Submission to Legislative Council

Bills Committee on Competition Bill

15 November 2011

by

Dr. Andrew Simpson
Assistant Professor, Faculty of Business
Hong Kong Polytechnic University

Honourable Chairman and Members,

1. Thank you for the opportunity to address the Bills Committee today. I offer the following submissions in a personal capacity (as a competition lawyer, academic and former competition agency staff member).

Summary

2. I begin my remarks today with the following general observations:

- ***SMEs are not the only stakeholders affected by competition law*** -- SMEs are of undeniable importance to Hong Kong's economy and way of life but Hong Kong consumers' interests must also be prominent in policy formation, if the competition law is to serve the community effectively.

- ***Competition agencies usually have strong incentives not to go "Trawling for Minnows"*** -- the funding received by competition agencies is necessarily finite; enforcement action is costly; and prosecuting SMEs will seldom be the best way for an agency to achieve its mission. To ensure the Competition Commission is giving priority to the matters the community considers most serious, the Commission should publicly communicate its priorities by means of Annual Plans and Enforcement Guidelines.

- ***There is a real risk that exemptions from competition law that are intended to help SMEs will impose economic costs that end up being paid for by consumers*** -- unless such exemptions are economically justified and carefully delimited.

3. In relation to the changes to the Competition Bill that have recently been proposed:

- ***"Warnings" to businesses and settlements of investigations on the basis of "commitments" are cost-effective*** -- each enables the agency to secure an end anti-competitive conduct at the least cost to taxpayers and businesses. If the Competition Commission cannot accept commitments to pay monetary compensation, however, it may

be forced to take proceedings to the Competition Tribunal which otherwise it could settle.

- ***Maximum penalties are imposed only in the most serious cases*** -- so reductions to maximum penalties should be expected to benefit the largest and most egregious offenders.

- ***Stand-alone private actions do not in reality pose serious risk to SMEs but the right for private litigants to bring follow-on actions is much more important*** -- because a wrong should not be without a remedy. Persons who have suffered harm due to proven anti-competitive conduct must be able to seek compensation.

- ***Dis-applying the Conduct Rules to mergers enhances certainty*** -- but the lack of a general merger review rule could well have adverse economic effects, so should be reviewed three to five years after the Ordinance commences.

Competition Agencies have no business "Trawling for Minnows"[1]

4. Since competition authorities have finite resources at their disposal, and are required to account in detail for how their funds have been used, they have strong incentives to use the money allocated to them to investigate and prosecute the most serious cases of infringement.

5. To ensure that the Competition Commission directs enforcement priority to those infringements that are regarded by the community as being the most serious, the Commission should publish Enforcement Guidelines. The Australian Competition and Consumer Commission, for example, states in its "Enforcement and Compliance" document:[2]

> [T]he ACCC gives enforcement priority to matters that demonstrate one or more of the following factors:
> - conduct of significant public interest or concern
> - conduct resulting in a significant consumer detriment
> - conduct demonstrating a blatant disregard for the law
> - conduct involving national or international issues
> - conduct detrimentally affecting disadvantaged or vulnerable consumer groups
> - conduct involving a significant new or emerging market issue
> - conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene
> - whether ACCC action is likely to have a worthwhile educative or deterrent effect, and/or
> - the person, business or industry has a history of previous contraventions of competition.

---

1 This phrase appears as the title of *Trawling for Minnows: European Competition Policy and Agreements between Firms* by Damien Neven, Penelope Papandropoulos and Paul Seabright (Centre for Economic Policy Research, 1998).

2 Australian Competition and Consumer Commission "Compliance and Enforcement Policy" (April 2009) available at <http://www.accc.gov.au/content/index.phtml/itemId/344494>; see, also: New Zealand Commerce Commission "Enforcement Criteria", available at <http://www.comcom.govt.nz/enforcement-criteria/>.

Broad Exemptions are prone to Reduce Consumer Welfare

6. The risk attending straight exemptions or carve-outs from competition law in favour of SMEs (or any sector) is that competition is prone to be reduced and consumer welfare suffers accordingly. If exemptions are too broad, SMEs' gain will be consumers' loss.

7. Measures intended to lessen the "impact" or "burden" of competition law on SMEs must be designed with great care, lest they be paid for by consumers. Unless exemptions are strictly limited to conduct that is harmless in economic terms, or that can be justified on public benefit grounds, they operate as a transfer from consumers to businesses.

8. Very many households in Hong Kong can ill-afford to subsidise anti-competitive business conduct, whether engaged in by businesses that are large or small.

Abolition of Stand-Alone Private Actions

9. The fear that large undertakings might use the competition law to harrass small undertakings by bringing private actions against them is misplaced, in my opinion.

