

**For discussion
on 19 March 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 16 and 31 January 2012.

A. Enforcement by the Tribunal

Pecuniary penalty

2. Clause 90(2)(b) of the Competition Bill (the Bill) provides that the Competition Commission (the Commission) may not apply to the Competition Tribunal (the Tribunal) for a pecuniary penalty to be imposed on a person contravening the conduct rule more than five years after the day on which the contravention ceased or the Commission became aware of the contravention, whichever is the later. A comparison of similar time limit for the imposition of pecuniary penalties in overseas competition jurisdictions is at **Appendix A**.

Disqualification order

3. Regarding the Tribunal's power to make a disqualification order, we have specified in clause 101(2) the relevant factors for the Tribunal to determine whether a person as a director is unfit to be concerned in the management of a company. This provision is modeled on section 9A(6) of the UK Company Directors Disqualification Act 1986 (at **Appendix B1**), which deals specifically with the matters that the court may consider in determining the unfitness of a director who contravenes the competition law. Compared to the list of general matters for determining the unfitness of a director under section 168K and Schedule 15 of the Companies Ordinance (Cap. 32) (at **Appendix B2**), clause 101(2) of the Bill could offer more useful and relevant guidance to the Tribunal for the purpose of making a disqualification order in relation to competition infringements. The matters referred in clause 101(2) have also captured the essence of the director's duty to exercise reasonable care, skill and diligence as elucidated in clause 456 of the Companies Bill (at **Appendix C**).

4. As regards Members' suggestion to replace "*took no steps to prevent it*" in clause 101(2)(b) with "*took no reasonable steps to prevent it*", we consider that the provision as currently drafted, which is identical to paragraph (b) of section 9A(6)(b) of the UK Company Directors Disqualification Act 1986, strikes a balance between a director's duty and a reasonable standard to satisfy the Tribunal that the relevant provisions on disqualification order do not apply to a person as the director of a company. Thus, we recommend no amendment to clause 101(2)(b).

B. Enforcement by the Commission

5. Clause 48 of the Bill empowers the Court of First Instance (CFI) to issue a warrant to an authorized officer to enter and search any premises. Some Members suggested that the warrant should also specify those persons whom an authorized officer may call upon to assist in the search operation. As explained in our earlier response (Paper No. CB(1)823/11-12(01)), the type and extent of assistance required by the authorized officers would vary in each operation and allowing the Commission to retain the flexibility would ensure that it could obtain all the necessary assistance during its search. Nonetheless, in view of Members' concerns, we propose amending clause 48 of the Bill, drawing reference from section 191(1) of the Securities and Futures Ordinance (Cap. 571), to provide that the CFI may issue a warrant authorizing a person specified in the warrant and such other persons as may be necessary to assist in the execution of the warrant. For clarity sake, we also suggest introducing an amendment to clause 48 by stating that the CFI may impose conditions upon the execution of the warrant. This would help put things beyond doubt that all persons involved in executing the warrant would be bound by the conditions so imposed on them and their exercise of power would be limited to the extent specified in the warrant, thereby safeguarding the interests of the parties being investigated or searched.

C. Clause 167

6. Clause 167 prohibits any person from indemnifying another person against liability for, inter alia, costs incurred in defending an action in which that other person is convicted of an offence under Part 3 of the Bill, which concerns the obstruction or interference of the Commission's investigation. There are also offences in Part 12 (such as offences arising from the provision of false information under clause 171 of the Bill). Indemnities against liability arising from conviction of these offences should likewise be prohibited. To this end, we propose adding Part 12 offences (including offences under clauses 171, 172 and 173) to clause 167(1)(b)(ii).

D. Others

7. On the issue of the right of appeal against a decision of the Tribunal, we are considering the views expressed by Members and the Law Society of Hong Kong, and will revert in due course.

8. Concerning the examples of conduct that may or may not contravene the competition rule, the sample guidelines on the conduct rules¹ and the responses² we have submitted on earlier occasions have provided examples in this regard. With the proposed warning notice in place, undertakings engaging in anti-competitive agreements (except for those involving serious anti-competitive activities which are defined in the Bill) would be put on notice by the Commission and given reasonable time to rectify their misconduct before enforcement action is taken against them. Coupled with the Commission's regulatory guidelines and public education, the concerns over inadvertent breach of the law should be addressed.

