

**Submission on Amendments to the Competition Bill
and the Guidelines on the Second Conduct Rule**

Introduction

1. The Consumer Council (CC) is taking this opportunity to comment on the amendments to the Competition Bill (the Bill) recently proposed by the Government and the guidelines regarding Clause 21(1) of the Bill dealing with an undertaking that has a substantial degree of market power in a market and who abuses that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

Proposed Amendments

2. CC appreciates the efforts to facilitate passage of the Bill behind the amendments to the Bill proposed by the Government. CC believes that these amendments have addressed all reasonable concerns of SMEs and it will not be in the public interest to make further concessions. Other demands for further concessions, such as raising the thresholds for de minimis, extending the coverage of infringement notice to violations of the Second Conduct Rule and granting more exemptions are only aimed at undermining the effectiveness of the future law and as such objectionable.

Warning notice

3. CC believes that the implementation of warning notice should remove SMEs' worry about the possibility of inadvertent violations and is very generous to SMEs. CC does not agree to any further extension of the application to Second Conduct Rule violations. The practice of warning notices should be withdrawn after the law has been in effect for a certain time.

De minimis arrangements

4. With the proposed generous de minimis thresholds, most genuine SMEs who cannot afford to obtain legal advice on compliance will be exempted. CC considers that the proposed thresholds for de minimis are sufficient and already generous.

Pecuniary penalty

5. As other jurisdictions with competition law might follow up on cases ruled as anti-competitive by the courts in Hong Kong, CC believes the amendment in lowering the pecuniary cap to 10% of the local turnover for each year of infringement, up to a maximum of three years, would still serve the purpose of deterring international cartel conduct.
6. CC, however, is worried that the level of the amended cap might not be adequate in deterring repeated violations by local companies. CC urges the

Government to review the level of penalty if repeated violations are observed in the economy.

Standalone action

7. CC is of the view that the removal of stand-alone private action would reduce the ability of consumers to seek redress to protect their own interests when faced with anti-competitive behaviours.
8. With the removal of stand-alone private action, the future Competition Commission will be the only body to safeguard competition in the market place so it is crucial that the Commission is adequately funded to address complaints by consumers, SMEs and business entities against any anti-competitive behaviours.
9. CC doubts whether the current budget would be sufficient for an agency that will oversee the entire local economy, and is also concerned whether the Competition Commission would have representatives for consumers to address anti-competitive behaviours affecting consumers at large.
10. There were concerns among SMEs that large companies, which have more resources, could make use of private actions to affect the business of smaller competitors. Experience in other jurisdictions did not substantiate such worry. CC calls for stand-alone private action to be introduced as soon as possible after the business community has acquired experience with the new competition regime.

Merger rule

11. It is always the position of CC that a merger regulation can strengthen the effectiveness of the law safeguarding market concentration and market competition. As the merger rule stood in the gazetted Bill, there was already a restriction to application of the merger rule so that it cannot regulate merger activities in business other than telecommunications. CC is concerned that in the latest amendments proposed by the Government an even further restriction of the merger rule by the addition of section 4 to Schedule 1.
12. In particular, CC noted that the existing formulation of the merger rule as stated in section 3 and 5 of Schedule 7 is broad, covering:
 - (a) [*Cross-share holding where*] 2 or more undertakings previously independent of each other cease to be independent of each other [stated in section 3(2)(a) of Schedule 7];
 - (b) [*Strategic alliance where*] one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings. [stated in section 3(2)(b) of Schedule 7]; and

(c) [*Joint venture*] the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity also constitutes a merger within the meaning of subsection (2)(b) [stated in section 3(4) of Schedule 7].

13. The Bill also states that for the purposes of Schedule 7 control, in relation to an undertaking, is to be regarded as existing if, by reason of rights, contracts or any other means, or any combination of rights, contracts or other means, decisive influence is capable of being exercised with regard to the activities of the undertaking.
14. Assuming mergers were to be included in Schedule 1 as one head of general exclusions if the broad definition of the merger in Schedule 7, the proposed exclusion of merger from the First Conduct Rule could apply to all joint ventures and almost all cooperative activities between companies, thereby rendering any prohibitions against hardcore activities and anti-competitive agreements under the First Conduct Rule ineffective.
15. CC believes that in proposing the new exclusion of merger in Schedule 1, the intention of the Government is to exclude application of the First Conduct Rule to merger in a narrow sense. If that is the case, CC urges that the scope of merger to be excluded be defined and specified.

Guidelines on the Second Conduct Rule

16. The Guidelines set out three elements to define market power: (a) the ability to set prices irrespective of reactions of customers and competitors; (b) the ability to impede competition; and (c) the ability to make “excessive” profit. The Guidelines do not state whether they are cumulative or they can stand alone. CC supports adoption of the stand-alone approach in defining market power which will be in line with the general understanding of consumers.
17. Regarding assessing whether an undertaking has a substantial degree of market power, the Guidelines illustrate constraints on an undertaking’s ability to profitably sustain prices above competitive levels. Relevant constraints on an ability to exercise market power include: (a) existing competitors; (b) potential competitors, where the strength of potential competition is affected by barriers to entry and the ability of potential competitors to enter the market; (c) other factors: such as the existence of powerful buyers. CC is of the view that local factor such as conglomerates, which can be defined as an undertaking assuming market power by leveraging across multiple relevant markets or industries, should be considered when examining the extent of market power of an undertaking in Hong Kong.
18. It is understood that the Bill has not set any market share threshold in defining a substantial degree of market power. To avoid uncertainty and to demonstrate that the proposed law should be able to address the

monopolization in some notorious problematic oligopoly markets (such as one-stop shopping market, property development market, shopping mall market and estate agency market in which the incumbents only have around market share of 35%), CC proposes a threshold of market share of 30% as a condition of substantial market power for the future Competition Commission to tackle the abuse of market power of the incumbents in those markets.

19. Under the Guidelines, it is stated that in assessing whether the conduct under examination had the effect of preventing, restricting or distorting competition, the future Competition Commission will consider whether there has been an appreciable adverse effect on competition in the relevant market on a case-by-case basis in the light of available evidence. The Guidelines have illustrated some prohibited effects including: anti-competitive foreclosure of competitors; raising of barriers to entry; or withdrawal of products or services from the market or a reduction in the quality of the services offered.
20. CC proposes that 'reducing consumer welfare', which is considered more appropriate in Hong Kong's context to protect consumer interests and safeguard the competition in the market, should be one of the criterion in deciding different abuses of substantial market power to prevent, restrict and distort competition in Hong Kong.

Consumer Protection against Excessive Market Concentration

21. Hong Kong is a small economy and the local market is replete with oligopolies and corporations with market dominance. It would be extremely unfair to consumers to abandon a cross-sector merger provision without offering an alternative mean of protection against exploitation of consumers resulting from excessive market concentration.
22. Under sections 1 to 4 of Schedule 1, the First Conduct Rule does not apply if certain conditions are met. Section 1, which concerns agreements enhancing overall economic efficiency, is modeled after Article 101(3) of the Treaty on the Functioning of the European Union, except that the requirement under EU law that consumers are allowed a fair share of the benefit has been removed, CC believes that this requirement should be re-introduced to ensure that consumer interests are adequately considered by the future Competition Commission and Tribunal before granting any exclusion under sections 1 and 4 of Schedule 1.

Consumer Council
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