

**President's ruling on
Fair Competition Bill
proposed by Hon Fred LI and Hon SIN Chung-kai**

Hon Fred LI and Hon SIN Chung-kai have submitted the Fair Competition Bill (the Bill) which they intend to jointly introduce into this Council. I am required to rule whether it relates to the restrictions prescribed in Rule 51(3) and (4) of the Council's Rules of Procedure. Before making a ruling on the Bill, I have invited the Secretary for Economic Services (SES) to offer her comments on the Bill and Messrs LI and SIN to offer their response. I have also sought the advice of Counsel to the Legislature in this regard.

Rule 51(3) and (4) of the Rules of Procedure

2. Rule 51(3) and (4) read as follows:

"51(3) Members may not either individually or jointly introduce a bill which, in the opinion of the President, relates to public expenditure or political structure or the operation of the Government."

"51(4) In the case of a bill which, in the opinion of the President, relates to Government policies, the notice shall be accompanied by the written consent of the Chief Executive in respect of the bill."

Purpose of the Bill

3. According to the Bill's Explanatory Memorandum, the Bill seeks to render anti-competitive behaviour among competitors unlawful. Clause 5(1) confers on businesses and individuals the right to commence civil actions against those businesses that have caused them damage through unlawful anti-competitive behaviour. Clause 5(3) authorizes the Government, in its discretion, to bring suits against such businesses. Clause 7(3) provides that the Chief Executive in Council may make regulations for the better carrying out of the purposes of the Bill, and may establish an independent commission to:

- (a) investigate complaints of breaches of prohibited conducts;
- (b) monitor the implementation of this Ordinance;

- (c) propose amendments to this Ordinance; and
- (d) make other recommendations for the better carrying out of the purposes of this Ordinance.

The Administration's views

4. SES considers that the Bill relates to "public expenditure" and "government policies" under Article 74 of the Basic Law (BL), for the reasons stated in the following paragraphs.

Public expenditure

5. As the Bill seeks to render anti-competitive behaviour unlawful and to provide a civil remedy in cases of unlawful conduct (Clause 5(1)), its enactment would likely lead to a large number of civil litigation. By reference to the situation in three economies which have competition laws (viz South Korea, Taiwan and Australia), the Administration estimates an additional caseload of around 20 to 130 per year for the court. Such additional caseload, even at the lower end of the range, would necessitate the opening of one additional Court of First Instance of the High Court at a recurrent cost of around \$3 million a year in order to avoid any adverse impact on court waiting time.

6. The Administration also estimates that additional and irrecoverable legal costs of \$20 million to \$134 million per year would be incurred in handling an estimated 20 to 130 civil actions taken by the Government under clause 5(3) of the Bill. These estimates do not take into account the adverse cost orders in cases where the Government turns out to be the losing party. If such costs are included, the overall additional costs to be incurred by the Department of Justice would range from \$30 million to \$197 million. In arriving at such estimates, the Administration has not taken into account the additional costs of the appellate proceedings.

7. Clause 7(3) of the Bill provides that CE in Council "may" establish an independent commission. The Administration considers that notwithstanding the use of the word "may", the setting up of such an independent commission would be unavoidable once the Bill is enacted. Again, referring to the situation in South Korea, Taiwan and Australia, the Administration estimates that the independent commission would have to handle about 50 to 400 complaints a year. Based on its estimation that the independent commission could be similar in nature and set-up to the Equal Opportunities Commission (EOC), the Administration estimates that the additional recurrent cost to be incurred in establishing the independent commission could range from \$20 million to \$82 million.

8. Therefore, an overall additional recurrent cost of at least \$53 million to \$282 million would be required for the implementation of the Bill.

Government policies

9. SES states that it is the Government's established policy not to have a general and all-embracing competition law, but to adopt a sectoral approach in the promotion of competition. The policy, as approved by the CE in Council, was stated in the Administration's response of November 1997 to the Consumer Council's Report on Competition Policy. The Government's policy position was that given Hong Kong's free market, liberal regulatory environment and generally highly competitive economy, it would not be necessary to enact a general competition law or to establish a competition authority. This policy was also set out in the Statement on Competition Policy promulgated by the Competition Policy Advisory Group in May 1998 following approval by the CE in Council, and the then Provisional LegCo was briefed on the Statement. SES also states that the Bill would also have substantive effects on the policies in other areas such as broadcasting and telecommunications.

