

**For discussion  
on 16 January 2012**

## **Bills Committee on Competition Bill**

### **Responses to follow-up questions arising from previous meetings**

#### **Purpose**

This paper responds to questions raised by Members at the meetings of 6 and 20 December 2011.

#### **A. Handling of complaints**

2. Under clause 38 of the Competition Bill (the Bill), the Competition Commission (the Commission) would issue guidelines indicating the manner and form in which complaints are to be made to the Commission. It is the policy intent that the Commission would specify in the guidelines the types of basic and essential information to be provided that would facilitate the Commission's handling of complaints. The Commission should also inform the complainant (if identifiable) of the outcome of the complaint, including a decision not to investigate into the allegations which are trivial, frivolous or vexatious in nature, or are baseless to the extent that the Commission has no reasonable grounds to suspect that a breach of the competition rule has occurred. Following international best practice, we consider that these administrative arrangements would be best dealt with in the Commission guidelines, rather than specifying them in the law.

#### **B. Investigation**

##### *Powers conferred by warrant*

3. Clause 48 of the Bill provides that the court may issue a warrant to enter and search any premises if there are reasonable grounds to suspect that there are or are likely to be documents on the premises that may be relevant to an investigation by the Commission. We consider this threshold appropriate to enable the Commission to gather the necessary evidence to establish whether there are reasonable grounds to believe that a contravention of the competition

rule has occurred for subsequent enforcement by the Commission (e.g. issue of infringement notice or bringing proceedings before the Competition Tribunal (the Tribunal)). This threshold is the standard for the issue of warrant in a number of legislation in Hong Kong such as the Copyright Ordinance and the Securities and Futures Ordinance, and is on par with that in the competition laws in the UK and Singapore. The powers conferred by a warrant under clause 50 of the Bill are also comparable to other laws, a comparison of which is at **Appendix A**.

4. To ensure the smooth execution of entry and search of premises under warrant, the Commission may, pursuant to clause 50(2) of the Bill, call upon other persons to assist in the search operation. These other persons may include members/ staff of the relevant undertaking, building security, third party specialists (e.g. IT expert), service providers (e.g. transport or labour), as well as other public officers (e.g. police). The type and extent of assistance required would vary in each operation. Hence, specifying the types of persons to whom an authorized officer may call upon under clause 50 would restrain the Commission's ability in carrying out investigation effectively. In any event, all such other persons would be constrained by the conditions, if any, specified in the warrant. Any authority conferred pursuant to clause 50(3) on these other persons is also limited by the extent and terms of the request for assistance made by the authorized officers under clause 50(2).

#### *Retention of property*

5. As regards clause 56 concerning the retention of property produced to or obtained by the Commission under Part 3 of the Bill, there are other Hong Kong laws providing for similar powers, including sections 191(3) and (4) of the Securities and Futures Ordinance (Cap. 571), section 10A(2) of the Smoking (Public Health) Ordinance (Cap. 371), and section 12C(5) of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575).

#### *Self-incriminating information*

6. Regarding the suggestion of the Law Society of Hong Kong to give a person the right to adduce or admit self-incriminating information, we have no objection to the waiver of the immunity against self-incrimination under clause 45(2) and will consider how best to give effect to the proposal through amendments to the Bill.

## **C. Enforcement by the Commission**

### *Commitment – clause 60*

7. Clause 60 provides for the three grounds on which the Commission may withdraw an acceptance of commitment. The withdrawal would in effect bring the parties back to the position as if no commitment has been made, while carrying no legal consequence in itself. Hence, the decision relating to the withdrawal is not made one of the reviewable determinations under clause 81. If the Commission intends to institute legal proceedings against an undertaking after the withdrawal of its acceptance of a commitment, it is still required to prove before the Tribunal that it has reasonable grounds to believe that a contravention has occurred. The threshold currently proposed for triggering off a withdrawal under clause 60 has struck a balance between safeguarding the interest of the parties and ensuring efficacy of the Commission's enforcement work.

