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Panel on Economic Development

**Minutes of the special meeting
held on Tuesday, 6 May 2008, at 5:30 pm
in the Chamber of the Legislative Council Building**

- Members present** : Hon Jeffrey LAM Kin-fung, SBS, JP (Chairman)
Hon Abraham SHEK Lai-him, SBS, JP (Deputy Chairman)
Hon James TIEN Pei-chun, GBS, JP
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Dr Hon LUI Ming-wah, SBS, JP
Hon CHAN Kam-lam, SBS, JP
Hon SIN Chung-kai, SBS, JP
Hon Howard YOUNG, SBS, JP
Hon LAU Chin-shek, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Vincent FANG Kang, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Hon TAM Heung-man
- Members attending** : Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Hon CHAN Yuen-han, SBS, JP
- Members absent** : Dr Hon David LI Kwok-po, GBM, GBS, JP
Hon Fred LI Wah-ming, JP
Hon Albert CHAN Wai-yip
Hon KWONG Chi-kin

- Public officers attending** : Mr Frederick MA, JP
Secretary for Commerce and Economic Development
- Miss Yvonne CHOI, JP
Permanent Secretary for Commerce and Economic Development (Commerce, Industry and Tourism)
- Ms Linda LAI, JP
Deputy Secretary for Commerce and Economic Development (Commerce and Industry)¹
- Mr Jonathan MCKINLEY
Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry)²
- Attendance by invitation** : Arculli, Fong and Ng
- The Honourable Ronald ARCULLI
Partner
- Mr Peter WATERS
Consultant
- Clerk in attendance** : Ms Connie SZETO
Chief Council Secretary (1)⁶
- Staff in attendance** : Ms Debbie YAU
Senior Council Secretary (1)¹
- Ms Michelle NIEN
Legislative Assistant (1)⁹

Action

- I Briefing on detailed proposals for the new Competition Law**
(LC Paper No. CB(1)1440/07-08(01) - Paper on Competition Policy in Hong Kong prepared by the Legislative Council Secretariat (Background brief)
- Ref: CITB CR 05/62/25/13
- Legislative Council Brief entitled: Public Consultation on Detailed Proposals of a Competition Law, issued by the

Commerce and Economic Development Bureau on 6 May 2008 (with a public consultation paper))

Ms Miriam LAU declared that she was a consultant of Arculli, Fong and Ng.

Briefing by the Administration

2. At the invitation of the Chairman, the Secretary for Commerce and Economic Development (SCED) said that Hong Kong thrived on competition. The business sector and consumers alike benefited from markets where there was free and fair competition, as such markets attracted investment, innovation and improvement in products and service quality. The Government valued competition as a cornerstone of Hong Kong's economic success. For this reason, the Administration conducted a public consultation exercise in 2006 on how best to ensure the local competition policy could keep pace with the times. The results of the consultation exercise showed a clear support from the community for the introduction of a cross-sector competition law in Hong Kong. Based on the outcome of the exercise, the Administration had been working with a team of international experts in the relevant field to draw up detailed proposals for a suitable competition law for Hong Kong. On 6 May 2008, the Government published a consultation paper on the major provisions that were envisaged for the new competition law for a three-month public consultation. Recognizing the concerns expressed by small and medium-sized enterprises (SMEs), the consultation paper had specifically set out a number of proposals to address these concerns.

3. SCED added that in drafting the legislative proposals, the Administration was mindful of the need to ensure that the new competition law would not create extra compliance costs for business or lead to excessive litigation. As regards merger regulation, the Government maintained an open mind on the matter and had set out three options in the consultation paper for comment and discussion by stakeholders. On exemptions and exclusions, SCED said that the new law generally would not apply to activities of the Government and statutory bodies because the economic activities engaged by the public sector were normally pursued in the wider public interest. Anti-competitive acts engaged by statutory bodies could be regulated by the Government through administrative means. Nevertheless, the Administration proposed to conduct a review of the issue in the light of actual experience in implementing the competition law.

