

Bills Committee on Competition Bill

List of follow-up actions arising from the discussion at the meeting on 20 December 2011

At the meeting on 20 December 2011, the Administration was requested to provide written responses to the following concerns/requests raised by members: –

- (1) According to paragraph 5.19 of the extract from the template guidelines on the first conduct rule (Appendix to LC Paper No. CB(1)643/11-12(01)), "mere approval by the Government of the activities carried out by the undertaking will not suffice" to constitute entrustment. Since both "entrustment" and "approval" would require the compliance of certain procedures before taking effect, members find difficulty in understanding why one act would constitute "entrustment" and the other would not. Please clarify the difference between "entrustment" and "approval".
- (2) In relation to clause 60 on withdrawal of acceptance of commitment –
 - (i) consider whether the threshold of "reasonable grounds for suspecting" provided in sub-clauses (1)(b) and (1)(c) for the withdrawal was too low and, in recognition of the serious consequences of the withdrawal, consider making the withdrawal a reviewable determination under clause 81; and
 - (ii) explain why a different threshold of "reasonable grounds for believing" was used in sub-clause (1)(a).
- (3) With reference to the responsibilities of directors of different types and in different situations provided under the Companies Bill currently under scrutiny, please advise the criteria for deciding whether a director of the parent company of an undertaking which has contravened the Competition Ordinance (upon enactment) would be held directly responsible for such contravention;
- (4) Compare and ensure the consistency of the definition of "bid-rigging" in the proposed new clause 2(2) and that in the Prevention of Bribery Ordinance (Cap. 201).

(5) According to clause 75(2), nothing in clause 74 "prevents the Commission from bringing proceedings in the Tribunal, where it has reasonable grounds for suspecting that the person who has made the commitment has failed to comply with one or more of the requirements of the infringement notice". Members have requested the Administration to consider whether the above threshold is too low and should be changed to "reasonable grounds for believing", and whether the relevant determination should be made a reviewable determination under clause 81;

(6) Drafting issues

(i) consider deleting the note presently used to supplement the definition of "serious anti-competitive conduct" newly proposed to be added to clause 2, as this was the only note provided in the Bill;

(ii) change the simplified form of the character "争" in the phrase "嚴重反競爭行為" in the Chinese text of the proposed new clause 2(2) to its traditional form;

(iii) amend clause 63(3) to ensure that the Competition Commission would make use of the latest technology available (in particular the Internet) to make available for inspection the register of commitments made under Part 4;

(iv) the Commission might still bring proceedings against a person who did not make a commitment to comply with the requirements of an infringement notice although he had stopped the alleged contravention. Some members have expressed the concern that, by stating that the person is not obliged to make the commitment, clause 67 might be misleading. Please consider amending the clause to properly alert the person to the above consequence and hence the need to make the commitment;

(v) consider amending clause 72 on withdrawal of infringement notice in the light of members' views:

- Ms Miriam LAU considers it unfair that the Commission might at any time before the expiry of the compliance period withdraw the infringement notice. She suggests setting out clearly the circumstances under which this action would be taken.

- Mr LEUNG Kwok-hung considers it necessary to give the Commission the above power to enable it to flexibly take actions as necessary when new evidence has emerged.
- (vi) amend clause 77 on publication of infringement notices to ensure that the Commission would make use of the latest technology available (in particular the Internet) to publish the electronic copy of infringement notices; and
- (vii) according to clause 64, Schedule 2 had effect regarding the procedural requirements for the acceptance, withdrawal of acceptance, and variation and release of commitments. While "commitments" could be varied, substituted and released under clause 61, neither clause 64 nor Schedule 2 seemed to apply to the substitution of commitments. Please examine whether clause 64 and/or Schedule 2 should be amended to achieve consistency with clause 61.

Council Business Division 1
Legislative Council Secretariat
23 December 2011