8. Under clause 60(1), the threshold of "*reasonable grounds to believe*" adopted for paragraph (a) (material change of circumstances) is of a higher standard than the other two scenarios for withdrawal in paragraphs (b) (non-compliance with the commitment) and (c) (incomplete, false or misleading information in a material particular). A differential benchmark is proposed for paragraph (a) since changes of circumstances might go beyond the control of the parties concerned and hence a higher threshold should be met before the Commission may withdraw the acceptance of the commitment.

### *Commitment – substitution under clause 61*

9. Clause 61(1) provides that the Commission may accept from the person who made a commitment a variation of the commitment or a commitment in substitution for it. Substituting an existing commitment essentially means making a new commitment in lieu of the old one. Hence, the procedural requirements for acceptance of commitments in Schedule 2 would apply to the substitution of commitments.

### *Commitment – register under clause 63(3)*

10. Similar to the proposed arrangements in respect of the register of decisions under Part 2 of the Bill, we will introduce amendments to clause 63(3) to require the Commission to make available the register of commitments for inspection through the Internet or other electronic means.

*Infringement notice – consequence of not making a commitment*

11. Clause 67 of the Bill provides that a person is not obliged to make a commitment to comply with the requirements of an infringement notice, which if accepted would have the effect, pursuant to clauses 66(2) and 74, of barring the Commission from bringing proceedings in the Tribunal against that person in respect of the alleged contravention specified in the notice. Clause 67 further states that if a person does not make the commitment, the Commission may bring proceedings against that person in the Tribunal in relation to the alleged contravention of the conduct rule. Thus, the effect of accepting the infringement notice, as well as the consequences of not doing so, has been set out clearly in the Bill.

*Infringement notice – withdrawal under clause 72*

12. Clause 72 provides that the Commission may, before the expiry of the compliance period, withdraw the infringement notice. Circumstances necessitating such a decision may include emergence of new evidence, bleak prospect of reaching consensus on the terms of the commitment, etc. The Commission should be given the flexibility to consider the need of withdrawal for each case; specifying the circumstances under which withdrawal may be effected would hamper the Commission's ability to act aptly according to the circumstances of individual cases.

*Infringement notice – failure to comply under clause 75*

13. Under clause 75, the Commission may, where it has reasonable grounds for suspecting that the person who has made the commitment has failed to comply with the requirements of the infringement notice, bring proceedings in the Tribunal against that person in respect of the alleged contravention specified in the notice. We consider this reasonable having regard to the consensual nature of the infringement notice, in that the suspected failure to honour a commitment should relieve the Commission from the restriction to take alternative enforcement action, which could have been pursued in the first instance. The same reasoning applies to the proposal of not making this Commission's decision a reviewable determination under clause 81.

*Infringement notice – register under clause 77*

14. Same as the proposed amendments in respect of the register of commitments under clause 63(3), we would amend clause 77 to require the Commission to publish the infringement notices through the Internet or other electronic means.

## **D. Confidential information**

15. Clause 122(2) provides that information provided to the Commission would be regarded as confidential information if so identified by the provider. This notwithstanding, the Commission may still, under clause 125, disclose such confidential information under lawful authority for purposes such as performance of its functions under the Bill. As such, the need to preserve the confidentiality of information identified by any person would not undermine the Commission's ability to discharge its functions effectively.

16. In connection with the impending establishment of the Communications Authority, we would introduce amendments to clauses 121 and 123, as well as other parts of the Bill, to reflect the institutional changes to the Broadcasting Authority and the Telecommunications Authority.

## **E. Schedule 7**

17. On Members' suggestion to require the Commission to publish notices, through the use of Internet, under section 12(1)(a) of Schedule 7 relating to an application for a decision on mergers, we consider it acceptable as it helps ensure that the application is brought to the attention of those likely to be affected more efficiently. We would propose amendments in this regard. Similarly, we would also amend along the same line clauses 10(1), 14(2), 25(1) and 29(2) which concern notification of the proposed decisions relating to exclusions from the conduct rules.

