HONG KONG
RETAIL MANAGEMENT
ASSOCIATION
香港零售管理協會

HKRMA's Submission to Bills Committee on the Competition Bill

25 November 2010

The Hong Kong Retail Management Association ("the HKRMA") would like to highlight a few specific areas in the Competition Bill of concerns for legislators' consideration. We sincerely hope that the Legislative Council members would seriously look into these issues and work with the business community to improve the Bill.

1. Objective

Hong Kong has long been recognized as one of the freest economies in the world. It is particularly true to the retail sector which is highly competitive with a wide cross section of operators from traditional markets, to supermarkets, specialty stores and discount chains. To international corporations, there is virtually no barrier to entry to the Hong Kong market which allows consumers to enjoy a wide selection of products or services.

In view of this, the underlying objective to enhance economic efficiency for benefit of consumers should be clearly stated in the Bill. The Government should only be seeking to regulate conduct which has an adverse effect on consumers.

2. First Conduct Rule

A. Vertical Agreements

The First Conduct Rule should only apply to "horizontal" agreements as previously proposed by the Government in the "Detailed Proposals for a Competition Law", published in May 2008. But the wording of the First Conduct Rule in the Bill is broad enough to cover vertical agreements as well, although only horizontal agreements are provided as illustrations of restricting agreements in Section 6(2).

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The Government should clearly state its policy intention and improve the drafting as appropriate to reflect accurately its intention, in order to avoid unintended consequences.

B. Specific Anti-Competitive Behaviours

The examples of anti-competitive agreement provided in Section 6(2) are very vague and could possibly be interpreted in such a way that may catch some normal business activities, such as joint purchase practices and agreements. It is preferable that the object of the law be limited to regulating clearly defined anti-competitive behaviours, and that price-fixing, bid-rigging and market-sharing – as an exhaustive list – should be consistently referred to in defining anti-competitive conduct.

3. Second Conduct Rule

The Government should more clearly define what is covered by the Second Conduct Rule and should take careful consideration of the EU example where there is still a lot of uncertainty about the concept of 'abuse of dominance'. Businesses will find it hard to determine whether they have "a substantial degree of market power", as "market power" in itself is a difficult concept to be defined. The "market" of a business or a product or service can vary according to different perspectives and depending on a number of different factors, such as geographical scope, number and type of existing players and the ease of entry to the market for new players. It would be unfair to expect businesses to carry out complex economic assessments to determine whether the agreement/conduct may "prevent, restrict or distort competition" and then to penalize them if they are deemed to have got it wrong.

The lack of clarity will give rise to higher compliance costs and excessive litigation.

4. Merger Rule

The Bill should expressly state that both the First Conduct Rule and the Second Conduct Rule do not apply to mergers, in order to reflect accurately the Government's legislative intent. The Government has publicly stated that its policy is to restrict the

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application of the merger rule to telecommunications and broadcasting industries only, but there are concerns that the broadly worded First Conduct Rule might catch mergers and acquisitions in other sectors as well. The First Conduct Rule prohibits any form of "agreement" which has the purpose or effect of preventing, restricting or distorting competition in Hong Kong. Mergers invariably involve some sorts of agreements and, as such, the agreements may be regarded as anti-competitive under the First Conduct Rule. This must be clarified now to enhance the certainty of the law and eliminate serious unintended consequences.

5. Penalties and Remedies

In the early stages of implementing the competition law, especially if the legislation and enforcement guidelines remain vague in key aspects, it is possible that some companies may breach the law inadvertently. Thus, penalties should only be imposed where the breach is intentional or negligent.

It is excessive to impose a maximum pecuniary penalty of 10% of global turnover of an undertaking (which can be a subsidiary or a group or the entire group) for each year of contravention. A more reasonable approach is to impose the pecuniary penalty only in relation to the specific product(s) or service(s) concerned in the contravention. The turnover to be considered in imposing pecuniary penalty should only be turnover obtained locally.

6. Competition Commission

We recommend that all major guidelines should be vetted together with the main Bill.

The future Competition Commission should play the role of regulator of anti-competitive behaviours, and not to promote competition. The Commission is expected to enforce and implement the law. The power to make law should rest with the Legislative Council. Publishing detailed guidelines as soon as practicable is the only way to enhance the certainty of the policy and the law, and to eliminate the potentially serious unintended consequences that might arise from the lack of legal certainty.

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7. Private Actions

While victims of misconduct should be allowed to take private ("follow-on") actions to recover damages where there is proven anti-competitive conduct based on a finding by the Competition Commission and/or Tribunal, third parties should not be allowed to take private actions directly to the Tribunal ("stand-alone") without going through the Competition Commission, as this will create further legal uncertainty and excessive litigation. With reference to the PRC, there have been a number of spurious claims under the new Anti-Monopoly Law, which have either settled or been rejected by the courts as vexatious or unfounded, but nonetheless have resulted in considerable publicity and great inconvenience and cost to all concerned.

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