



28 March 2012

Hon Andrew KY LEUNG, GBS, JP
Chairman of Bills Committee on Competition Bill
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong

Dear Hon Andrew LEUNG,

**Submission for the Summary of Views and Concerns of the
Construction Industry on the Competition Bill**

On behalf of the Construction Industry Council (CIC), I would like to express our support to the Competition Bill (the Bill) so as to facilitate a fair competitive environment for doing business in Hong Kong. On the other hand, I would also like to convey the views and concerns of the construction industry on the Competition Bill to your Bills Committee for your consideration before the finalisation of the Bill.

In order to identify and assess the impact of the Competition Bill on the construction industry of Hong Kong and to provide the industry with information regarding Competition Law compliance, the Committee on Procurement under the CIC established a Task Force on Competition Law (the Task Force), chaired by Dr. Andrew SIMPSON and comprising representatives of various construction industry bodies. The Task Force has examined the implications of the Competition Bill to the construction industry and has solicited the views of its members in relation to the Bill.

We set out in the submission our views and concerns in relation to the Competition Bill for consideration by your goodself and Members of the Bills Committee.

We very much look forward to receiving your favourably response. Should you wish to clarify matters further, please do not hesitate to contact either myself or my colleague Mr Alex LEUNG on telephone number 2100 9030.

Yours sincerely,

Christopher TO
Executive Director

Encl: as stated

Cc: Mr CHEW Tai-chong – Chairman of the Committee on Procurement, CIC
Dr Andrew SIMPSON – Chairman of the Task Force on Competition Law, CIC
Mr Alex LEUNG – Senior Manager (Council Services), CIC

Construction Industry Council

Submission to Legislative Council

Bills Committee on Competition Bill

Summary

The Construction Industry Council ("CIC") strongly supports competitive business operation in all sectors of the economy and supports the Competition Bill as an important signal of Hong Kong's commitment to competition.

In order to assess the impact of the Competition Bill on the construction industry of Hong Kong and to provide the industry with information regarding competition law compliance, the Committee on Procurement under CIC has convened a Task Force on Competition Law, chaired by Dr. Andrew Simpson and comprising representatives of various construction industry bodies.

Over recent months, the Task Force has examined the implications of the Competition Bill for the construction industry and solicited the views of its members. The CIC sets out in this submission its views on the Competition Bill, for the consideration of the Honourable Chairman and Members of the Bills Committee.

In summary, the CIC makes the following submissions:

- The CIC supports the introduction of competition law, as being in the best interests of the construction industry and in the best interests of Hong Kong's economy as a whole.
- The CIC supports the proposed division of responsibilities between the Competition Commission and the Competition Tribunal.
- The CIC submits that the Commissioners should include among their number a person having experience in the construction industry given to the significance of the industry in terms of Gross Domestic Product (GDP) contributions.
- The CIC supports phased commencement of the Competition Ordinance and submits that the Bill should expressly provide for the timing of commencement of Part 2 (conduct rules).
- The CIC is in favour of the Competition Commission having the roles of educating the business community and issuing guidelines and submits that *industry-specific guidance* will be required on a number of issues.

- The CIC welcomes the Commerce and Economic Development Bureau (CEDB)'s provisional/indicative guidelines on the conduct rules but submits that issuing guidelines must be the responsibility of the Commission, as the independent expert agency.
- The CIC considers that the Competition Commission should in due course provide guidance to industry associations on permissible and impermissible conduct in relation to: fees and contract prices, information sharing, standard-form contracts, industry advocacy, listing qualified suppliers, and collective bargaining.
- The CIC recommends further study of the reasons for Singapore's broad exemption of vertical agreements¹.
- The CIC submits that the new Competition Commission should consider making a "block exemption" in favour of vertical agreements in the construction industry as one of its first priorities.
- The CIC supports the "warnings" procedure proposed to be included by the Bill but submits that the Bill should require the Commission to provide clarification or explanations of any warning, upon request by an undertaking.
- The CIC submits that the "warnings" procedure should initially apply in relation to hardcore as well as non-hardcore conduct, for a limited period, e.g. the first twelve months of enforcement of the First Conduct Rule.
- The CIC supports the "infringement notice" and "commitment" procedures but submits that the infringement notice procedure should trigger the opportunity for an "infringement conference" between the Commission and the recipient of the notice, at the recipient's option.

Competition in Hong Kong

1. The CIC supports the introduction of competition law, as being in the best interests of the local construction industry and in the best interests of Hong Kong's economy as a whole.