## **F. Schedule 1**

### *Section 3: exclusion for services of general economic interest*

18. Our earlier submissions (Paper No. CB(1)518/11-12(01) and CB(1)643/11-12(01)) have responded to Members' enquiries on the application of the exclusion from competition law for the operation of a service of general economic interest. Concerning the difference between approval and entrustment by the Government, the former generally refers to empowerment which permits, but does not necessarily obliges, an undertaking to do certain act, while the latter specifically entrusts an undertaking with the performance of an essential function. In this context, empowerment means "*can/ may do something*", and entrustment means "*have to/ would do something*".

## G. Others

19. On the definition of bid-rigging under clause 2(2) of the Bill, we have drawn reference from the Competition Act of Canada to specify more clearly the circumstances under which conduct would be caught under the competition law. As regards the Prevention of Bribery Ordinance (Cap. 201), sections 6 and 7 concern the offences relating to the offering of advantage/ financial inducements for the subversion of competitive tendering, the recipients of which may not be undertakings but could be public officers. The focus of these offences is dishonesty and is different from that of the competition law, hence the differences between the definitions in the Bill and that of Cap. 201. **Appendix B** sets out the relevant definition under the Canadian competition law and Cap. 201 for Members' easy reference.

20. Concerning a company director's liability, a director of a holding or parent company will not, merely by virtue of holding that position, be responsible for the conduct of the company or its subsidiary. Clause 456 of the Companies Bill, extracted at **Appendix C**, codifies the common law as regards duties owed by directors and shadow directors. Under the Bill, if a director is involved in a contravention by a company, he may be subject to a financial penalty pursuant to clause 90(1)(b) or to an order pursuant to clause 92 as a person "*involved in a contravention of a competition rule*" within the meaning of clause 89.

21. At Members' request, a list of offences created under the Bill is at **Appendix D**.

## H. Drafting issues

22. For the sake of consistency and clarity, we would propose amendments to the following provisions of the Bill:

- (a) **Clause 2**: the note to the definition of "*serious anti-competitive conduct*" in clause 2(1) seeks to remind the readers that provisions supplementing the definition are contained in clause 2(2). We consider this note useful to the readers. To clarify the status of this supplementary note, we would add a subclause (3) as follows -

“(3) A note located in the text of this Ordinance is provided for information only and has no legislative effect.”

- (b) **Clause 39(1)(c)**: to add the expression “*or the Tribunal*” after “*the Court of First Instance*” to give effect to our policy intent;
- (c) **Clause 41(2)(a)**: to amend “複本” in the Chinese text to “副本” to achieve consistency with similar expression in clause 56(2) and section 27(2)(b) of Schedule 5;
- (d) **Clause 53(1)(a)**: to amend “罔顧後果地” in the Chinese text to “罔顧實情地” to achieve consistency with similar expression in clause 55(2)(b);
- (e) **Clause 56**:
  - (i) to amend “如並非在其他情況下對該文件享有管有權的人” in the Chinese text of subclause (2) in order to enhance clarity of the English equivalent “*by a person otherwise entitled to possession of the document*”;
  - (ii) to amend “容許並非在其他情況下對該文件享有管有權的人” in the Chinese text of subclause (3) in order to enhance clarity of the English equivalent “*allow a person otherwise entitled to possession of the document*”; and
  - (iii) to amend “法庭” in subclause (4) to “法院” to achieve consistency with similar expression in clauses 57(3), 125(1)(c), 127(1)(e), 142(2)(a), 146, etc.; and
- (f) **Schedule 7**:
  - (i) to amend “任何行動” in the Chinese text of section 14 to enhance clarity of the English equivalent “*any action*” which refers to legal proceedings; and
  - (ii) to amend “作何事情” in the Chinese text of section 15(6) to “任何事情”.