E. Drafting issues

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

- (a) **Clause 61(1)(b)**: to amend “*a commitment in substitution for it*,” in the English text to “*a new commitment in substitution for it*,” to clarify that the commitment refers to a new one in substitution for an existing one;
- (b) **Clause 94(1)**: to amend “該項調查的開支或附帶開支” in the Chinese text to “該項調查的開支及附帶開支” to achieve consistency with the English text;
- (c) **Clause 99(2)(b)**: to amend “*be a liquidator of a company*” to “*be a liquidator or provisional liquidator of a company*” to achieve consistency with similar interpretation of “*disqualification order*” under clause 43(4) of the Companies Bill;
- (d) **Clause 166(1)(d)(ii)**: to amend the paragraph as follows in order to achieve consistency with clauses 166(1)(b)(ii) and (1)(c)(ii) –

¹ For the sample guidelines on the first and the second conduct rules, please refer to Paper No. CB(1)2336/10-11(01) and CB(1)2618/10-11(01) respectively.

² Paper No. CB(1) 518/11-12(01) and CB(1) 389/11-12(02) contain overseas case law or examples on contravention of competition law.

“(d) *in the case of service on an undertaking other than a natural person, a body corporate or a partnership –*

(i)

(ii) *by sending it by post in a letter addressed to the undertaking’s ~~usual place of business at any place in Hong Kong at which the undertaking carries on business~~ or, if the undertaking’s address is unknown, addressed to the undertaking’s last known place of business of the undertaking in Hong Kong”;*

(e) **Clause 167(1)(b)(iii)**: to replace “*required*” with “*ordered*”;

(f) **Clause 167(3), 174(1)**: to replace “*secretary*” with “*company secretary*” as proposed in Paper No. CB(1) 922/11-12(01);

(g) **Clause 172(3)**: to amend “*可處第4級罰款或監禁3個月*” in the Chinese text to “*可處第4級罰款及監禁3個月*” to achieve consistency with the English text;

(h) **Section 1 of Schedule 2**: to add the following paragraph to the section to make it clear that the procedures in Schedule 2 also applies to the acceptance of a new commitment to substitute an existing one –

“(c) *accept a new commitment in substitution for such a commitment under section 61.*”;

(i) **Section 2(b) of Schedule 3**: to amend “*而按土地註冊處處長認為適當的方式，根據該條例在土地註冊處註冊*” in the Chinese text to “*而可按土地註冊處處長認為適當的方式，根據該條例在土地註冊處註冊*” to enhance clarity of the English equivalent.

Advice sought

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

**Commerce and Economic Development Bureau
March 2012**

Appendix A

Summary of time limits for competition authorities in selected competition jurisdictions to take action in respect of the imposition of pecuniary penalties

Jurisdiction	Time limit	Details
Australia	<u>Civil track:</u> 6 years	The competition authority may apply to the court for the imposition of pecuniary penalties no later than six years after the contravention of the prohibition against anti-competitive agreement or an abuse of market power.
	<u>Criminal track:</u> No time limit	There is no time limit for the competition authority to apply to the court for the imposition of pecuniary penalties for cartel offences.
Canada	<u>Anti-competitive agreements:</u> No time limit	There is no time limit for the competition authority to apply to the court, whether under the civil or criminal track, to impose pecuniary penalties for anti-competitive agreement or cartel offences.
	<u>Abuse of market power:</u> 3 years	In respect of an abuse of market power, the competition authority may make an application to the Competition Tribunal for the imposition of penalties no more than three years after the anti-competitive practice has ceased.
European Union	5 years	The competition authority may impose fines for anti-competitive agreement or an abuse of market power within five years from the day on which the infringement is committed, or where the infringement is continuing or repeated, five years from the day on which the infringement ceases.
Singapore	No time limit	There is no time limit for the competition authority to impose a financial penalty concerning an infringement of the prohibition against anti-competitive agreement or an abuse of market power.
United Kingdom	No time limit	There is no time limit for the competition authority to impose a financial penalty for an infringement of the prohibition against anti-competitive agreement or an abuse of market power under the civil track. Neither is there any time limit for the application to the court for imposing penalties for the cartel offences.

B1: Extract of section 9A of the UK Company Directors Disqualification Act 1986

(English only)

9A Competition disqualification order

(1) The court must make a disqualification order against a person if the following two conditions are satisfied in relation to him.

(2) The first condition is that an undertaking which is a company of which he is a director commits a breach of competition law.