4. On institutional arrangements, SCED said that the Administration proposed to set up a Competition Commission (the Commission) and a Competition Tribunal (the Tribunal). The Commission should have a "two-tier" structure, with an appointed board (the Board) overseeing a full-time executive arm. The Board should have a minimum of seven members, including a Chairman, to be appointed by the Chief Executive (CE). It was estimated that initially, the Commission

might need a full-time executive of about 70 staff and require an annual budget of \$60 million to \$80 million. The Tribunal would comprise of "judicial" and "non-judicial" members with a judicial member acting as the President. Both the President and other judicial members would be appointed by the CE on the recommendation of the Chief Justice. The initial cost of operating the Tribunal was estimated to be about \$6 million annually.

5. SCED further advised that the three-month consultation period would end on 5 August 2008. During the period, the Administration would brief the 18 District Councils, trade association, and the general public on the detailed proposals for the new competition law. He invited members of the public and interested organizations to submit their views and comments for the Administration's consideration. The Administration aimed to introduce the relevant bill (the Bill) into the Legislative Council (LegCo) in the 2008-2009 session.

Discussion

Issues of concerns to small and medium-sized enterprises

6. Mr Ronny TONG welcomed the Government's determination to introduce a new competition law in Hong Kong and consult the public on the detailed legislative proposals. Noting SMEs' concern that they could be threatened by litigations from large companies with a view to forcing them out of the market, he enquired about measures the Administration would put in place to guard against such acts. SCED responded that the Commission would be empowered to carry out in-depth investigation into alleged infringement of the law and impose appropriate sanctions on the parties concerned, irrespective of the sizes of the companies. He added that the Commission would be able to exercise formal investigative powers, including requiring persons concerned to provide relevant information and documents, and conducting physical search of premises.

7. Mr Andrew LEUNG said that he was a member of the Competition Policy Review Committee (CPRC). He relayed the worries of local SMEs about excessive litigation from large companies after the introduction of the new competition law. While the consultation paper had pointed out that except the United States of America, there were limited numbers of private cases related to competition laws in other overseas jurisdictions, he noted that the European Commission had formulated proposals to address the legal and procedural obstacles which it considered had resulted in the "under-use" of private actions provisions in seeking remedy for cases involving anti-competitive conduct in the European Union in order to enhance the potential effectiveness of such actions in deterring anti-competitive conduct. He referred to the "de minimis" approach set out in Chapter V of the consultation paper and sought the Administration's clarification on the proposal that the Commission would not normally pursue an agreement if the aggregate market share of the parties to the agreement did not exceed a certain level, say 20%.

8. SCED acknowledged the concerns expressed by SMEs and re-iterated that the public consultation paper had specifically set out a number of proposals to address these concerns. He pointed out that there was no evidence in other jurisdictions suggesting that large companies had filed large number of private claims against SMEs. Nevertheless, to guard against such possibility by large companies, the Administration had proposed that the Tribunal might disallow private actions that it considered to be without merit. As for the proposed "de minimis" approach, Mr Ronald ARCULLI, Partner of Arculli, Fong and Ng said that the Commission should clarify in its guidelines that it would not pursue an agreement where the aggregate market share of the parties to the agreement did not exceed a certain level, except where "hard core" conduct was involved. The 20% aggregate market share mentioned in the consultation paper was an example of the possible extent of market share that would be considered by the Commission. He added that international experience had revealed that competition laws were welcomed by SMEs. Indeed, about 70% of the litigations relating to competition matters raised in the United Kingdom (the UK) were initiated by SMEs.

