

Submitted by email: hysiu@legco.gov.hk

14 December 2010

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

Dear Mr. Leung,

Re: Competition Bills

Following are the key high level issues that the British Chamber of Commerce would like the Legislative Council to pay special attention to as the Competition Bill is being scrutinised:-

Vertical Agreements

We recommend that the First Conduct Rule should only apply to "horizontal" agreements.

Uncertainties exist as to whether the First Conduct Rule can potentially be applied to "vertical" agreements. Although only horizontal agreements are provided as examples of restricting agreements in Section 6(2), there are concerns that the wordings of the First Conduct Rule might be broad enough to cover vertical agreements as well. If such is the case, it would deviate from previous Government proposal that only horizontal agreements would be regulated.

Mergers

We recommend that the Bill should expressly state that both the First Conduct Rule and the Second Conduct Rule do not apply to mergers.

Although the declared Government policy is to restrict the application of the merger rule to telecommunications and broadcasting industries, there are concerns that the broadly worded First Conduct Rule, which prohibits any form of "agreement" which has the purpose or effect of preventing, restricting or distorting competition in Hong Kong, can be invoked to challenge mergers and acquisitions in other sectors.

Lack of Clarity

We recommend that the Government adopt the term "dominant position" in the Bill, as in the EU, instead of "a substantial degree of market power".

"Market power" is a very complex notion and businesses will find it hard to determine whether they have such power. The "market" of a business or a product can be defined in many different ways. A small company specialising and doing well in a narrow market could attract anti-competition investigation and even prosecution, which could easily lead to bankruptcies because of the legal cost and potential liabilities. The relevant part in the Bill as it is drafted now is too broadly worded for businessmen to ascertain whether they have substantial degree of market power.

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The examples of anti-competition agreement provided in Section 6(2) appear to be too vague and could attract different interpretations, possibly catching some normal business activities, such as joint buying arrangements. It is preferable to prescribe to the much clearer concepts of price-fixing, bid-rigging and market-sharing.

Penalties and Remedies

We recommend that penalties should only be imposed where the breach is intentional or negligent.

Maximum pecuniary penalty of 10% of global turnover for each year is excessive. A more reasonable approach would be 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 pecuniary penalty should only be turnover obtained in Hong Kong.

Private Actions

We recommend third party actions should be limited to “follow-on” actions. Otherwise there is a risk of excessive litigation.

Government and Statutory Bodies

The bill should apply to the commercial activities of Government and statutory bodies, such as the Hong Kong Trade Development Council.

We recommend that all statutory bodies be covered with exemptions, if any, for particular statutory bodies.

Competition Commission

We recommend that all major guidelines should be vetted together with the main Bill.

The future Competition Commission should play the role of regulator of anti-competitive behaviours, and not to promote competition. The Commission is expected to enforce and implement the law. The power to make law should rest with the Legislative Council. Publishing detailed guidelines as soon as practicable will comprise the only way to enhance the certainty of the policy and the law, and to eliminate the potentially serious unintended consequences that might arise from the lack of legal certainty.

Yours sincerely,



Executive Director
The British Chamber of Commerce in Hong Kong

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