(3) The second condition is that the court considers that his conduct as a director makes him unfit to be concerned in the management of a company.

(4) An undertaking commits a breach of competition law if it engages in conduct which infringes any of the following—

- (a) the Chapter 1 prohibition (within the meaning of the Competition Act 1998) (prohibition on agreements, etc. preventing, restricting or distorting competition);
- (b) the Chapter 2 prohibition (within the meaning of that Act) (prohibition on abuse of a dominant position);
- (c) Article 81 of the Treaty establishing the European Community (prohibition on agreements, etc. preventing, restricting or distorting competition);
- (d) Article 82 of that Treaty (prohibition on abuse of a dominant position).

(5) For the purpose of deciding under subsection (3) whether a person is unfit to be concerned in the management of a company the court—

- (a) must have regard to whether subsection (6) applies to him;
- (b) may have regard to his conduct as a director of a company in connection with any other breach of competition law;
- (c) must not have regard to the matters mentioned in Schedule 1.

(6) This subsection applies to a person if as a director of the company—

- (a) his conduct contributed to the breach of competition law mentioned in subsection (2);
- (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it;
- (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach.

(7) For the purposes of subsection (6)(a) it is immaterial whether the person knew that the conduct of the undertaking constituted the breach.

(8) For the purposes of subsection (4)(a) or (c) references to the conduct of an undertaking are references to its conduct taken with the conduct of one or more other undertakings.

(9) The maximum period of disqualification under this section is 15 years.

(10) An application under this section for a disqualification order may be made by the OFT or by a specified regulator.

(11) Section 60 of the Competition Act 1998 (c. 41) (consistent treatment of questions arising under United Kingdom and Community law) applies in relation to any question arising by virtue

of subsection (4)(a) or (b) above as it applies in relation to any question arising under Part 1 of that Act.]

B2: Extract of section 168K and Schedule 15 of the Companies Ordinance (Cap. 32)

Section 168K Matters for determining unfitness of directors

(1) Where it falls to a court to determine whether a person's conduct as a director of any particular company or companies makes him unfit to be concerned in the management of a company, the court shall, as respects his conduct as a director of that company or, as the case may be, each of those companies, have regard in particular-

- (a) to the matters mentioned in Part I of the Fifteenth Schedule; and
- (b) where the company has become insolvent, to the matters mentioned in Part II of that Schedule,

and references in that Schedule to the director and the company are to be read accordingly.

(2) Section 168H(2) applies for the purposes of this section and the Fifteenth Schedule as it applies for the purposes of section 168H.

(3) The Financial Secretary may by order modify any of the provisions of the Fifteenth Schedule; and such an order may contain such transitional provisions as may appear to the Financial Secretary necessary or expedient.

(4) In this section and the Fifteenth Schedule, "director" (董事) includes a shadow director.

Schedule 15 MATTERS FOR DETERMINING UNFITNESS OF DIRECTORS

PART I

MATTERS APPLICABLE IN ALL CASES

1. Any misfeasance or breach of any fiduciary or other duty by the director in relation to the company.
2. Any misapplication or retention by the director of, or any conduct by the director giving rise to an obligation to account for, any money or other property of the company.
3. The extent of the director's responsibility for any failure by the company to comply with any of the following provisions-
 - (a) section 81;
 - (b) section 95;
 - (c) section 96;
 - (d) section 107;
 - (e) (Repealed 30 of 1999 s. 40)
 - (f) section 109;
 - (g) section 119A;
 - (h) section 121;
 - (i) section 158; and
 - (j) section 158A.

4. The extent of the director's responsibility for any failure by the directors of the company to comply with sections 122 and 129B.

PART II
MATTERS APPLICABLE WHERE COMPANY HAS BECOME INSOLVENT

1. The extent of the director's responsibility for the causes of the company becoming insolvent.

2. The extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part).

3. The extent of the director's responsibility for the company entering into any transaction or giving any preference, being a transaction or preference liable to be set aside under section 182 or 266.

4. The extent of the director's responsibility for any failure by the directors of the company to comply with section 241.

5. Any failure by the director to comply with any obligation imposed on him by or under any of the following provisions-

- (a) section 190;
- (b) section 211;
- (c) section 228A;
- (d) section 241; (Amended 3 of 1997 s. 64)
- (da) section 274; and (Added 3 of 1997 s. 64)
- (e) section 300A.

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.