Response from Hon Fred LI and Hon SIN Chung-kai

10. Messrs LI and SIN do not agree to the SES's views. They contend that:

- (a) they doubt whether making comparison with other economies which are of totally different magnitude, and then making speculations on the future increase in court cases, can shed light on the future operation of the Bill;
- (b) clause 5(3) of the Bill does not seek to impose a duty nor create an obligation on the Government to commence civil action. As the enactment of the anti-discriminatory ordinances and the data privacy law in Hong Kong has not led to the establishment of a human rights court specifically and as most civil proceedings on discrimination are funded by the EOC, the enactment of the Bill is unlikely to lead to a large number of civil litigations in court;
- (c) clause 7(3) does not create an unavoidable obligation on the CE in Council to establish an independent commission. The enactment of the Bill does not necessarily entail the establishment of an independent commission; and

- (d) the Government, with its traditional emphasis on free market and non-interventionist approach to the market, has never formulated a general and all-embracing competition policy; the Bill does not relate to such a government policy.

11. The Members therefore argue that the Bill neither increases public expenditure nor relates to government policy.

Advice of Counsel to the Legislature

12. Counsel to the Legislature advises that a proposed bill which would authorize the increase or reduction of public expenditure or would require the performance of certain acts by the Government which requires public expenditure would most likely be one which relates to public expenditure unless the expenditure in question is one which only represents a minimal continuing demand on public expenditure.

13. A bill will also relate to public expenditure if its implementation would have a substantive effect on public expenditure. "Implementation" of a bill should mean the performance of the acts required or authorized by the provisions of the bill in question. The implementation of provisions which confer legal rights would mean that such rights could be enforced in a court of law. The implementation of provisions which impose legal obligations on persons would mean that a failure to perform such obligations may result in legal sanctions provided by law. In the case of provisions which empower a person to perform a certain act, the implementation of the provision would mean that there would be legal backing for the person to exercise that power in accordance with the terms of the relevant provision.

14. In forming an opinion on the effect of the Bill on public expenditure, the President will have to examine the likely financial impact in terms of the amount of additional resources required to implement the Bill.

15. Although the Bill does not explicitly have the purpose of incurring public expenditure and there are no provisions in the Bill which expressly provide that public expenditure has to be expended for a certain specified purpose, there are provisions which may fall within the type of provisions which, when implemented, would have substantive effect on public expenditure. These provisions are:

- (a) clause 5(1) which confers on a business or person who has suffered damages as a result of conduct rendered unlawful by clause 3 of the Bill the right to commence civil action in the Court of First Instance against the business that engaged in such

conduct. The Administration has given the assessment of at least \$3 million per year as the amount of public expenditure that would be required for implementing this clause. The amount of the likely cost is necessarily an estimation or assessment. Unless there is some indication that the Administration had arrived at the submitted figures by sheer speculation or there is substantial doubt that the basis used was appropriate, it would be very difficult for the President to reject the figures.

- (b) clause 5(3) which provides that "the Government may, in its discretion," commence civil action in the Court of First Instance against a business that have engaged in the same kind of conduct mentioned in clause 5(1). This clause may be regarded as relating to public expenditure if the President considers that an empowering provision relates to public expenditure if the exercise of the power conferred by such provision would require the Government to incur an amount of public expenditure which is substantial and is such that she must not ignore. According to the Administration's assessment, the overall additional cost for legal actions undertaken pursuant to clause 5(3) would be in the order of \$30 million to \$197 million per year. The two Members have not argued against the accuracy of these figures but have suggested that because clause 5(3) does not impose a duty nor creates an obligation on the Government to commence an action under the Bill, the legal costs that might be incurred should be ignored. Counsel to the Legislature considers that the Members' argument is contrary to my opinion in previous rulings that Rule 51(3) was wider in scope than the "charging effect" restriction provided in Rules 31(1) and 57(6) of the Rules of Procedure.

- (c) clause 7(3) which empowers the CE in Council to establish an independent commission to investigate complaints of breaches of prohibited conducts and monitor the implementation of the Ordinance, etc. In the Administration's submission, it seeks to equate the independent commission which the CE in Council may establish with the Equal Opportunities Commission (EOC) established under section 69 of the Sex Discrimination Ordinance (SDO) in terms of the amount of public expenditure that would be required for establishing the former. It is quite clear that the EOC is established as a statutory corporation operated with public funds. However, under clause 7(3) of the proposed Bill, there is no such provision. Nor is it expressly provided that the independent commission is intended under the

Bill to be operated by persons to be paid for from public funds. That being the case, it would be difficult to assess the estimated recurrent cost for operating the independent commission which may be established pursuant to clause 7(3).

