Consumer Council Submission to the Bills Committee on the Competition Bill on Major Prohibitions provided for the Competition Bill

Introduction

2. The Consumer Council (CC) previously made its submissions to the Bills Committee on the Competition Bill ("the Bill") in November 2010. CC would like to reiterates its position that legislation of the Bill should proceed with a view to completion within the Fourth Legislative Council session.

3. CC would like to take the opportunity to submit its views on the major prohibitions provided for in the Bill in relation to the following issues:

- Regulation of concerted practices
- Adoption the 'general prohibitions' approach
- Drafting of Clause 6.2 of the Bill

Concerted Practices

4. In the consultation paper issued by the Government in 2008, it is stated that prohibition should be imposed against anti-competitive agreements which include legally binding contracts or non-binding arrangements or understandings. It also points out that the competition laws in both the European Union ("EU") and Singapore also prohibit concerted practices that are anti-competitive. The Bill is therefore drafted to contain provisions against anti-competitive "concerted practices"[1] which allows the law to capture a potentially wider range of conduct.

5. CC holds the same view as the Government that there is a relatively higher risk of collusive behaviour in a small economy. With fewer market participants in many sectors, it is easier for competitors in a small economy to co-ordinate their actions through covert means and exchange of information. CC supports having provision to regulate concerted practices[2], which could be applied to regulate exchange of information between rival companies. However, undertakings must have agreed to exchange information to infringe the competition law as in EU. It is not sufficient simply that they obtain information about each other's behavior.

6. CC believes that the Government should adopt the stance of many competition authorities, including that in the EU that *parallel behaviour* does not in itself amount to a concerted practice. It is understandable that

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[1] The Government cited the definition of EU which defines concerted practice as any "co-ordination between undertakings which, without having reached the stage of concluding a formal agreement, have *knowingly* substituted practical co-operation for the risks of competition."

[2] Concerted practice could be modeled after EU where a concerted practice can be constituted by *direct or indirect contact* between firms whose *intention or effect* is either to influence the conduct of the market or to disclose intended future behaviour to competitors.

competition in the market leads to firms reacting to one another's conduct. However, if parallel behaviour impacts on competition to such an extent that it does not respond to the normal conditions of the market, it may amount to evidence of anti-competitive practice.

'General Prohibitions' Approach

7. The Government has adopted a 'general prohibitions' approach for the Bill instead of a 'per se infringement' approach. CC agrees with the Government that the 'general prohibitions' approach is appropriate for a cross-sector competition law as it would offer great flexibility to cater for the circumstances of different sectors and changing business practices.

8. Anti-competitive agreements can take various forms, which can change over time. CC always argues that it is not feasible to set out in the law all the possible forms of agreement and practices that would be prohibited even though using a 'per se infringement' approach might increase legal certainty by setting out the specific types of agreement that would be considered anti-competitive.

9. The current approach of having a general prohibition against anti-competitive agreements and concerted practices is in line with the practice in many other jurisdictions. Besides, the Bill has also made it a statutory requirement for the future Commission to draw up regulatory guidelines on how the agreements and practices could contravene the provisions [Clause 35].

10. Many anti-competitive horizontal agreements are held as illegal in virtually all nations that have adopted competition laws. Like the US and EU, most nations distinguish between horizontal agreements that are anti-competitive per se (like price-fixing) and those whose anti-competitive nature is judged only after considering all effects and justifications. However, nations vary in what inquiries their per se rule obviates.

11. Some countries (like Australia, Israel, Mexico and South Africa) use 'per se rule' that precludes inquiry into justifications or effects. Other nations, like Japan, use per se rules that preclude inquiry into justifications but not into the likelihood of substantial anti-competitive effects, even for hard-core claims like horizontal price-fixing, thus effectively creating a rule of per se legality for firms with market shares that are judged to be too small to affect the market. Indeed, Canada expressly provides for a presumptive safe harbour for horizontal agreements that cover less that 35% of the market. Some nations also exempt specific categories of horizontal agreements (such as joint ventures, standard setting or information exchanges) if they create no material anticompetitive harm.