¹ Vertical agreements are agreements between undertakings at different levels of the value chain, e.g. a manufacturer and a distributor.

2. The construction industry in Hong Kong is highly competitive, with numerous establishments at all levels of the industry and intense rivalry between them.
3. With reference to a report published by the Census and Statistics Department in year 2011², the number of establishments in different categories of the HK construction sector is as below:-

Industry Group / Class	Number of Establishments in 2010
Real Estate Development and/or leasing	3555
Construction Sector (Main Contractors and Sub-contractors)	20506
Main Contractor at Construction site (for Construction of buildings, civil engineering works and site preparation works only)	188
Architectural, Surveying and Engineering Services Industry	1761

4. The CIC is conscious that some construction companies in some overseas markets have been accused of anti-competitive behaviour and is committed to ensuring that Hong Kong's construction sector businesses understand and comply fully with the requirements of competition law.
5. With the objective of industry compliance before it, the CIC established the Task Force on Competition Law in September of 2011. The Task Force is chaired by Dr. Andrew Simpson of Hong Kong Polytechnic University and comprises representatives of various construction industry bodies, including: Development Bureau, Housing Authority, Hong Kong Construction Association, Hong Kong Construction Sub-Contractors Association, Hong Kong General Building Contractors Association, MTR Corporation Limited, Hong Kong Institute of Surveyors, and Pinsent Masons. The Terms of Reference of the Task Force are set out in "Appendix A" (attached).
6. In addition to sharing its views on the Competition Bill with the Bills Committee through this submission, the Task Force will be considering in coming months what other steps it can take to support CIC members' understanding of and compliance with the competition law.

² HKSAR Census and Statistics Department "Key Statistics on Business Performance and Operating Characteristics of the Building, Construction and Real Estate Sectors in 2010" (December 2011), available at:
http://www.censtatd.gov.hk/products_and_services/products/publications/statistical_report/commerce_and_industry/index_cd_B1080011_dt_detail.jsp

Institutions and Commencement

7. The CIC supports the proposed division of responsibilities between the Competition Commission and the Competition Tribunal.
8. The CIC submits that the Commissioners should include among their number a person having experience in the construction industry, as the construction industry plays a pivotal role in Hong Kong's economy. According to the quarterly publication of the Census and Statistics Department on GDP³, the overall contribution of construction works to GDP had been decreasing between 2001 and 2007 but started to increase again in 2008. The overall contribution of construction works to GDP was 3.3% in 2010. The contribution from private sector construction has remained fairly steady since 2005 and the increased contribution to GDP has mainly been due to public works construction.
9. The CIC supports phased commencement of the Competition Ordinance. Phased commencement is necessary for the orderly implementation of this new (to Hong Kong) law. It is essential that the people and businesses of Hong Kong should be confident that the necessary machinery is in place, and understand (in outline) the purposes of that law and where they can turn to for further advice, before the law begins to be enforced.
10. The CIC understands that the Government proposes that the Competition Ordinance (once it has become law) will take effect in phases: first the Commission and Tribunal will be established, then the Commission will begin its public educational role, and finally the Commission will begin enforcement of the law. The Competition Bill should expressly provide for the timing of the commencement of Part 2 (conduct rules), the CIC submits.

Guidance to the Industry

11. The CIC welcomes the CEDB's provisional/indicative guidelines on the conduct rules but submits that the issuance of guidelines must be the responsibility of the Competition Commission, as the independent expert agency.

³ HKSAR Census and Statistics Department "Gross Domestic Product (Quarterly)" (11 November 2011), available at:
<http://www.censtatd.gov.hk/products_and_services/products/publications/statistical_report/national_income_and_bop/index_cd_B1030001_dt_detail.jsp>.

