

22 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

Bills Committee Meeting on 26 July 2011

In our letter to you of 4 July, we explained in detail to the Bills Committee why the answers given by the Administration to certain questions raised by Bills Committee members were plainly inadequate.

We also raised eight important questions on the Bill, which we requested the Administration to answer, along with our comments on the Administration's previous answers, no later than the meeting on 26 July. At the Bills Committee meeting on 5 July, Secretary Greg So said that the Administration would do so.

We would also like to add a further two questions:

- At the Bills Committee meeting on 5 July, Mr So mentioned a "compromise" position which the Government was contemplating. In relation, Deputy Secretary Linda Lai mentioned during the depositions hearing on 20 July that proposals would be presented in the 4th quarter of this year. Could the Administration please indicate exactly what compromise Mr So is referring to, or what its proposals would be? Clearly there seems little point in the Bills Committee continuing any discussion on the content of the Bill if the Government is contemplating changes to the content: it is the proposed changes, or the "compromise", that would merit discussion in the first instance, before the Administration introduces the actual proposed amendments to the Bill (if such is the intention of the Administration) in the 4th quarter.

- At the public hearing held by the Bills Committee on 20 July, there was a virtually unanimous view from the many organizations which presented (particularly SMEs and SME associations) that the three “guidelines” documents which the Administration has issued are too vague and unclear (and at times inconsistent) to have any practical usefulness. We would add that, to the extent that they were intended to assist the Legco in assessing the implications of the Bill it is being asked to pass, they have failed to do so, for the same reason. Of course, all this adds weight to the position that simplicity and clarity by focusing on hardcore conduct would be the best way forward. In the light of the overall negative reaction to the guidelines, will the Administration consider issuing amended versions of these documents (and if so when would they be issued?) or is it still proposing to leave the issue of any further guidelines to the future Commission?

We should therefore be grateful if you would ensure that these 10 questions are tabled at the meeting on 26 July and that the Administration is requested to answer them, along with our comments on the Administration’s previous answers as contained in our letter of 4 July. These are fundamental questions which go to the heart of the approach which the Government has taken on the Bill, and which we submit must be answered for the benefit of the Bills Committee and the public at this stage, if any further discussion of the Bill’s content is to be meaningful.

For your convenience all ten questions are found below.

1. What are the reasons for the Administration’s view that the formulation “object or effect to prevent, restrict or distort” competition, drawn from the EU treaty, represents “international best practice”?
2. Why did the Administration decide to drop the formulation originally proposed in May 2008 of “purpose or effect to substantially lessen competition”?
3. How can the Administration imply, as it has done, that EU case law would provide businesses with more legal certainty than, say, the laws of Canada, Australia or New Zealand?
4. In the guidelines document the Administration has produced on the First Conduct Rule it states (on the one hand) that there are “**no automatic breaches**” and that everything depends on the facts, but (on the other hand) that bid-rigging will (as well as price-fixing and market-sharing) **by its very nature**, restrict competition appreciably.¹ Could the Administration please explain this apparent contradiction?
5. Would bid-rigging be automatically prohibited, i.e. prohibited just by virtue of the fact that it has taken place, irrespective of any effect on competition?

¹ CB(1)2336/10-11(01) paragraphs 4.2 and 4.10.

6. Are there any other practices which would be automatically prohibited in this sense?
7. In particular, would the practices listed in Clause 6(2) of the Bill be automatically prohibited in this sense?
8. Could the Administration please answer the points raised in Mr Lam's letter of 8 April, or indicate when they will be in a position to do so?
9. At the Bills Committee meeting on 5 July, Mr So mentioned a "compromise" position which the Government was contemplating. Deputy Secretary Linda Lai mentioned during the depositions hearing on 20 July that proposals would be presented in the 4th quarter of this year. Could the Administration please indicate exactly what compromise Mr So is referring to, or what its proposals would be?
10. At the public hearing held by the Bills Committee on 20 July, there was a virtually unanimous view from the many organizations which presented (particularly SMEs and SME associations) that the three "guidelines" documents which the Administration has issued are too vague and unclear (and at times inconsistent) to have any practical usefulness. In the light of the overall negative reaction to the guidelines, will the Administration consider issuing amended versions of these documents (and if so when would they be issued?) or is it still proposing to leave the issue of any further guidelines to the future Commission?

Thank you very much.

Sincerely yours,

Alex Fong
CEO