9. Ms Miriam LAU expressed concern about the limited safeguard for SMEs under the "de minimis" approach in the absence of a clear definition of "hard core" anti-competitive conduct. Specifically, she asked whether an agreement made among a few small retailers, of which the aggregate market share was insignificant, to sell a product at a lower price than a big retailer would be regarded the "hard core" conduct of price-fixing. She was concerned that if the Commission would pursue such an agreement, SMEs could not benefit from the market share protection under the "de minimis" approach.

10. SCED responded that under the new competition law, the Commission would be required to issue guidelines on how to interpret and implement the law, including setting out examples of agreements which were considered "hard-core" anti-competitive conduct. If the agreement involved "hard core" conduct, the "de minimis" approach would not apply. Mr Ronald ARCULLI added that regardless of the type or form of the conduct in question, the Commission would examine whether the conduct would have the purpose or effect of substantially lessening competition before arriving at a decision of infringement of the law. In the example cited by Ms LAU, the price-fixing agreement might have the effect of lessening competition, as in the absence of the agreement, the small retailers could set even a lower price for the product.

11. Mr James TIEN said that the Liberal Party had all along expressed support for implementing a business regime which promoted free and fair competition in the market place. He also welcomed the Administration's initiative to set out proposed arrangements in Chapter V of the consultation paper to address SMEs' concerns. He enquired about details of the proposal to permit representative actions under the competition law, which would allow organizations to bring private cases on behalf of SMEs to help them seek damages for losses as a result of anti-competitive conduct engaged by other parties.

12. Mr Ronald ARCULLI explained that besides lodging complaints about anti-competitive conduct directly with the Commission which could initiate investigation when it had reasonable cause to believe that infringement had occurred, SMEs could also take private actions in respect of the cases. It was also proposed that with the permission of the Tribunal, representative actions on behalf of SMEs or consumers should be permitted. This would help SMEs that had suffered damage from anti-competitive conduct, but which had limited resources, to seek redress. The Deputy Secretary for Commerce and Economic Development (Commerce and Industry) (DS/CED(C&I)) added that in granting such permission, the Tribunal had to reach the view that the representative could fairly and adequately represent the interests of the parties concerned. The representative body should be a credible organization acting in the interests of those it represented, and might have to satisfy a set of objective criteria to ensure that it had the appropriate status. In response to the Chairman's suggestion of compiling a specified list of such organizations for reference by SMEs, DS/CED(C&I) welcomed the suggestion and said that a similar approach was adopted in the UK where bodies specified by the Secretary of State were allowed to bring representative actions on behalf of consumers.

13. While expressing support for introducing a competition law in Hong Kong, Ms CHAN Yuen-han was concerned that the cross-sector law might not be able to address the concerns and problems in specific sectors. On the concerns expressed by SMEs, she said that the main concern was about abuse of substantial market power by large companies leading to market monopolization as in the cases of the auto-fuel retail market and pork market in Hong Kong. As "substantial market power" related to the degree of market share, there was also concern that the large companies could easily escape from the market share test through maneuvering their shareholdings.

14. Mr Ronald ARCULLI remarked that some large companies were successful companies which had achieved a dominant position in the market without engaging in anti-competitive acts. He highlighted that there would be a general prohibition in the new competition law on abuse of substantial market power, and the Commission would be empowered to investigate possible infringements in this area. The Commission would have the power to require persons to provide information and produce documents that it considered relevant to an investigation, and to conduct a physical search of premises if so empowered by a warrant issued by a magistrate. Such investigative powers would be effective in commanding cooperation from parties concerned and essential in considering whether infringement had occurred. These powers were unavailable to the Competition Policy Advisory Group established by the Administration in 1997 and the consultancy study his company had been commissioned to conduct on the competition situation in the auto-fuel retail market a few years before. On the concern about the market share threshold for investigating possible abuse of substantial market power, Mr ARCULLI said that it might not be appropriate to set a fixed threshold in the law because situations varied in specific sectors. He pointed out that different mechanisms were adopted in overseas jurisdictions to prohibit the abuse of dominance or substantial market power. In the case of Hong

Kong, instead of listing specific examples of conduct in the law that could be considered abuse of substantial market power, the new competition law should include a general prohibition on the conduct. The Commission should issue guidelines on how it would interpret and enforce the prohibition.

