



Legislative Council
Bills Committee on Competition Bill
Meeting on 20 July 2011
Competition Bill - Comments on Guidelines

Thank you for your undated letter inviting comments on the draft Guidelines. Whilst we are happy to share our comments and observations, we are limiting our comments to those Guidelines that affect the construction industry.

1. Guidelines on the First Conduct Rule
 - 1.1 Vertical agreements are dealt with on Pages 5 and 6 of the draft Guidelines. We welcome the suggestion of a block exemption for all vertical agreements in the construction industry.
 - 1.2 The test set out in Paragraphs 2.8 and 2.11 also seem fair and reasonable, and will contribute towards removing some concerns that undertakings might have when the Competition Bill was first introduced last year.
 - 1.3 We have no comments on the object test explained in Paragraphs 3.3 to 3.7.
 - 1.4 We reserve our comments on the proposed use of the de minimis principle pending further information as to the levels of thresholds to be set as explained in paragraph 3.12. We, however, propose that thresholds should be clearly set out as in the UK OFT Guidelines and European Commission's Notice on Agreements of Minor Importance.
 - 1.5 We have no comments on Part 4 of the draft Guidelines.
 - 1.6 Part 5 of the Guidelines attempts to illustrate and explain how the exemptions in Schedule 1 of the Bill will operate. The criteria set out in Paragraphs 5.3 to 5.14 remain abstract, and uncertain.
 - 1.7 Paragraphs 5.18 to 5.20 deal with the exception under 1(c) of Schedule 1. A similar exception is found in the UK Competition Act. OFT Guideline 421 expressly provides that private contracts entered into by an entrusted party will not be considered by the OFT in any application for exemption. We are not sure why there is no similar provision in the draft Guidelines.
 - 1.8 The draft Guidelines are silent as to how Sections 3-5 of the Competition Bill will operate.



2. Suggestions

- 2.1 We have on a number of previous occasions provided our views on the Competition Bill. For example, in our letters dated 29 January 2007 and 18 November 2010 we stated that one of our functions was to carry out an advisory function for our members on all aspects of the industry, from pricing information, statistics and data relating to labour and resources to changes in law. We share information with our members including pricing information, and by doing so we aim at creating a pro-competitive rather than an anti-competitive atmosphere.
- 2.2 The draft Guidelines seek to clarify that sharing integrated and historical information including pricing information is allowed. Given that this is the proposed legal position, we suggest that HKCA should be quoted as an example in the Guidelines to illustrate the principle.
- 2.3 Secondly, contractors in Hong Kong tend to have little bargaining power. They often encounter harsh and unreasonable tender terms and conditions, and contractual terms and conditions. Our members turn to us for advice and assistance in situations like these. As a result, we occasionally find ourselves in a collective bargaining position to discuss or at times negotiate with developers and the Government on terms and conditions that are unreasonable. By doing so, the intention is not to restrict or distort competition. On the contrary, we aim at achieving a fair and equitable contracting environment within the industry which coincides with the underlying objective of introducing competition legislation to Hong Kong.
- 2.4 Further, in dealing with inequitable and unfair contract terms and conditions, we sometimes advise our members to jointly insist on the qualifications of such unfair terms and conditions with a view to providing an equitable form of contract. Again, the objective is to create a fair and equitable platform for participants of the industry.
- 2.5 We consider our acts in Paragraphs 2.3 to 2.4 above to be pro-competitive rather than anti-competitive. We also believe that they would pass the object and effect tests as set out in the Guidelines. As such, we propose that these acts of HKCA be quoted in the Guidelines as examples of acts which would not constitute infringement of the proposed law.

Meanwhile, our general observation is that the Guidelines are helpful, and we look forward to hearing from you on our suggestions above.

The Hong Kong Construction Association, Ltd.
July 2011