illegally if they make an assessment which differs from that subsequently made by the Commission or Tribunal.

5. One solution to this problem is to prohibit only specific types of conduct: price-fixing, market-sharing and bid-rigging. However, if the Government's proposal that all conduct be subject to a competition assessment is to proceed (and we assume for the purpose of our other points below that this is the case), another solution to this problem is that agreements and conduct should not be automatically prohibited: they should be prohibited only in specific cases, if and when the Tribunal decides, after examination by the Commission, that they should be prohibited; and the prohibition will only take effect from the date of the Tribunal's ruling, thereby only outlawing relevant future conduct after the ruling. There is recent precedent for such an approach in Canada. The Tribunal could have the power to impose sanctions in the case of 'hardcore' conduct (price-fixing, market-sharing and bid-rigging) given the fact that these are more easily defined, and the likelihood that these practices will lessen competition substantially.

First Conduct Rule

6. The so-called 'illustrative examples' of anti-competitive agreements under the First Conduct Rules are too vague to give any guidance, and are capable of covering normal, pro-competitive conduct such as joint buying by SMEs. They should specifically refer to price-fixing, market-sharing and bid-rigging.

Second Conduct Rule

7. The concept of 'dominant position' is preferable to 'substantial market power' as it has a clearer meaning and is widely used in other jurisdictions (such as the EU and China).

8. The concept of 'abuse' has given rise to great difficulty and uncertainty in other jurisdictions. The overseas case-law is unclear and in some respects contradictory. Academics and think tanks have tried for many years to find a satisfactory definition of abuse, without success. The risk of using this term in the Hong Kong legislation is that this difficulty and uncertainty will be 'imported' into Hong Kong. A better approach is to avoid using the term, but to identify the essence of the conduct which most competition experts agree should be targeted, i.e. conduct that forecloses competition by pushing competitors out of a market or blocking entry in the medium to long term. This means that the 'illustrative examples', which are in any event too vague to provide guidance (e.g. what does 'predatory' mean?), are unnecessary.

Merger Rule

9. The business sector and perhaps the wider public had been led to believe that mergers will be excluded from the law, at least for the first few years of the new law being in force. But a closer reading of the Bill and discussions with officials during consultation meetings indicate that this appears not to be the case.

10. First, if the Government's policy objective continues to be that the Merger Rule should apply to mergers between Hong Kong telecommunications carrier licensees, but not to other sectors, the Bill does not achieve this objective. As currently drafted, the rule would catch mergers involving any other market outside telecommunications, as long as a party to the merger happened to have a Hong Kong carrier licensee in the same group of companies. This would need to be amended.

11. Government officials have indicated during consultation forums that the First Conduct Rule could indeed be applied to mergers in all sectors, as some legal experts have pointed out. Officials seem to imply that the potential application of the First Conduct Rule to mergers is a deliberate arrangement, not an oversight, and that the Government intends the First Conduct Rule to be a general rule, hence no carving out of mergers from it. Such indication is in stark contrast to the declared policy that merger regulation will be restricted to telecommunications carrier licensees only. The Government should clarify their stance on this very important issue. The HKGCC remains of the view that general merger regulation should not be contemplated at this stage.

12. It should be emphasised that if the Government chooses to introduce general merger control by this method, it is going to impose further unnecessary and unjustified costs to businesses and the regulatory authorities, as Europe has come to realize when this was not

clear under the EC competition rules. If the question about the First Conduct Rule's applicability to merger is not clarified in Hong Kong, it will necessarily need to be determined by the Commission/Tribunal one way or the other, inviting expensive and entirely unproductive satellite litigation on the point. In the meantime, people will have no certainty as to what is and is not prohibited.

Appropriate test: 'Substantially Lessen Competition'

13. The appropriate test for Commission/Tribunal intervention in all cases should be 'substantially lessen competition' (SLC), as in the Merger Rule, not 'prevent, restrict or distort competition' (PRDC) as in the First Conduct Rule. This is because the SLC test refers to the effects on the market, which should be the concern of competition law. By contrast, virtually any restraint on commercial freedom has been viewed as anti-competitive under the PRDC test, which is overly-intrusive. There is also no justification for using the SLC test for mergers and the PRDC test for other agreements and conduct, as currently proposed.