15. Ms CHAN Yuen-han further enquired whether an entity that had a market share of 40% or above could be regarded to have dominated the market or possessed substantial market power. Mr Peter WATERS, Consultant of Arculli, Fong and Ng pointed out that the concept of dominance or substantial market power was well-understood around the world, i.e. the power enabling the entity to act independently in the market without paying attention to other competitors. Nonetheless, the Commission should investigate into the actual facts to ascertain whether the entity had abused its market position, in which market share was only a major factor to be considered. In this connection, Mr Ronald ARCULLI said that concern about whether abuse of dominance was present in the pork market would require further investigation.

Institutional arrangements for the proposed Competition Commission

16. Given the wide powers and functions vested in the Commission, Mr CHAN Kam-lam enquired about operation of the Commission and the envisaged future workload. On the operation of the Commission, DS/CED (C&I) said that under the "two-tier" structure of the Commission, the executive arm would be overseen by the Board. The executive arm would assist in the conduct of investigation, day-to-day administrative duties and other functions of the Commission such as educating the public and the business sector on competition matters. As the Commission would act as both the investigating and adjudicating authority, there should be a formal separation between the investigation and determination functions within the Commission. To ensure the regime was fair and impartial, the Board would appoint an Investigation Committee to conduct investigation of cases. The Investigation Committee would be chaired by a Commission member, and could include other Board members. On completion of an investigation, the Board would make determination based on the report submitted by the Investigation Committee. Board members who were members of the Investigation Committee concerned should not participate in the adjudication of the case. As regards the future workload of the Commission, SCED said that the actual number of Commission members could be more than the minimum of seven to ensure that there would be a sufficiently large "pool" of members to allow for the efficient conduct of the Commission's business. Should the Board consider it necessary to initiate investigation on a number of cases, it could establish more Investigation Committees to undertake the work. On the power of the Commission to disregard complaints which were considered vexatious or frivolous, SCED responded that whether to commence an investigation of a case of possible anti-competitive conduct would be a matter to be determined by the Commission. It was believed that the Commission would determine the matter in a fair and impartial manner.

17. The Chairman was concerned about the protection of confidential information provided to the Commission by complainants or persons under investigation. He cautioned that leakage of confidential information might lead to legal claims by parties concerned.

18. SCED said that the Commission would be obliged to protect confidentiality of information it had access to in carrying out its duties. Nonetheless, under exceptional situations where disclosure of confidential information was necessary for the Commission to perform its duties, or for the purpose of proceedings before the Tribunal or a court, the Commission would need to consider whether the disclosure of information would be consistent with the public interest, and the extent of such disclosure to allow it in discharging its duties. Mr Peter WATERS advised that in the competition laws of some overseas jurisdictions, there were penalties on parties for breaches of provisions on information confidentiality. Persons involved in the investigation of cases were subject to legal obligation not to disclose any information they had access to. He pointed out that the success or otherwise of the competition law hinged on whether people could lodge complaints with the Commission in confidence.

Relationship with existing sector-specific laws

19. Mr SIN Chung-kai said that being a member of CPRC, he was pleased to note that the Government had drawn up detailed proposals for the new competition law for public consultation. He called on the Administration to spare no efforts in finalizing the Bill for introduction into LegCo in the 2008-2009 session. On Mr SIN's concern about the relationship of the new law with existing sector-specific competition laws, the Permanent Secretary for Commerce and Economic Development (Commerce, Industry and Tourism) (PS/CED(CI&T)) said that to ensure anti-competitive conduct in all sectors of the economy would be treated equally, the new law should apply to all sectors. As such, it was proposed that the competition provisions in the Telecommunications and Broadcasting Ordinances that duplicated those in the new law be repealed. To enable the Broadcasting Authority (BA) and Telecommunications Authority (TA) to continue to regulate competition matters within their respective sectors, it was proposed that BA and TA should have the same powers as the Commission to enforce the new competition law in their sectors. The Commission would issue guidelines to set out details for the parties in the exercise of concurrent jurisdiction.