12. Although the "Guidelines on the First Conduct Rule" and "Guidelines on the Second Conduct Rule" (Bills Committee papers CB(1)2336/10-11(01) and CB(1)2618/10-11(01)) are useful insofar as they indicate the *kinds* of issues that the future guidelines are likely to address, they are not definitive of the positions that the Competition Commission should be expected to take on those issues. Each of those papers appropriately states that it "...sets out the key topics which could be covered in the guidelines ... with a view to facilitating Members' scrutiny of Part 2 of the Competition Bill". Nor should the Government seek to pre-empt the Commission on such issues, the CIC submits, as the Commission's effectiveness and stature will depend very much on it being an *independent and expert body* in this field.
13. The CIC therefore submits that the Bills Committee should focus its attention on the Bill itself. The Competition Commission will be obliged to consult publicly on its draft guidelines once it has prepared those, which will provide the appropriate opportunity for public scrutiny and debate on the Commission's proposed analytic methods.
14. The CIC is in favour of the Competition Commission having the roles of educating the business community and issuing guidelines (clauses 35, 129) and submits that *industry-specific guidance* will be required on a number of issues, which should be early priorities for the new Commission.
15. As industry structure and practices differ between industries, particular sectors of the economy are likely to require guidance that addresses the issues that arise for them. The CIC submits that the construction industry would benefit from specific guidelines in relation to:
 - good practice in competitive bidding and tendering; and
 - good practice in dealings between contractors and sub-contractors.
16. The CIC considers that the Competition Commission should provide particular guidance to industry associations on such issues as:
 - good practice in gathering and sharing industry information among association members;
 - promulgation of standard-form contracts;
 - association advocacy on behalf of the industry;
 - disclosure to the public of "qualified supplier" lists; and

- collective bargaining.
17. It is not necessary to stipulate in the Bill that guidelines address these matters but it would be desirable, the CIC submits, for the Government to request the Competition Commission gives consideration to providing guidelines on these subjects, upon appointment of the first Commissioners.

Vertical Arrangements

18. In recent decades it has come to be recognised that a wide range of arrangements between businesses which stand in a "vertical" relationship to one another are pro-competitive and efficiency-enhancing. Efficient vertical arrangements are an important feature of the construction industry, the CIC observes, as they enable the coordination of the diverse suppliers that complex modern construction projects require, with the least wastage and at the lowest cost to the customer.
19. Having regard to the pro-competitive character of most vertical arrangements, the CIC recommends that the Government devote further study to the reasons underlying Singapore's broad exemption of vertical agreements from its *Competition Act*.
20. If vertical arrangements are not generally excluded from the Competition Bill, the CIC submits that the new Competition Commission should consider making a "block exemption" in favour of vertical agreements in the construction industry as one of its first priorities.

Warnings, Infringement Notices and Commitments

21. The CIC supports the "infringement notice" and "commitment" procedures under Part 4 of the Competition Bill. The CIC submits, however, that infringement notices should trigger the opportunity for an "infringement conference" between the Commission and the recipient of the notice, at the recipient's option. While it would always be open to the recipient of a notice to request such a meeting, and the Commission should be responsive to any such request, the potentially serious implications of an infringement notice being issued justify the inclusion in the legislation of a right to meet with staff of the Commission to exchange information and views in relation to the alleged infringement and to discuss options for resolution of the Commission's concerns.
22. The CIC welcomes the addition to the Competition Bill of a "warnings" procedure, which will assist undertakings (especially SMEs and

especially in the early days of the regime) to understand their obligations under competition law.

23. The CIC submits that the Bill should require the Competition Commission to provide, upon request by an undertaking that has received a warning from the Commission, such clarification or explanations of the relevant warning as the undertaking may reasonably require, as soon as reasonably practicable.
24. The CIC further submits that the "warnings" procedure should initially apply in relation to hardcore as well as non-hardcore conduct, for a limited period, e.g. the first twelve months of enforcement of the First Conduct Rule.

Conclusion

25. The CIC reiterates its support for competitive operation of business in Hong Kong and the enactment of the Competition Bill.
26. The CIC is grateful for the opportunity to make the above submissions and would be pleased to provide any further information or comments the Bills Committee might require. (No part of this submission is regarded as confidential.)

Task Force on Competition Law
Committee on Procurement
March 2012

Construction Industry Council

Committee on Procurement

Task Force on Competition Law

Terms of Reference

Objective

To assess the impact of the Competition Bill on the construction industry of Hong Kong and to provide the industry with information regarding competition law compliance.

Terms of Reference

1. To monitor the development of the Hong Kong Competition Bill;
2. To identify and assess the implications of application of competition law, for the full spectrum of stakeholders in the local construction industry (e.g. employers, consultants, main contractors, subcontractors, suppliers of equipment/materials, etc.);
3. To understand the interests and concerns of small and medium-sized contractors;
4. To consider the representation of the construction industry in the independent statutory body, Competition Commission;
5. To deliberate and consider the appropriateness of drafting guidance notes with regard to the competition law;
6. To undertake the drafting of guidance notes, if agreed to be issued, and to formulate a plan for their promulgation;
7. To coordinate and organise discussion forums, technical talks, seminars and events for the industry on the concerned areas.