

## LCQ1: Enactment of a competition law

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Following is an oral reply by the Secretary for Commerce and Economic Development, Mr Frederick Ma, to a question by the Hon Fred Li in the Legislative Council today (May 21):

Question:

The Government is now consulting the public again on the enactment of a competition law. In this connection, will the Government inform this Council:

(a) as the public discussion document issued in November 2006 recommended that seven types of anti-competitive conduct be covered in the competition law, yet the latest consultation paper only covers four of them, leaving out “joint boycotts”, “unfair or discriminatory standards” and “abuse of a dominant market position (such as predatory pricing)”, of its rationale for doing so; whether it has assessed if this approach runs contrary to the consensus in the community of widely supporting a competition law in Hong Kong;

(b) while the Government proposes that fines up to \$10 million may be imposed by the Competition Commission, the Secretary for Commerce and Economic Development indicated some days ago that depending on different cases, the level of fines could be increased to 10% of total turnover during the period when the infringement occurred, whether it can elucidate further the meaning of “depending on different cases”; whether it has assessed if such a practice will lead to grey areas in the competition law and hence resulting in enforcement difficulties; and

(c) as the Government has proposed that the competition law will not apply to the Government or statutory bodies, whether it has assessed if the approach which does not regulate government conduct giving rise to a monopolistic and anti-competitive situation will render utility undertakers providing water, electricity, gas and postal services as well as their activities being also excluded from the application of the competition law will be undermined as a result; whether it will make reference to the practice of foreign countries and study how granting such exclusion on an across-the-board basis can be avoided?

Reply:

Madam President,

(a) The seven types of conduct referred to in the consultation document issued in 2006 are only some examples of anti-competitive conduct. Anti-competitive conduct is not limited to four types or seven types. Since the form of anti-competitive conduct changes with time and circumstances, it is not possible to list all types of anti-competitive conduct in the law. In this regard, we propose in the consultation paper to provide in the law for a general prohibition against all conduct that has the purpose or effect of substantially lessening competition. This approach follows the practice adopted in most overseas competition jurisdictions, and also concurs with the feedback received on this issue in the 2006 consultation exercise.

I would like to point out here that no matter whether anti-competitive conduct falls within one of the seven categories of conduct highlighted in the consultation document issued in 2006, or the four types of conduct mentioned in the consultation paper issued in 2008 (i.e., price-fixing, bid-rigging, output restriction and market allocation), it will still be regulated under the general prohibition. It is only when enforcing the general prohibition that we propose to follow the practice of most overseas regulatory authorities in presuming that price-fixing, bid-rigging, output restriction and market allocation are entered into with the express purpose of substantially lessening competition. It would be up to the future Competition Commission to decide how it would treat such conduct. However, in order to increase legal certainty, we propose that the Commission should issue guidelines clearly setting out the types of conduct that it would presume always to have the purpose of substantially lessening competition, and how it would treat such conduct.

I wish to emphasise that we have not discarded the three types of conduct (joint boycotts, unfair or discriminatory standards and abuse of a dominant market position) mentioned in the question. These would still be regulated under the general prohibition. For example, in the consultation paper, there is a special section on the prohibition on abuse of substantial market power, under Proposal 27. Detailed discussion on how to deal with this type of conduct is also included in this section.

(b) We propose that the Commission could take the seriousness of each case into account when deciding the penalties. Fines of up to \$10 million could be imposed by the Commission. More severe penalties, including higher fines and disqualification from holding a directorship or a management role in any company for up to five years, could be imposed by the Competition Tribunal, on application by the Commission. Our proposal that the maximum financial penalty be 10% of turnover during the period when the infringement took place is in line with international practice.

As is the case with judicial authorities, the Commission would exercise its judgment and take the seriousness of each case into account when considering the criteria for imposing penalties, so that there would be no question of grey areas arising. To increase transparency, the Commission would issue guidelines to explain the considerations to be used in calculating levels of fine.

(c) This question concerns two issues. First, how the Government and statutory bodies should be treated under the law and second, treatment of public services provided by the private sector.

The results of the previous round of public consultation showed that the public is mainly concerned with anti-competitive conduct in the private sector. In the proposed legislation our key aim is to address the public's concerns in this area.

Hong Kong's public sector is relatively small, and mainly provides essential public services on the grounds of public interest. Therefore we propose not to apply the law to government or statutory bodies. This should help to ensure that the Government and statutory bodies would not be subject to unfounded or misconceived complaints.

Further, statutory regulation may not be the best way of ensuring that the public sector adheres to the principles of competition. If a public sector body engages in anti-competitive conduct, the Government can take appropriate administrative measures under the existing competition policy to rectify the situation.

We will review this approach in the light of actual experience after the implementation of the law.

As regards the provision of major public services by private sector undertakings (for example public transport, electricity, etc.), we have made reference to the approaches adopted in the European Union, the United Kingdom and Singapore, and propose that such activity should be excluded from the application of the law in so far as the prohibition would obstruct the performance of the undertaking's obligation to provide the public service in question. It should be noted that the law would only exclude the undertaking's activities that were essential to fulfilling its obligation to provide an essential public service. As regards the Commission's handling of cases where it might allow for a specific activity to be excluded, the undertaking concerned should submit the reasons why it considers an activity should be excluded, for the Commission to decide in the light of the actual facts.

Ends/Wednesday, May 21, 2008