Exemptions and exclusions

20. Noting that the Administration had proposed vesting power with the CE-in-Council to exclude activities from the new competition law, Mr SIN Chung-kai considered that granting exemptions and exclusions from the law warranted serious consideration and should be approved by LegCo on the recommendations of the Government. In response, PS/CED(CI&T) said that to ensure better checks and balances on the power of granting such exemptions and exclusions from the new competition law, the preliminary proposal was that they would be subsidiary legislation subject to LegCo's scrutiny.

21. On the Administration's proposal of excluding the Government or statutory bodies from the application of the new competition law, Mr Ronny TONG expressed concern about the scope of "statutory bodies", and asked whether it would include those bodies which the Government had a major stake but were operating under commercial principles such as MTR Corporation (MTRC) and Hong Kong Disneyland (HKD). SCED responded that statutory bodies were those organizations set up under specific legislation. MTRC could be one but HKD was not a statutory body.

22. Miss TAM Heung-man welcomed the consultation document and appreciated the Government's determination in introducing a competition law in Hong Kong. On the proposal of excluding services of general economic interest from the application of the law, such as essential public services of an economic nature, Miss TAM sought further information on the definition of "essential public services of an economic nature". To prevent exploitation of possible loopholes in granting such exemption, she considered that the Administration should include anti-avoidance provisions in the Bill.

23. SCED referred to the competition laws in other jurisdictions and pointed out that no definition of "service of general economic interest" was provided. The application of the concept was established by case law or guidelines. As such, it was proposed that the Commission would issue guidelines in this respect with examples on the types of service that might be described by the general term "essential public services of an economic nature".

24. On the proposal of empowering the Commission to issue a block exemption for a category of agreement on grounds that the agreement yielded economic benefits which outweighed anti-competitive harm, Mr Ronny TONG asked whether a group of SMEs could seek the Commission's exemption for an agreement which would benefit consumers and promote sustainable competition.

25. Mr Peter WATERS advised that one of the major forms of economic benefits recognized in other jurisdictions concerned innovation. For example, a number of companies in the mobile phone service market might enter into an agreement to develop a system of e-payment using mobile phone networks. These companies needed to demonstrate the anticipated economic benefits of the agreement for the consumers to the competition authority. The authority would then determine whether the agreement would meet the criteria for exemption on grounds of economic benefits. As for Hong Kong, the Commission would act as the gatekeeper to ensure exemptions would be granted only on grounds of economic benefits or public interest. Mr WATERS added that in addition to seeking formal exemption for the agreement, the group of SMEs could obtain the Commission's advice prior to implementing the agreement. As the advice of the Commission would be legally binding, it would provide certainty to SMEs.

Penalty for engaging in anti-competitive conduct

26. On the penalties for engaging in anti-competitive conduct, members noted that under the Administration's proposal, sanctions would be limited to civil penalties with maximum fines of \$10 million. Considering the level of fine too low, Mr Ronny TONG suggested that consideration be given to impose a daily fine on the offender until after remedial action was taken. SCED explained that in case of more serious infringement of the law, the Tribunal, on application by the Commission, could impose fines exceeding \$10 million. DS/CED(C&I) elaborated that international precedent showed a wide range of levels of fine on breaches of competition laws, which usually subject to a cap of 10% of total turnover during the period when the infringement occurred. The Administration proposed that a similar cap be applied in Hong Kong, and that the Commission should be required to publish guidelines on the factors to be considered in the calculation of fines.

II Any other business

27. There being no other business, the meeting ended at 6:30 pm.