

Bills Committee on Competition Bill

List of follow-up actions arising from the discussion at the meeting on 9 November 2010

At the meeting on 9 November 2010, the Administration was requested to provide written responses to the following concerns/requests:

- (a) provide draft guidelines on interpretation and implementation of the conduct rules, which the Administration would provide for the reference of the future Competition Commission (the Commission) which was statutorily required to issue the guidelines in consultation with persons it considered appropriate;
- (b) in respect of the proposed pecuniary penalty not exceeding 10% of the global turnover of the undertaking involved in the contravention of the competition rule for the year in which the contravention occurred,
 - (i) consider confining the scope for calculation of pecuniary penalty to local rather than global turnover with reference to the approach adopted in Singapore;
 - (ii) consider confining the scope for calculation of pecuniary penalty to the type of business activity relating to the contravention in question rather than all types of business activity engaged by the undertaking;
 - (iii) clarify whether the turnover of the subsidiary company concerned only or those generated by the subsidiary together with the parent company would be taken into account in the calculation of the pecuniary penalty; and
 - (iv) provide overseas case law examples in which the proposed pecuniary penalty was imposed;
- (c) consider explicitly stating consumer protection as one of the objects of the Bill having regard that "allowing consumers a fair share of the resulting benefit" was spelt out in the legislation of the United Kingdom and European Union and that as set out in the public consultation paper entitled "Detailed Proposals for a Competition Law" issued by the Government in May 2008, "the purpose of the legislation should be to enhance economic

efficiency and thus the benefit of consumers through promoting sustainable competition";

- (d) allay the concerns of SMEs with regard to abuse of market power,
 - (i) consider stating in the Bill the relevant matters to be taken into account in considering whether an undertaking had a substantial degree of market power; and
 - (ii) consider amending the Chinese text of clause 21(1) of the Bill from "在市場中具有相當程度的市場權勢的業務實體" to "具有足以影響市場的權勢的業務實體" ;
- (e) provide information on the total number of complaints vis-à-vis those made against SMEs received by the Competition Policy Advisory Group since its establishment in 1997;
- (f) provide the Administration's comments on matters relating to SMEs in respect of competition policies in selected jurisdictions as set out in the Annex and consider stating provisions in the Bill relating to the "de minimis" approach (Proposal 43 in the Government's public consultation paper issued in May 2008); and
- (g) provide the number of multi-national corporations in Hong Kong which had engaged business activities in more than one product/service market.

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Matters relating to small and medium enterprises in respect of competition policies in selected jurisdictions

European Union

2.1.20 The Commission does not have any exemptions for SMEs engaging in anti-competitive conducts. In fact, the Commission considers that SMEs are rarely capable of appreciably affecting competition in the EU market because they are small in size. Nevertheless, the Commission has adopted the *Notice on Agreements of Minor Importance* under Article 81 of the *EC Treaty*. By defining those situations when agreements between companies are not prohibited by the *EC Treaty*, the *Notice* reduces the compliance burden for smaller companies without conspicuously restricting competition. At the same time, the Commission can avoid examining cases which have no interest from a competition policy point of view and is thus able to concentrate on more problematic agreements.

2.1.21 The essence of the *Notice* is for the Commission to quantify, with the help of market-share thresholds, those agreements, decisions of associations of undertakings and concerted practices that do not constitute an appreciable restriction of competition. This approach is considered useful when it is necessary to exempt agreements that do not affect competition but are not covered by the *Block Exemption Regulations*.

2.1.22 Whilst the main criterion for exemption is the market-share threshold, compliance with other conditions must also be verified:

- (a) thresholds of the combined market shares of 10% for agreements between competitors and 15% for agreements between non-competitors. As agreements between competitors may be prone to anti-competitive effects, the market-share threshold applicable to them is lower than that for agreements between non-competitors;
- (b) thresholds of the combined market shares of 5% for agreements having a cumulative anti-competitive effect. If firms operate in

sectors where there are already similar agreement networks, there is a considerable risk that competition will be restricted because of a cumulative effect; and

(c) there are no thresholds for agreements between SMEs.