### **Advice sought**

23. Members are invited to note the contents of the paper.

**Commerce and Economic Development Bureau  
January 2012**

## Appendix A

### Comparison of local and overseas legislation authorizing the issue of search warrant

| Legislation          | Sections | Powers conferred by a warrant <sup>1</sup>   |
|----------------------|----------|--|
| <i>UK</i>            |          |  |
| Competition Act 1998 | 28/28A   | <ul style="list-style-type: none"><li>- To enter the specified premises and use force as is reasonably necessary</li><li>- To search the premises and take copies of or extracts from any document</li><li>- To take possession of any documents and take any other steps if it is necessary for preserving them, or it is not reasonably practicable to take copies of the documents on the premises</li><li>- To require any person to provide an explanation of any document or to state where it may be found to the best of his knowledge and belief</li><li>- To require any information in electronic form to be produced in a visible and legible form which can be taken away</li></ul>                   |
| <i>Singapore</i>     |          |  |
| Competition Act 2004 | 65       | <ul style="list-style-type: none"><li>- To enter the specified premises and use force as is reasonably necessary</li><li>- To search the premises and take copies of or extracts from any document</li><li>- To search any person on the premises if there are reasonable grounds for believing that such person has in his possession any relevant document</li><li>- To take possession of any documents and take any other steps if it is necessary for preserving them, or it is not reasonably practicable to take copies of the documents on the premises</li><li>- To require any person to provide an explanation of any document or to state where it may be found to the best of his knowledge</li></ul> |

<sup>1</sup> The threshold of “reasonable grounds to suspect” is adopted for the issue of warrant under these laws. Some of the key powers conferred by warrant are summarized herein.

| Legislation                                 | Sections             | Powers conferred by a warrant <sup>1</sup>  |
|---|----------------------|---|
|   |                      | and belief<br>- To require any information in electronic form to be produced in a visible and legible form which can be taken away<br>- To remove any relevant equipment or article from the premises for examination   |
| <b><i>Hong Kong</i></b>                     |                      |   |
| Securities and Futures Ordinance (Cap. 571) | 191                  | - To enter and search specified premises and use force as is reasonably necessary<br>- To seize, remove and retain any record or document which the person specified in the warrant or police officer has reasonable cause to believe may be required to be produced under the Ordinance<br>- To require any person on the specified premises to produce for examination any record or document which is in the possession of the person and which he has reasonable cause to believe may be required to be produced under the Ordinance, and to take any other steps if it is necessary for preserving the record or document<br>- To prohibit any person found on the specified premises from removing from the premises any record or document required to be produced |
| Copyright Ordinance (Cap. 528)              | 122/123 <sup>2</sup> | - To enter and search any place and use force as is reasonably necessary<br>- To seize, remove or detain any article which appears to be an infringing copy of a copyright work or anything which appears to be or to contain, or to be likely to be or to contain, evidence of an offence under the Ordinance<br>- To remove by force any person or thing obstructing an authorized officer in the performance of his functions under the Ordinance  |

<sup>2</sup> Section 122 of the Copyright Ordinance provides for a range of powers to the investigating officers, subject to section 123 which authorizes the magistrates to issue a warrant to enter and search a place.

