HKSAR Legislative Council

Bills Committee on Competition Bill

Invitation for Submissions on Three Guidelines

Submission by
The Real Estate Developers Association of Hong Kong

August 2011

1 Introduction and statement of interest

The Real Estate Developers Association of Hong Kong (REDA) has been closely following the ongoing discussions regarding the Government's proposal to introduce a cross-sector competition law regime in Hong Kong.

REDA has already made a submission to the Bills Committee on 29 November 2010 presenting concrete proposals to amend the Competition Bill with a view to ensure the adoption of a law that would be suitable to Hong Kong's economy.[1] We welcome this opportunity to submit further comments to your Committee in the context of the three sets of draft implementation guidelines which were made available to the Bills Committee by the Commerce and Economic Development Bureau in May and June.

The present submission limits itself to commenting on issues arising under the draft implementation guidelines, but REDA remains concerned about other matters highlighted in its previous submission, to which reference is made.

2 No broad delegation of power on competition policy

While we understand that some of the suggestions we made in our previous submission may possibly be addressed by way of guidelines to be issued by the future Competition Commission, REDA is uncomfortable with the adoption of a principles-based legislation leaving broad discretion to the enforcement authority on major aspects of competition policy. REDA would prefer to see practical and clear rules in the text of the Ordinance itself, with more oversight from the Legislative Council and the Government over competition policy and over the enforcement priorities of the future Competition Commission.

In this context REDA wishes to repeat its proposal that an advisory committee be established, on the model of the Advisory Council on the Environment. In this regard REDA refers to its proposal to amend Section 28 of Schedule 5 of the Bill (see point 8 of REDA's prior submission).

3 Need for materiality threshold in the Ordinance

Section 3.7 of the Guidelines on the First Conduct Rule clarifies that a restriction of competition must be appreciable to fall within the scope of the Competition Ordinance. Section 3.12 provides further indications on what the appreciable impact on competition test entails. While REDA welcomes the inclusion of such a materiality test, to increase legal certainty the text of the Ordinance should expressly provide for market share thresholds below which a specific conduct or agreement will not be caught by the Competition Ordinance, because it lacks an appreciable adverse effect on competition. Such an approach would help to significantly reduce the compliance costs for enterprises and enable the Competition Commission to focus on real competition issues.

Most established competition law jurisdictions have adopted specific *de minimis* regulations or guidelines.[2] In a small and open economy such as Singapore for instance, the implementation guidelines adopted by the Singapore Competition Commission expressly refer to market share thresholds (for instance 20 per cent of the aggregate market share of the parties in the case of a horizontal agreement) to identify agreements that are unlikely to have an appreciable adverse effect on competition.[3]

REDA believes that a similar approach would also be appropriate in the Hong Kong context. The text of Sections 6, 7, 8, 21, 22 and 23 of the Bill should therefore be amended to expressly include a materiality requirement, ideally in the form of a 20 per cent market share threshold. Reference is made to the concrete proposals in point 6 of REDA's prior submission.

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[1] Our previous submission is available at http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121129cb1-622-8-e.pdf.
[2] See for instance the European Commission's *Notice on agreements of minor importance which do no appreciable restrict competition.*, 2001/C 368/07
[3] See *Singapore guidelines on the section 34 prohibition* published by the Singapore Competition Commission in June 2007.

4 Guidance on legitimate forms of horizontal cooperation such as joint ventures and consortia

While the Guidelines on the First Conduct Rule describe in chapter 4 certain types of agreements which may infringe the first conduct rule, they contain very little guidance on how to assess joint ventures and other legitimate cooperation agreements between competitors.

Horizontal cooperation agreements can lead to substantial economic benefits. They can be means to share risk, save costs, increase investments, pool know-how, enhance product development and innovation. Many property development projects are only achievable through the pooling of the financial and technical means of several developers. In line with the practice in established competition law jurisdictions, the Guidelines on the First Conduct Rule should provide a detailed framework for a balanced assessment of these horizontal agreements so as to clearly identify the type of desirable horizontal cooperation that will not be challenged under the Competition Ordinance.

While the Guidelines provide general insight on how joint purchasing or selling agreements will be assessed, this guidance is insufficient to provide comfort to businesses that pro-competitive horizontal cooperation will not be challenged under the Bill. For instance, legitimate joint ventures agreement may sometimes involve ancillary restrictions or market sharing arrangements which under the current guidelines may be deemed illegal. Rather than focusing on agreements likely to infringe the first conduct rule, the Guidelines should provide a detailed analytical framework for the most common types of horizontal cooperation agreements.

REDA further believes that the policy on horizontal cooperation agreements should include safe harbours - in the form of market share thresholds - enabling businesses to quickly assess for themselves whether a proposed horizontal cooperation agreement is likely to be caught under the Bill. An agreement which would not fall within that safe harbour would not be illegal but require a more detailed analysis of its effects on the relevant markets. Most other jurisdictions have introduced similar rules which significantly reduce the compliance costs in relation to agreements which are unlikely to raise any substantive issues.[4] REDA believes that a similar approach would be appropriate also in the Hong Kong context. This could be achieved by the introduction of a materiality threshold in the text of the Bill itself and in further discussion of how the rule will apply in practice in the implementing guidelines.