10. Outside the USA, stand-alone private actions are relatively rare. When they occur, they typically involve one large business suing another large business to enforce the law. In such cases the defendant's compliance with the law is tested before the courts at the expense of the businesses involved: the public purse does not bear the costs of prosecution.

11. Arguably, since stand-alone private actions are relatively unusual, removal of the right to bring stand-alone private actions is not a serious loss -- but fears that private rights might be misused are not a strong justification for removing those rights.

12. Follow-on private actions are considerably more important to the public, I submit. If an undertaking is found by the judges of the Competition Tribunal to have behaved anti-competitively, then it will very probably have caused significant economic harm to its customers or suppliers. Since a wrong should not be without a remedy, it is vital that parties who have suffered harm as a result of the conduct should have the right to seek compensation by bringing private actions on a follow-on basis.

Reduction of Penalty Ceilings

13. The proposed turnover-based penalty provisions specify *maximum* penalties -- i.e. they set a limit or ceiling on penalties. Around the world, maximum penalties for competition law infringements have seldom been approached and only in cases involving the most egregious breaches of the law by large undertakings that have knowingly extracted very large

monopoly rents or cartel profits from their customers over periods of years.

14. Since the judges of the Competition Tribunal can confidently be expected to impose penalties approaching the ceiling only in the very most serious cases, legislating for a lower ceiling on penalties should not be regarded as protecting SMEs, but rather as limiting the potential liability of those very large undertakings (e.g. multinationals) which are in a position to cause the most economic harm by engaging in egregious infringements.

15. Calls by the public for "anti-monopoly" law to target the "big tigers" rather than small players seem to reflect concerns about possible anti-competitive behaviour by the largest corporate groups. Misconduct by big businesses predictably has more severe consequences for the public than misconduct by SMEs. It is misconduct having the most severe consequences that will attract the most severe penalties.

16. Any further reduction of the proposed penalties is highly undesirable, I submit, as the inevitable effect of doing so would be to reduce the potential liability of the "big tigers" in the very cases in which they cause the most economic harm. Those are the cases about which the public is most concerned.

"Warning Notice" Procedure

17. In my experience, a timely warning issued by a competition authority normally is extremely effective in bringing a prompt end to anti-competitive conduct of a less-serious nature (e.g. conduct that is proposed or engaged in unwittingly and causes only limited harm to customers).

18. If a business will desist from anti-competitive conduct on receiving a warning, then the objectives of the law may be achieved at low cost to the public purse.

19. Both taxpayers and businesses should welcome the proposed "warning notice" provisions.

Non-Monetary "Commitments"

20. So-called "administrative settlement" of anti-competitive conduct investigations often is beneficial both to the competition authority and to the business that is under investigation -- both parties save money and staff time if the matter can be resolved without the need for extensive investigation, discovery and trial.

21. Much of the benefit of the "infringement notice" and "commitment" procedure may still be available without the Competition Commission being able to accept monetary settlements. Without the power to accept payment of money, however, the Commission may find that it is forced to bring proceedings before the Competition Tribunal in order to enable

parties who have suffered harm to seek compensation for that harm (either by judicial order under Schedule 3 para. 1(k) or by follow-on action). This could well be disadvantageous to small businesses.

Dis-application of Conduct Rules to Mergers

22. The proposal to dis-apply the Conduct Rules to merger and acquisition transactions will avoid the uncertainty experienced in the European Union, which led to European businesses demanding merger rules at EU level.[3]

23. In other jurisdictions (e.g. Mainland China, Singapore), active enforcement of the merger provisions has *preceded* enforcement of the conduct rules. It is regrettable that mergers lessening competition will not generally be reviewable in Hong Kong, under the present proposals. This exclusion could well have significant adverse effects within the Hong Kong economy, so should be reviewed three to five years after the Competition Ordinance commences.

24. The Merger Rule set out in Schedule 7 should be retained for mergers involving telecommunications licensees, I submit, as it represents a significant improvement over the rule which currently applies under s 7P of the *Telecommunications Ordinance* (Cap. 106).

Concluding Remarks

25. Open competition drives the free market system. A pro-competition law is essential to the long-term success of Hong Kong businesses. It is essential to Hong Kong's continuing stature as an outstanding place to do business. And it is essential to improving the standard of living of Hong Kong people.

26. I thank the Bills Committee for the opportunity to make these submissions.

Andrew Simpson BA, LLB, LLM (Cant), LLM, PhD (Syd).
Assistant Professor
Faculty of Business, Hong Kong Polytechnic University

3 See, Bulmer S. "Institutions and Policy Change in the European Communities: The Case of Merger Control" *Public Administration* 72: 3 (1994).