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Federation of Hong Kong Industries
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Mrs Rita Lau, JP
Secretary for Commerce &
Economic Development
Government Secretariat
2/F, Murray Building
Garden Road
Hong Kong

Dear *Rita*,

Competition Bill

1.1 Since we last met to exchange views on the Competition Bill, the Federation of Hong Kong Industries has further consulted its members on this important issue.

1.2 To most of our members, the Bill appears to be lacking in clarity, certainty and fairness. Many are deeply worried that if the Bill is passed into law in its present form, it would create intolerable regulatory uncertainties and insurmountable difficulties for the vast majority of Hong Kong's SMEs in compliance.

1.3 The problematic areas of the Bill which our members consider to have serious pitfalls are set out below. We urge the Government to look into those areas and revamp the legislation, with a view to ensuring the future competition regime will not undermine Hong Kong's attractiveness to investors or become excessively onerous on companies.

Clear Definitions for Key Terms

2.1 The foremost problem they have pointed out is that a number of the key terms in the Bill either lack a definition or are only vaguely defined, rendering compliance exceptionally difficult and costly.

2.2 For instance, nowhere in the Bill does it provide a definition of "market", which is a core concept in adjudicating whether an act or an agreement is in contravention of any of the two Conduct Rules. Nor does it lay out any formula or guidelines on how "market" is to be delineated when carrying out anti-competition tests.

2.3 Likewise, the meaning of the phrase "substantial degree of market power" referred to in the Second Conduct Rule is too ambiguous to give any legal certainty.

2.4 They are concerned that in the absence of precise, objective and straight-forward definitions for the key terms, it would leave too much discretion to the proposed Competition Commission in exercising its powers. This is the last thing they want to see. They also fear that the uncertainties arising from this piece of loosely drafted legislation would increase their business risks.

2.5 To address these concerns and ensure legal certainty, it is essential for the legislation to have its key terms set forth in plain and unambiguous language.

Specifying the “De minimis” Approach

3.1 Given the limited market power of SMEs and their inability to curtail competition to any appreciable extent, we strongly recommend that SMEs be given exemption from the two Conduct Rules, perhaps except for blatant anti-competitive practices, such as bid-rigging.

3.2 We understand that it is the intention of the Government to leave the responsibility to determine the exemption threshold with the future Competition Commission by using a “de minimis” approach. While agreeing with the adoption of a “de minimis” approach, we find it desirable and necessary to specify in the legislation the principles of this approach and the exemption threshold in respect of market share, so as to better reassure SMEs.

Private Actions

4.1 Abuse of private actions is another major concern of our members, in particular the SMEs.

4.2 Given the high litigation costs involved in anti-competition lawsuits, they are afraid that private action might be used maliciously by unscrupulous large corporations as a tactic to threaten and eliminate their SME competitors in the market.

4.3 In order to guard against such possible abuse, we suggest that third party’s right to bring “stand-alone” private actions be taken out from the Bill, while continuing to allow “follow-on” private actions to give aggrieved parties in cases where the judiciary has found infringement an avenue to seek legal redress.

Maximum Penalty

5.1 Under the Bill, the maximum pecuniary penalty is proposed to be set at 10 per cent of worldwide group consolidated turnover for each year of the breach. We find this fine level unreasonably high, which may seriously deter potential multinational corporations from setting up operations in Hong Kong.

5.2 According to papers submitted by the Government to the Legco Bills Committee, the competition laws of our neighbouring economies generally pitch the

maximum penalty at a definitive amount or use the turnover of the local operations of an infringing company as a basis for determining the fine level. In order to keep Hong Kong's competition regime on a par with these economies which are our major competitors for investments, we suggest lowering the cap of pecuniary penalty to **10 per cent of the turnover of the concerned products or services in Hong Kong.**

In this connection, it is worth noting that in Singapore, the maximum penalty is 10 per cent of turnover of the business of the undertaking in the country for each year of infringement, up to a maximum of three years.

Statutory Bodies

6.1 Pursuant to Clause 5 of the Bill, the Chief Executive in Council may make regulations to remove the exemption of statutory bodies if such entities are engaged in economic activities in direct competition with another undertaking or if their economic activities are affecting the economic efficiency of a specific market.

6.2 Statutory bodies that have been set up by the Government shoulder important, specific public functions for the benefit of Hong Kong as a whole. Among others, these public functions include promoting Hong Kong's economic development and supporting the growth of local businesses.

6.3 Considering that Hong Kong's statutory bodies are non-profit-making in nature, we strongly feel that they should be universally exempted from the Conduct Rules, regardless of whether they engage in economic activities. More importantly, giving statutory bodies immunity can enable them to concentrate on performing their public functions, without being distracted by compliance issues.

Conclusion

7.1 Finally, we would like to reiterate our grave concern about the proliferation of business regulations over recent years, which has not only caused disturbances to business operations, but also erosion of Hong Kong's economic freedom. This must not be allowed to continue; otherwise, Hong Kong will run the risk of losing competitiveness, to the detriment of our whole society.

7.2 We look forward to hearing your positive response to our suggestions.

Yours sincerely,



Cliff K. Sun, BBS, JP
Chairman

c.c. Hon. Andrew Leung