HKGCC
Hong Kong General Chamber of Commerce
香港總商會1861

Steering Business for 150 Years
引領商界 百五載

香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

8 July 2011

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

Dear Andrew

Competition Bill

We would like to summarise for the Bills Committee HKGCC's proposed enforcement approach for non-hardcore conduct under both the First and Second Conduct Rules.

As you know, HKGCC has proposed that for non-hardcore conduct (i.e. conduct other than price-fixing, market sharing or bid-rigging) the prohibitions in the Conduct Rules should only take effect from the date of the Tribunal's order (as in Canada). This is for two reasons:

- Non-hardcore conduct is, in the vast majority of cases, pro-competitive and efficiency-enhancing. It is only in some cases, and under specific market conditions which are often not apparent to businesses at the time they are making decisions, that such conduct might have the potential to be anti-competitive. A general and automatic prohibition, as currently proposed in the Bill, is therefore over-inclusive, and risks preventing genuinely beneficial behaviour, contrary to the law's objective.
- For non-hardcore conduct, businesses can simply not predict with sufficient certainty whether they will be found to have broken the law, under a general, automatic prohibition as currently proposed in the Bill.

Accordingly, a bar only from the date of the Tribunal's order strikes the right balance. Of course, if a Tribunal order is violated (or an agreement with the Commission is violated) then penalties could be imposed.

It should be noted that there is also the problem with alleged non-hardcore conduct of regulatory lag, in which grey area conduct is determined to be inappropriate several years later.

Such problems have been acknowledged amongst competition experts and authorities in other jurisdictions, such as the EU and US.

As to whether the Commission and Tribunal can act speedily when considering non-hardcore conduct, and in particular an alleged breach of the Second Conduct Rule, the answer is yes. The Tribunal has power under Clause 93(1) of the Bill to make an interim order against a company, which could take the form of an order against the company to cease the conduct in question pending the final determination of the case. While we would not suggest that such interim orders be routinely issued, as they tend to be based on minimal levels of submissions and due process, the power does exist. As noted above, non-hardcore cases are often marginal, but in cases where it was clear from the outset that conduct under either the First or Second Conduct Rule was likely to justify prohibition by the Tribunal because it was substantially lessening competition and had no efficiency or other justification, the Tribunal could issue an interim order. Breach of an interim order would, as in the other areas of the law, constitute contempt of court, a criminal offence.

In practice, a business or individual which believes it is being harmed by anti-competitive conduct will have every incentive to seek redress at the earliest opportunity by making a complaint to the Commission, a relatively low-cost process. Again with minimal consequential re-drafting to the Bill, the Commission would have the same powers of investigation for non-hardcore conduct as it would in the case of hardcore conduct. To take up the case by opening an investigation, all the Commission would need to have is a "reasonable cause to suspect" that conduct likely to be prohibited was being engaged in, a relatively low threshold. And failure to comply with a Commission investigation would also be a criminal offence under Clauses 171 and 173, whether hardcore or non-hardcore conduct was involved.

The above factors, in combination, mean that any financial benefit the company would derive from anti-competitive conduct would be short-lived, and perhaps even non-existent. Moreover, if the conduct was clearly likely to have anti-competitive effects, the likelihood is that a business would decide not to engage in such conduct in the first place: the threat of incurring potential bad publicity and legal costs in defending a complaint, in return for little or no financial gain are likely to act as deterrents. The argument that the Bill would "lack teeth" as to both the First and Second Conduct Rules if HKGCC's proposal is adopted is therefore without substance.

To adopt HKGCC's proposed enforcement approach to non-hardcore conduct, the amendments to the Bill would be straightforward. All that would essentially be needed (apart from some consequential amendments), as shown in the mark-up of the Bill which HKGCC provided to the Bills Committee in November 2010, would be to:

(i) replace the examples of anti-competitive agreements in Clause 6(2) with clear references to hardcore conduct, i.e. price-fixing, market-sharing and bid-rigging; and

(ii) insert a new sub-section in the First and Second Conduct Rules to the effect that, save for the conduct described in Clause 6(2), the prohibition in those rules would take effect from the date when the Tribunal so determines.

What HKGCC is proposing is a fair and reasonable way of avoiding major problems which other regimes such as the EU and US have already acknowledged they are facing in dealing with non-hardcore conduct under their general prohibition approaches. Moreover, a law having hardcore conduct as its primary focus, with a lighter touch approach to conduct with more ambiguous and less predictable effects, as advocated by HKGCC, would be in line with current international enforcement practice. Canada has recognized this in the recent changes to its competition law.

Hong Kong has the opportunity to introduce a law which reflects this international best practice, rather than one which merely replicates wording from a law which was drafted in the post-war era in Europe against a much different economic and political background and with very different policy objectives in mind. Hong Kong can take advantage of his opportunity, with minimal amendment to the current Bill, and without jeopardising the July 2012 target date for its adoption. It would be unfortunate, to say the least, if it did not do so.

As always, the Chamber remains happy to work with Legco and the Administration to introduce a competition law in Hong Kong which reflects its unique situation.

Yours sincerely

Alex Fong
CEO