5 Exclusions and exemptions

While the Guidelines on the First Conduct Rule provide useful clarifications on the scope of application of the general exclusion grounds for (i) agreements enhancing overall economic efficiency and (ii) services of general economic interest, they do not elaborate further on the exclusion grounds for agreements made for compliance with legal requirements. They also provide very little guidance on the block exemption regime and fail to provide any guidance on the exclusion regime for statutory bodies. The Guidelines should address these matters in detail and provide further guidance as to their scope of application.

REDA would first wish to restate its opposition to the exclusion of statutory bodies engaging in economic activity from the scope of the Competition Ordinance. Reference is made to point 1 of its prior submission. If REDA's proposal is not retained, at the very least the implementing guidelines should further clarify under which conditions the Competition Ordinance will be made applicable to statutory bodies engaged in commercial activities.

With regard to the proposed exclusion for compliance with legal requirements, REDA cannot see any compelling reason to limit its application to situations where an agreement is compelled by law with no latitude for individual choice. Many businesses in Hong Kong are conducting their business according to rules and guidance from sector regulators. In the exercise of their powers, regulators have due regard to competition in the markets they regulate, but also to

[4] See for instance, the European Commission *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements*, 2011/C 11/01.

considerations of financial stability and protection of the investing public. In appropriate circumstances, it should be sufficient merely to show that an agreement was approved, authorized, sanctioned or permitted by law or a decision of an administrative nature to benefit from such exclusion.

With regard to the block exemption regime, the Guidelines should further clarify the manner and form in which the Commission will receive applications for a decision or block exemption order as well as how the Commission intends to exercise its power to grant block exemptions.

6 Abuse of market power

- **Prohibited conduct**

For the avoidance of any doubt, REDA is of the view that the Guidelines on the Second Conduct Rule should expressly mention that enjoying a substantial degree of market power is as such not to be prohibited under the Competition Ordinance. Only the abuse of such market power without objective justification contravenes the second conduct rule.

- **A dominance threshold is more appropriate**

REDA has consistently argued for the adoption of a dominance threshold which is relied upon in most established competition law jurisdictions. Please see point 2 of our previous submission. There has been significant uncertainty as to the meaning of "substantial degree of market power" in the handful of countries which apply this test (e.g. Australia). Also in the current debate regarding the Bill there is great uncertainty as to whether there is a substantive difference between a "dominance test" and a "substantial degree of market power" test.

Even the Government does not seem to have a clear view on the matter. Whereas it has consistently held in the past that there was no substantial difference between both concepts, we understand that it is now of the view that both concepts are not synonyms. If that is the case, the Guidelines should clarify what the notion of a substantial degree of market power exactly entails and in what this notion differs from the concept of dominance. This is all the more important that the current guidelines keep referring to jurisdictions which rely on a dominance test to explain the scope of application the proposed substantial degree of market power test.

Also, in line with the practice in many other jurisdictions, REDA believes that to increase legal certainly the Guidelines should provide for a market share threshold that would be a first indication of a substantial degree of market power. While REDA agrees that a high market share needs to be interpreted in light of other relevant factors, and does not, on its own, determine whether an undertaking has market power, the adoption of an indicative market share threshold would help undertakings to self assess to what extent the second conduct rule is likely to apply to their business lines. A threshold of 60 per cent would be appropriate, as is the case in Singapore.

Finally, REDA is concerned that the Guidelines seem to provide for a concept of "collective market power" not provided for in the Bill. Indeed section 2.4 of the Guidelines provides that *"[m]ore than one undertaking may have a substantial degree of market power in a relevant market"*. Such collective market power scenario is not provided for in the Bill and is inconsistent with the Administration's view expressed on 18 May 2011, in which it has been made clear that clause 21 of the Competition Bill does not apply to more than one undertaking.[5] For the avoidance of any doubt, REDA therefore recommends to clarify in the Guidelines that the second conduct rule does not apply to collective market power situations.

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[5] Please refer to the "*Summary of views expressed by deputations on major prohibitions, exclusion and exemption of the Bill and the Administration's response*".

7 Market Definition

The Guidelines on Market Definition appear to be broadly in line with the theoretical framework adopted in established competition law jurisdictions. It is unfortunate, however, that they do not also reflect the pragmatic approach adopted as a first step by foreign competition authorities. REDA understands that many foreign competition authorities would typically start their analysis with a common sense approach centred on product characteristics and industry views, before relying on the complex and time consuming economics tests described in the Guidelines on Market Definition.

REDA would also prefer to see the principle that markets can be broader than Hong Kong enshrined in the text of the Ordinance itself.

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We hope the Bills Committee will find these comments helpful. Should you wish to discuss any of the points raised we would be happy to accommodate the Committee.

The Real Estate Developers Association of Hong Kong
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