16. Counsel to the Legislature is of the view that the Bill clearly relates to Government policies.

My opinion

Does the Bill relate to public expenditure?

17. In my previous rulings on bills proposed by Members, I stated that in order for a bill not to be regarded as "relating to" public expenditure; political structure; operation of the government; or Government policies (hence caught by Rules 51(3) and (4) which have been made to give effect to Article 74 of the BL), the implementation of the bill must not have a substantive effect on one or more of these four prescribed areas.

18. I also stated, in regard to the term "public expenditure", that the term is wider in scope than "the disposal of or charging any part of the revenue or other public moneys of Hong Kong" under Rules 31(1) and 57(6). A bill will relate to public expenditure if its implementation has the effect of either increasing or reducing public expenditure and the amount involved is substantial and is such that I must not ignore.

19. According to the Administration's estimation, an overall additional recurrent costs of at least \$53 million would be required for an additional court, legal costs, and for establishing an independent commission if the Bill is implemented.

20. It is quite clear that the Bill has been proposed for enactment so that its implementation will not only define as unlawful anti-competitive behaviour among competitors, but also confer under clause 5(1) a right to commence action in court, to deal with which the Administration has assessed that at least an additional court is required at an estimated sum of \$3 million a year. I cannot agree with the Members that this estimation is speculative. The implementation of the Bill will require the court to deal with a distinct category of court actions and I am of the opinion that the public expenditure on this is not that which only represents a minimal continuing demand on the public purse.

21. The Members have advanced the argument that, since clause 5(3) is only an empowering provision, the bringing of actions by the Government by virtue of the clause is at the Government's discretion and so does not impose a

duty or obligation on the Government to bring suits. The question arises: what then is the point of introducing a bill which, when enacted, is not intended to be implemented, hence no public expenditure will be incurred? Whilst I can understand that it may be possible in some cases to exercise some discretionary lawful powers, e.g. the exercise of the power to pardon or commute prison sentences, without incurring public expenditure to an extent that is so substantial that I cannot ignore, I cannot say that the power conferred by clause 5(3) belongs to this kind of case. The estimated minimum annual costs of \$30 million for 20 actions taken by the Government is substantial indeed.

22. Forming an opinion on whether clause 7(3) relates to public expenditure is less straight-forward. Based on the mode of operation of the EOC which is a statutory corporation using public funds, the Administration estimates that at least \$20 million in recurrent cost is required to set up the independent commission that the CE in Council may establish. On the other hand, the Members have again argued that the CE in Council is not obliged to form the commission. Furthermore, Counsel to the Legislature advises that the terms of clause 7(3) do not suggest that the commission, if established, needs to be a statutory commission financed by public funds. Neither does it expressly provide that the commission is to be operated by persons to be paid for from public funds. However, given that the clause stipulates that the functions of the commission are to investigate complaints of breaches of prohibited conducts; monitor the implementation of the Ordinance; proposed amendments to this Ordinance; and make recommendations for the better carrying out of the purposes of this Ordinance, I think it stands to reason that public funds will have to be provided for its establishment and operation. The question of how much the expenditure is likely to be cannot, however, be answered unless the Members provide further details on the kind of commission that the Bill intends it to be and how it will operate, in order that it can properly discharge the stipulated functions. Since I have already formed the opinion that the other main provisions in the Bill relate to public expenditure within the meaning of Rule 51(3), I deem it not necessary to deal with this issue in further details for the purpose of this ruling.

Does the Bill relate to Government policy?

23. I have stated in my previous rulings my view that "Government policies" include, among others, policies that have been decided by the CE or CE in Council and those that have been promulgated in the Legislative Council or its committees by public officers designated by the CE.

24. I consider that the Bill relates to the Government policy on dealing with anti-competition conduct. The Policy has been approved by the CE in Council and promulgated in the Legislative Council and its committee.

Ruling

25. Having taken into account the views of the SES and Messrs Fred LI and SIN Chung-kai, together with the advice of Counsel to the Legislature, I rule that the proposed Fair Competition Bill relates to public expenditure and Government policy within the meaning of Rule 51(3) and (4) of the Rules of Procedure. Messrs LI and SIN may not introduce the Bill.

(Mrs Rita FAN)
President
Legislative Council

12 February 2001