2.1.23 The exemption does not apply to agreements between competitors aimed at limiting production or sales, fixing selling prices and restricting product supplies to customers; and agreements between non-competitors relating to the sale price of products²⁵, restriction of territory or customers, and restriction of sales in a selective distribution system.

2.1.24 On concerns of SMEs regarding accused anti-competitive conduct in the EU, RLSD has enquired the Directorate General for Competition, the European Competition Network and OECD on this issue. In response, OECD has stated that small businesses often support the competition law because they benefit from having an opportunity to enter the market and fairness among participants in the market. In the EU, there are seldom any reports about such concern²⁶.

United Kingdom

3.1.24 Under the current legislative framework, there are no specified exemptions for small and medium enterprises (SMEs) when applying the competition legislation. In any event, under sections 39 and 40 of the *Competition Act 1998*, the government enacted the *Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations* in 2000 so as to avoid the prohibition regime advocated in the *Act* being unduly burdensome on small businesses. The *Regulations* provide limited immunity from financial penalties for small agreements in relation to infringements of the Chapter I prohibition addressing restrictive trade practices, excluding price-fixing agreements, and for conduct of minor significance in relation to infringements of the Chapter II prohibition concerning the abuse of a dominant position⁷⁸.

²⁵ However, maximum or recommended prices are generally authorized.

²⁶ As at the publication of this research report, the Directorate General for Competition and the European Competition Network have not replied.

⁷⁸ This immunity does not apply to any infringements of Article 81 or Article 82 of the *EC Treaty*, and thus small businesses with activities having an effect on trade between member states may be subject to penalties even in respect of small agreements or conduct of minor significance.

3.1.25 The term small agreements refers to agreements, other than price-fixing agreements, between undertakings whose combined annual turnover does not exceed £20 million (HK\$244 million). Conduct is considered to be of minor significance if annual turnover of the undertaking concerned does not exceed £50 million (HK\$610 million).

3.1.26 RLSD has enquired the Office of Fair Trading and the Competition Commission on whether there are any concerns of SMEs regarding accused anti-competitive conduct. The Office of Fair Trading has replied that treatment of SMEs is less of an issue for the Office of Fair Trading as it prioritizes its work and tends to take action against infringements involving major companies. In addition, it has undertaken educational programmes to help small businesses avoid anti-competitive practices.

3.1.27 The Competition Commission has stated that at the beginning of an investigation, all interested parties are invited to submit evidence and make submissions to the Commission. Each inquiry has its own designated web page which contains submissions and documents published by the Competition Commission for the parties concerned and the public to access. At the completion of the investigation stage, the Competition Commission will publish a provisional findings report that sets out its proposed decision on the statutory questions it must answer, its reasoning and also the core background details necessary for an understanding of the inquiry. The parties involved in the inquiry and any other interested parties have an opportunity to respond to this document and voice their concerns before the Competition Commission publishes the final report.

3.1.28 In relation to the Competition Commission's inquiries involving SMEs, they may participate in inquiries relating to their own businesses. For example, SMEs were active in the Groceries Market Investigation⁷⁹ in 2006. Based on past experiences, SMEs might voice their concerns relating to the competition situation of a particular market, and the number of cases of accusing them for committing any anti-competitive practices was minimal.

3.1.29 RLSD has enquired the two leading business organizations in the

⁷⁹ In that incident, smaller retailers raised concerns about the impact of the buying power of larger grocery retailers on competition.

UK, the Confederation of British Industry⁸⁰ and the Federation of Small Businesses⁸¹, about their views on competition⁸². The Confederation of British Industry has replied that it has consistently supported an effective competition regime in the UK and welcomed the reforms introduced by the *Competition Act 1998* and the *Enterprise Act 2002*. SMEs, as well as consumers, may be victims of anti-competitive practices and it is important that they are protected under the competition law. In fact, there are rarely any cases of accusing SMEs of violating the competition law. The government's primary focus has been on cartels which are seen as causing greater economic damage, and the Confederation of British Industry supports this enforcement policy.