| Legislation                             | Sections            | Powers conferred by a warrant <sup>1</sup>   |
|---|---------------------|--|
| Import and Export Ordinance (Cap. 60)   | 21/ 22 <sup>3</sup> | <ul style="list-style-type: none"> <li>- To enter and search any domestic premises and use force as is reasonably necessary</li> <li>- To seize and remove from the domestic premises any thing in respect of which the authorized officer has reasonable grounds to suspect that an offence under the Ordinance has been committed</li> <li>- To require any information which the authorized officer reasonably suspects that relates to an offence under the Ordinance</li> <li>- To require any information in electronic form that relates or appears to relate to the commission of an offence under the Ordinance to be produced in a visible and legible form which can be taken away</li> <li>- To remove by force any person or thing obstructing an authorized officer in the performance of his functions under the Ordinance</li> </ul> |
| Telecommunications Ordinance (Cap. 106) | 35/35A <sup>4</sup> | <ul style="list-style-type: none"> <li>- To enter and search specified premises used for dwelling and use force as is reasonably necessary</li> <li>- To seize, remove and detain anything in respect of which the Authority reasonably suspects that an offence under the Ordinance has been committed, or anything that appears to be or to be likely to be, or to contain, evidence of an offence</li> <li>- To remove by force any person or thing obstructing any arrest, detention, search, inspection, seizure or removal</li> </ul>  |

<sup>3</sup> Section 21 of the Import and Export Ordinance provides for a range of powers, including the power to enter and search premises, subject to section 22 which imposes restrictions upon exercise of the powers to search domestic premises pursuant to a warrant.

<sup>4</sup> Section 35A of the Telecommunications Ordinance empowers the Telecommunications Authority to enter premises of a licensee without warrant. Section 35(2) provides that a magistrate may issue a warrant authorizing entry and search of any premises used for dwelling purposes by the Authority.

| <b>Legislation</b>                                   | <b>Sections</b>    | <b>Powers conferred by a warrant<sup>1</sup></b>  |
|--|--------------------|---|
| Unsolicited Electronic Messages Ordinance (Cap. 593) | 40/41 <sup>5</sup> | <ul style="list-style-type: none"><li>- To enter or search specified premises or place, and use force as is reasonably necessary</li><li>- To detain any person found in or on the premises or place, where that person might prejudice the purpose of the search if he were not so detained</li><li>- To seize, remove or detain any telecommunications device or other thing found in or on the premises or place that is or that contains, or that appears to be or to contain, or to be likely to be or to contain, evidence of the commission of a specified offence</li><li>- To inspect, operate and analyse any telecommunications device or other thing found in or on the premises or place, and require to be given or produced any information or document or other thing as will enable the Authority to inspect, operate and analyse</li><li>- To require any information in electronic form that relates or appears to relate to the commission of a specified offence to be produced in a visible and legible form which can be taken away</li><li>- To remove by force any person or thing obstructing an authorized officer in the performance of his functions under the Ordinance</li></ul> |

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<sup>5</sup> Section 41 of the Unsolicited Electronic Messages Ordinance provides for a range of powers, including the power to enter and search premises, subject to section 40 which empowers the magistrates to issue search warrant.

**Comparison of definitions relating to bid-rigging**

**Section 47(1) of the Competition Act of Canada**

“bid-rigging” means

- (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or
- (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.

**Section 6 of Prevention of Bribery Ordinance (Cap. 201):**

**Bribery for procuring withdrawal of tenders**

- (1) Any person who, without lawful authority or reasonable excuse, offers any advantage to any other person as an inducement to or a reward for or otherwise on account of the withdrawal of a tender, or the refraining from the making of a tender, for any contract with a public body for the performance of any work, the providing of any service, the doing of any thing or the supplying of any article, material or substance, shall be guilty of an offence.
- (2) Any person who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or a reward for or otherwise on account of the withdrawal of a tender, or the refraining from the making of a tender, for such a contract as is referred to in subsection (1), shall be guilty of an offence.

**Section 7 of Prevention of Bribery Ordinance (Cap. 201):**

**Bribery in relation to auctions**

- (1) Any person who, without lawful authority or reasonable excuse, offers any advantage to any other person as an inducement to or reward for or otherwise on account of that other person's refraining or having refrained from bidding at any auction conducted by or on behalf of any public body, shall be guilty of an offence.
- (2) Any person who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his refraining or having refrained from bidding at any auction conducted by or on behalf of any public body, shall be guilty of an offence.