Exclusions and Exemptions

14. The proposed exclusion for transactions which produce overall economic efficiencies is framed in different terms for mergers than for other agreements. There is no valid justification for this difference: the terms should be consistent and the wording for mergers should be used, as it is clearer and more consistent with the Government's stated policy objective. Moreover a similar exclusion should apply to unilateral conduct subject to the 'Second Conduct Rule'. In addition, the exclusion in all three cases should make it clear that, in balancing economic efficiencies against the lessening of competition, innovation and dynamic efficiency (such as through the introduction of new or improved products, processes or services) are to be given prominence, given Hong's reputation for creativity, dynamism and entrepreneurship. This in turn acts as a spur to continuing competition in any event, by encouraging competitors to continually match or outdo each other's performance, as well as new market entry.

15. The conditions which must be satisfied before the Commission is obliged to issue a decision confirming whether an exemption or exclusion applies are too tightly drawn. In the early years of the new regime, in particular, when businesses are still becoming accustomed to it, it is more appropriate that the Commission be obliged to issue such a decision, unless the request relates to purely hypothetical questions.

Disproportionate penalties and relief powers

16. The investigation powers (e.g. the power to take away property) are too stringent compared with other competition regimes such as the EU, particularly in the early stages of a new competition law. Moreover the proposed cap on penalties- 10% of worldwide group consolidated turnover for each year of the infringement- is grossly disproportionate compared with even the EU. As a new competition regime, it would be proportionate to set the cap at 10% of one year's turnover in the products or services concerned in Hong Kong (since the law is only addressed at conduct which has anti-competitive effects in Hong Kong).

17. The Government has consistently said the law is not going to target structural issues. The proposed structural relief powers in Schedule 3- in particular Paragraphs 1(d), (e) and (f)- should therefore be removed. More generally, there are a number of other proposed

powers which, like the structural powers, are additional to those specifically proposed in previous consultations, which have not been consulted upon, and which overlap with other powers, such as a power to order disgorgement of profits (paragraph 1(p)) as well as impose penalties and damages orders. These proposed powers should be carefully scrutinized by the Bills Committee to ensure that they are proportionate, and not excessive or duplicative, particularly in comparison with other more mature competition regimes.

Private actions: Should limit to "follow-on"

18. Third party actions should be limited to 'follow-on' actions (i.e. only available once the Tribunal has determined after investigation by the Commission that there is an infringement). Otherwise there is a risk of excessive litigation. It is instructive to note that, in the UK, where competition law has been in force for many years, even follow-on actions in the Competition Tribunal have only been available since 2003, and it is not possible to bring a standalone action. Hong Kong should proceed with similar caution.

Proposed Section 7Q of Telecommunications Ordinance

19. There is a wide consensus amongst competition experts that rules against 'exploitative' behaviour should have no place in competition rules, because they are not about protecting competition. Moreover, the difficulties and subjectivity involved in assessing what constitutes exploitative behaviour are notorious. Consistent with this position, the Government has therefore correctly limited the Second Conduct Rule to exclusionary (i.e. anti-competitive) abuse. It is therefore anomalous to impose a rule against exploitative abuse in the telecommunications sector, as the proposed new section 7Q of the Telecommunications Ordinance would do. This proposed new section (contained in Schedule 8 Part 4 of the Bill) should be withdrawn.

Regulations that unreasonably limit competition

20. Hong Kong Government policy has, for a long time, sought to ensure government intervention is minimal and, where it does occur, that it is not unduly distortive of competition, e.g. through COMPAG's existing role reviewing both private and Government conduct and the Government's "Be the Smart Regulator" policy. In other jurisdictions over the last few decades the role of competition policy has also expanded to include lessening the adverse effects of government intervention in the market place. In some countries, competition authorities can analyze whether regulatory measures from the public sector will negatively affect competition and strive to have any measures that unreasonably limit competition amended or abolished. It could be proposed that similar provisions be included in Hong Kong's competition law.

-END-