United States

4.1.23 The federal agencies do not provide small and medium enterprises (SMEs) with any exemptions from the antitrust laws on the ground that free-market competition is the foundation of the US economy, and the antitrust laws stand as a bulwark to protect free-market competition. Although the US does not have any statutory exemptions for SMEs, the federal agencies generally adopt a 30% market share¹²³ of the undertakings involved as a threshold in identifying conduct that is of minor economic significance and therefore is unlikely to be anti-competitive. Such threshold does not apply to agreements involving price fixing, bid rigging and output restriction. The approach is aimed at facilitating the compliance with the antitrust laws, whilst providing some relief to SMEs.

4.1.24 The Fair Trade Commission states that SMEs have not been the focus of enforcement. Instead, it concentrates its efforts on price-fixing activities and large-scale mergers which lessen competition. Further, to help SMEs understand how to comply with the antitrust laws, the Fair Trade Commission and the Antitrust Division of the Department of Justice have been co-working to provide them with readily understandable guidance documents such as *Bureau of Competition User's Guide*, *Guidelines for Collaborations*

⁸⁰ It represents some 240 000 businesses that together employ around one-third of the private sector workforce.

⁸¹ The Federation, with 215 000 members, is the UK's largest campaigning pressure group promoting and protecting the interests of the self-employed and owners of small firms.

⁸² As at the publication of this report, the Federation of Small Businesses has not responded

¹²³ The threshold may vary among industries.

among Competitors and *Horizontal Merger Guidelines*, which are available on the Fair Trade Commission's website. In addition, the Fair Trade Commission has conducted outreach programmes with chambers of commerce, trade associations and business owners, including a series of one-day workshops on understanding the competition law.

4.1.25 While no information on SMEs unwittingly violating the competition laws could be identified in the public domain, RLSD has enquired the US Chamber of Commerce¹²⁴ and the National Small Business Association¹²⁵ to comment on this issue.¹²⁶

Singapore

5.2.5 Singapore is a small open economy with about 150 000 small and medium enterprise (SME)¹⁶¹ establishments in 2008, generating more than 40% of the Gross Domestic Product and employing more than half of the workforce. Nonetheless, under the current competition law, Singapore does not have any specific exemptions for SMEs.

5.2.6 The Competition Commission of Singapore considers that SMEs are characterized by their relatively smaller scale of operations. In most cases, the total market share of SME parties to an agreement is not likely to be significant enough to create an appreciable adverse effect on competition in a market. By the same reasoning, it is unlikely that an SME can have a dominant position in a market. In any event, the Commission reserves the right to investigate alleged anti-competitive conduct on the part of an SME if it is warranted.

5.2.7 In relation to anti-competitive agreements, the Commission has adopted the following market share thresholds of limited economic significance to determine if an agreement is likely to have any adverse impacts on

¹²⁴ The US Chamber of Commerce is the world's largest business federation, representing over three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. More than 96% of the US Chamber members are small businesses with 100 employees or fewer.

¹²⁵ The Association is a national non-profit membership organization founded in 1937, representing small business companies and entrepreneurs.

¹²⁶ As of the publication of this report, they have not responded to the request.

¹⁶¹ SMEs in Singapore are classified into two categories: (a) manufacturing SMEs which have fixed asset investment of less than S\$15 million (HK\$80.1 million) and (b) SMEs in the services sector which have less than 200 employees.

competition:

- (a) the agreement is made between competing businesses, and the aggregate market share of the parties to the agreement does not exceed 20%;
- (b) the agreement is made between non-competing businesses, and the market share of each of the parties to the agreement does not exceed 25%; and
- (c) in the case of an agreement between undertakings where each undertaking is a SME.

5.2.8 The Competition Commission of Singapore has pointed out that these market share thresholds are only indicative. There may be an adverse effect on competition even if the total market share of the businesses involved is below the indicated thresholds. Similarly, agreements between businesses with market shares above these thresholds do not necessarily lead to a case with an appreciable effect on competition. The hinge is not upon the numerical value of the share, but on the ability to distort competition by exercising market power.

5.2.9 This approach does not apply to agreements containing the various hard-core restrictions including: price-fixing, bid-rigging, market sharing and limiting production, which always have an appreciable adverse effect on competition, notwithstanding that the market shares of the parties are below the threshold levels, and even if the parties to such agreements are SMEs.

(Source: Extract from "Competition policies in selected jurisdictions" (LC Paper No. RP02/09-10) issued on 25 June 2010)