Clause 456 of the Companies Bill

*“Directors’ Duty of Care, Skill and Diligence*

**456. Duty to exercise reasonable care, skill and diligence**

- (1) A director of a company must exercise reasonable care, skill and diligence.
- (2) Reasonable care, skill and diligence mean the care, skill and diligence that would be exercised by a reasonably diligent person with -
  - (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and
  - (b) the general knowledge, skill and experience that the director has.
- (3) The duty specified in subsection (1) is owed by a director of a company to the company.
- (4) The duty specified in subsection (1) has effect in place of the common law rules and equitable principles as regards the duty to exercise reasonable care, skill and diligence, owed by a director of a company to the company.
- (5) The section applies to a shadow director as it applies to a director.
- (6) For the purposes of subsection (5), a body corporate is not to be regarded as a shadow director of any of its subsidiaries only because the directors, or a majority of the directors, of the subsidiary are accustomed to act in accordance with its direction or instructions.

**Appendix D**

**Offences created under the Competition Bill**

| <b>Clause</b> | <b>Offence</b>   | <b>Maximum Sanction</b>   |
|---------------|--|---|
| <b>52</b>     | Failure to comply with the requirement or prohibition imposed under – <ul style="list-style-type: none"><li>- sections 41 (powers to obtain documents and information);</li><li>- section 42 (persons may be required to attend before Commission);</li><li>- section 43 (statutory declaration regarding evidence); or</li><li>- section 50 (powers conferred by warrant)</li></ul> | On conviction on indictment, a fine of \$200,000 and imprisonment for 1 year<br><br>On summary conviction, a fine at level 5 and imprisonment for 6 months    |
| <b>53</b>     | Destroying or falsifying documents required under – <ul style="list-style-type: none"><li>- section 41 (powers to obtain documents and information); or</li><li>- section 50 (powers conferred by warrant)</li></ul>   | On conviction on indictment, a fine of \$1,000,000 and imprisonment for 2 years<br><br>On summary conviction, a fine at level 6 and imprisonment for 6 months |
| <b>54</b>     | Obstruction of search authorized under section 48  | On conviction on indictment, a fine of \$1,000,000 and imprisonment for 2 years<br><br>On summary conviction, a fine at level 6 and imprisonment for 6 months |
| <b>55</b>     | Providing false or misleading documents or information to the Competition Commission under Part 3 of the Ordinance   | On conviction on indictment, a fine of \$1,000,000 and imprisonment for 2 years<br><br>On summary conviction, a fine at level 6 and imprisonment for 6 months |
| <b>103</b>    | Contravention of disqualification order  | On conviction on indictment, a fine of  |

| Clause | Offence   | Maximum Sanction   |
|--------|---|--|
|        |   | <p>\$1,000,000 and imprisonment for 2 years</p> <p>On summary conviction, a fine at level 6 and imprisonment for 6 months</p>  |
| 124    | <p>Contravention of the requirement to preserve the confidentiality of any confidential information</p>                                       | <p>On conviction on indictment, a fine of \$1,000,000 and imprisonment for 2 years</p> <p>On summary conviction, a fine at level 6 and imprisonment for 6 months</p> |
| 150    | <p>Failure to comply with an order not to disclose material the Competition Tribunal receives</p>   | <p>A fine at level 6 and imprisonment for 6 months</p>   |
| 171    | <p>Provision of false information to the Competition Commission</p>   | <p>A fine at level 6 and imprisonment for 6 months</p>   |
| 172    | <p>Failure to comply with the prohibition against termination of the employment of the employees for assisting the Competition Commission</p> | <p>A fine at level 4 and imprisonment for 3 months</p>   |
| 173    | <p>Obstruction of specified persons in the performance of any function under the Ordinance</p>  | <p>On conviction on indictment, a fine of \$1,000,000</p> <p>On summary conviction, a fine at level 6</p>  |