THE HONG KONG POLYTECHNIC UNIVERSITY
香港理工大學

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By EMAIL

The Hon Andrew Leung Kwan-yuen, GBS, JP
Chairman
Bills Committee on Competition Bill
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central,
Hong Kong

Email: mjylee@legco.gov.hk

Submission to Bills Committee on Competition Bill on 15 November 2011

Dear Mr Andrew Leung,

Thank you for your letter dated 28 October 2011 inviting me to provide the Bills Committee with my views on the proposed government amendments to the Competition Bill.

I would like to respond to the six issues in the order that they appeared in your letter:

(a) General Prohibition against anti-competitive agreements

I agree with the Government's position that a general prohibition approach corresponds with the majority of jurisdictions that have a competition law. The suggestion to adopt part of the Canadian approach toward less egregious anti-competitive agreements would not be appropriate as this is coupled with a criminal liability component to severely punish hardcore

offenses. Both the civil and criminal remedy systems complement each other and adopting only part of the Canadian system would be illogical and provide inadequate deterrence to prevent repeated breaches and would unjustifiably restrict the available remedies for reaches of the law in Hong Kong, so being insufficient to rectify the wrongs inflicted by the law breakers.

The Government proposal to separate "hard-core" from other competition infractions is a reasonable answer to the concerns of business that a general competition law is a new proposition in Hong Kong. However, it should be remembered that competition law has existed in the telecommunication and broadcasting sectors for over 10 years without these issues being a significant problem.

The government proposal to introduce an additional step in the enforcement process whereby non-hardcore anti-competitive practices would be addressed by a warning notice in the first instance is a significant concession to the business community.

I believe that the government intends to provide that the division between hard-core and non-hard core activities will be reviewed in the future to decide whether such bifurcation is appropriate. I suggest that a 'sunset' period of 5 years from the commencement of the Ordinance should be incorporated in the Bill to remove the additional step in the enforcement process and the bifurcation. The business communities will by then have had a reasonable period to become familiar with the new law and its prohibitions.

(b) Payment requirement under the infringement notice procedure

The removal of the payment requirement under the infringement notice procedure is another significant concession to the business sector. However, I consider that it might be adverse to the interests of SME sector, in that this infringement notice process provided a fast-track to settle relative minor infractions. The original intention was, apparently, that such notices would be

subject to the infringing party accepting that they had broken the law, and that they accepted the proposed settlement sum. Where the accused party denied the breach or did not accept the 'payment' amount, the Commission would have to prove its case before the independent Tribunal. Removal of the payment requirement seems to me to be unfortunate as it may cause more relative minor cases to be sent to the Tribunal, so increasing litigation and associate costs to the detriment of SMEs who have committed relatively minor breaches of the law. This may be an unintended consequence of this proposal.

(c) De minimis arrangements

The inclusion of the de minimis requirement in relation to non-hard core infractions being exempted from the law when the combined turnover of the relevant parties to the agreement does not exceed HKD 100 million is another significant concession to the SME sector. In fact, such a provision is common in other jurisdictions but it is usually found in delegated legislation or guidance, which can be more flexible and can be changed quickly, as circumstances demand. Placing the de minimis provision in primary legislation may be detrimental to SME interests as this will be more difficult to change the limit in line with inflation or other changes in circumstances. I do not think that this is actually in the interests of the SME sector. A similar observation is made as regards the proposed amendment to the second conduct rule.

(d) Pecuniary penalty cap

The reduction in the proposed power of the tribunal to impose a pecuniary penalty is a very major concession to large businesses but does not benefit the SME sector at all. The proposed reduction in penalties only benefits large businesses because the vast majority of SMEs have little, if any, turnover outside Hong Kong. The purpose of a high maximum penalty threshold is

to provide discretion for the independent tribunal to (a) appropriately punish breaches of the law; (b) deter the same or other parties from committing future serious breaches of the law. The use of the maximum penalty available to competition authorities internationally have never (to my knowledge) been exercised but the existence of a large potential penalty encourages compliance and deters anti-competitive activities. I would also add that using an undertaking total turnover as opposed to limiting the maximum penalty to turnover of specific goods or services concerned in the infraction is the better approach. This is in line with international norms. Limiting the maximum penalty to a particular line of commerce is not effective and will greatly increase the complexity of penalty calculation. Such as system would create great uncertainty to the legal advisers of enterprises and the tribunal, this would increase legal costs and prolong cases unnecessarily.

(e) Stand-alone private right of action

The removal of standalone private action on the basis that SME might be harassed by larger enterprises or by frivolous consumer action is fundamentally misconceived. The use by large enterprises of competition law to intimidate small enterprises is unknown in overseas jurisdictions which contain similar provisions to those contained in Hong Kong's Bill. Removal of the private right of action on this basis is fallacy. In fact, such a stand-alone private right of action benefits small businesses who may be the victim of anti-competitive action by larger businesses. The removal of private right of action deprives SMEs of a valuable tool to protect their legitimate interests to prevent or remedy anti-competitive injury they have suffered.

The concern that such a right would open the floodgates to mass litigation from consumers against businesses is another fallacy because individual consumers will rarely suffer injury on a scale that will make a private litigation economically viable. The cost of private litigation in Hong

Kong is very high and this alone would deter the most consumers from taking private actions against enterprises that infringe competition law. However, the right of private action as a complement to public enforcement is seen by competition authorities worldwide as an important tool to discourage anti-competitive activities and protect the legitimate interests of small businesses and private consumers. Competition authorities will never be able to act on all competition complaints and so private citizens and businesses should have the right to protect their legitimate interests. Most developed jurisdictions with competition law are attempting to encourage private enforcement to improve effectiveness of their competition law system.

It is extremely unfortunate that the government proposes to remove this provision and in my opinion it significantly weakens the Bill and is not in line with the position in most developed economies.

(f) Merger rule

The confirmation that the 1st and 2nd prohibitions will not apply to mergers and acquisitions is a clarification of the government's previously stated policy. This is notwithstanding the fact that a merger control regime has existed in the telecommunication and broadcasting sector for almost a decade. The omission of a general merger control procedure is regrettable as firstly, it creates an unlevel playing-field and therefore may affect investment decisions. Secondly, almost all developed economies have a merger control procedure as an intrinsic part of their competition law. Unfettered mergers can create or strengthen market power and potentially increase the likelihood that such market power is abused. The absence of an appropriate cross-sector merger control regime is detrimental to the interests of consumers, SMEs and competition in the market generally. Government should introduce merger control provisions in the Bill or commit

to review the situation provision shortly after the Bill has been amended to introduce an appropriate merger control system.

Unfortunately, I am unable to attend the Bills Committee meeting as I will be attending an ASEAN Competition Law Conference in Indonesia on 15-16 November 2011. However, I would be happy to assist the Committee in its future deliberations.

Yours sincerely,

Mark Williams