A Cost effective approach

12. It will involve a potentially costly inquiry to demonstrate that a conduct has an object or effect of substantially lessening competition under a 'general prohibition' approach. It would be a more cost-effective approach in reviewing

potentially anti-competitive practices if court follows clear cut rules, such as per se infringement, that both enhance deterrence, by sending a clear message to potential defendants, and save administrative costs, by dispensing with many of the lines of inquiry that a full blown 'object or effect' test would require.

13. Judicial decisions are not flawless. Legal approach and standard of proof should be set with a view to controlling or minimizing the costs of judicial error. An erroneous finding of liability (or "false conviction") happens when the court finds the defendant liable (guilty) when the defendant in fact did not violate the legal standard.

14. There are costs associated with the judicial error. False convictions have the effect of raising the legal standard. As the frequency of false convictions increases, even those potential defendants who are not complying with the standard will be compelled to change their conduct in order to reduce the risk of being held liable. Thus may have a chilling effect on legitimate competitive conduct.

15. Choosing between 'per-se infringement' and 'general prohibition' is in part a choice between a greater cost of false conviction and a greater cost of inquiry. Potential false conviction risk is likely to be greater under the 'per se infringement' approach with the court looking at the act rather than the object behind or the adverse effect of the act to competition. CC would not like to see it happen and believes that the "general prohibition" approach would minimize the false conviction costs to Hong Kong.

16. In conclusion, CC supports the current 'general prohibition' approach for the Conduct Rules in the Bill. The major concern of legislation should not be the type of business activities to be regulated. Rather it should be concerned with how to ensure there are adequate competition safeguards. Besides, it is seen in many cases that a contractual restriction or a restrictive practice does not necessarily result in a restriction of competition to the detriment of consumer welfare. The concept of restriction of competition is an economic one, and as a general proposition, economic analysis is needed to determine whether an agreement or a business practice could have an anti-competitive effect. It involves more than just identification of a prescribed conduct.

Drafting of Clause 6.2

17. In the 2008 Government consultation paper titled "Detailed Proposals for a Competition Law", Chapter 3 paragraphs 17-18 state

... A purpose or effect of substantially lessening competition would have to be shown before a decision of infringement could be made. In other words, without such purpose or effect the conduct in itself, or "per se", would not be an infringement of the competition law.

However, even though conduct might not be an infringement "per se", it is arguable that certain types of anti-competitive agreement, such as price-fixing, market allocation and bid-rigging, almost always have the effect

of lessening competition and rarely have any redeeming economic benefit. Competition authorities in many jurisdictions therefore presume that such conduct is entered into with the purpose of substantially lessening competition. Whilst it would be up to the future Competition Commission to issue guidelines on how it would treat such "hard core" conduct, we consider that the list of such types of conduct should be kept to a minimum.

18. Although the Government stated that it would not generally adopt a "per se" approach, it viewed that "hard core" conduct including price-fixing, market allocation and bid-rigging, always has the effect of lessening competition without any redeeming economic benefit. As such, the purpose of substantially lessening competition could be presumed for infringement to be held. The suggestion appeared to be that special treatment would be accorded to such conduct by the future Competition Commission by ways of guidelines. The public would therefore expect a list (although a short list) of such conduct to constitute infringement per se.

19. However, the current drafting of the Clause 6.2[3] seems to make the test of object or effect of distorting competition apply to "hard core" conduct which is contrary to what the public might have been led to believe.

20. CC considers that it is important for the drafting of the clause to reflect the intention of the provisions. CC therefore invites the Bills Committee to seek clarification of the Government to avoid unnecessary interpretation problems in future.

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Consumer Council

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[3] *Clause 6.2: Subsection (1) applies in particular to agreements, concerted practices and decisions that*

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development or investment;
(c) or share markets or sources of supply.