

**For discussion
on 29 March 2011**

**Bills Committee on
Competition Bill**

**Responses to Follow-up Questions
Arising From the Meeting on 15 March 2011**

Purpose

This paper responds to questions raised by Members at the meeting on 15 March 2011.

Measure of market concentration

2. The Herfindahl-Hirschman Index (HHI) is a commonly accepted measure of market concentration. To compile the HHI, individual firms' industry / market shares in that sector are required as inputs. According to the United States' (US) Horizontal Merger Guidelines, in evaluating the likely competitive effects of a merger, the US competition authorities may consider both the post-merger level of HHI and the increase in HHI resulting from the merger in conjunction with other relevant evidence. Hence, HHI is normally used as an indicator of the level of concentration in a sector and not a methodology to calculate the market share of an undertaking.

3. The Census and Statistics Department (C&SD) regularly compiles the HHIs for selected economic sectors of Hong Kong to analyse the extent of business concentration within each of these selected sectors⁽¹⁾. The C&SD calculates the HHI of a sector by summing the squares of the individual firms' market shares based on their business receipts⁽²⁾. Higher values of HHI indicate greater sectoral concentration.

(1) The HHIs of selected economic sectors are presented in a featured article on "Statistics on Sectoral Concentration". The latest edition covering data for 2007 and 2008 was published in August 2010.

(2) For example, a sector consisting of four companies with market shares of 30%, 30%, 20% and 20% has an HHI of 0.26 ($0.3^2 + 0.3^2 + 0.2^2 + 0.2^2 = 0.26$). The HHI ranges from 1 (in the case of a pure monopoly) to a number approaching zero (in the case of a market with numerous small players).

“Appreciable adverse effect” and “De minimis” arrangements

4. The notion of “appreciable effect” forms part and parcel of “de minimis” arrangements under the competition laws of many other jurisdictions. For instance, according to the European Commission’s (EC) guidelines⁽³⁾, Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 81(1) of the Treaty establishing the European Community) is not applicable where the impact of the agreement on competition is not appreciable. The EC also sets out in the guidelines the market share thresholds below which agreements between undertakings will generally be regarded as not having an appreciable effect on competition under Article 101(1) of the TFEU. The Competition Commission of Singapore (CCS) essentially adopts the same “de minimis” approach as the EC.

5. This notwithstanding, as explained by the EC and CCS in their guidelines, the fact that the market shares of the parties to an agreement exceed the “de minimis” thresholds does not necessarily mean that the effect of that agreement on competition is appreciable. Other factors, such as the market power of the parties to the agreement, the content of the agreement and the structure of the market or markets affected by the agreement (such as entry conditions or the characteristics of buyers), are also relevant when assessing whether the agreement has an appreciable effect and hence should be caught by a competition law. We have adopted a similar approach. In determining whether there is an appreciable effect in cases where the “de minimis” threshold is exceeded, the future Competition Commission and Competition Tribunal will also have due regard to these factors, similar to the practices of competition authorities in other jurisdictions.

Appointment mechanisms adopted by overseas competition authorities

United Kingdom (UK)

6. Pursuant to Schedule 1 of the Enterprise Act 2002, the Office of Fair Trading (OFT) shall consist of a chairman and no fewer than four

(3) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (2001/C 368/07).

other members as appointed by the Secretary of State. The Secretary of State shall consult the chairman before appointing any other member. The term of appointment of the chairman and other members shall be determined by the Secretary of State. An appointment of a person to hold office as chairman or other member shall be for a term not exceeding five years. A previous appointment as chairman or other member does not affect a person's eligibility for appointment to either office.

Singapore

7. Section 5 and the First Schedule of the Competition Act 2004 stipulate that the CCS shall consist of a Chairman and such other members, not being less than 2 or more than 16, as the Minister for Trade and Industry may from time to time determine. The persons to be appointed by the Minister shall be chosen for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment. A member of the Commission shall hold office on such conditions and for such term of not less than 3 years and not more than 5 years as the Minister may determine, and shall be eligible for re-appointment.

South Korea

8. Chapter 9 of the Monopoly Regulation and Fair Trade Act stipulates that the Fair Trade Commission shall consist of nine commissioners including a chairman, a vice chairman, and four commissioners who shall serve as non-standing members. The President shall appoint the chairman and vice chairman at the recommendation of the Prime Minister, and the other commissioners, at the recommendation of the chairman. The terms of office of the chairman, vice chairman, and commissioners of the Fair Trade Commission shall be three years, and they may be renewed only once. The standing and non-standing commissioners of the Fair Trade Commission shall be appointed from among those persons with experience or specialized knowledge in the field of monopoly regulation and fair trade or consumers and who meet the following qualifications –

- (i) Grade II public officials or higher with experience in monopoly regulation and fair trade; or
- (ii) Judges, prosecutors, or attorneys with at least fifteen years'

experience; or

- (iii) Associate professors, professors, or their equivalent at certified research institutes with at least fifteen years' experience and who majored in law, economics, or business administration at their respective universities; or
- (iv) Business managers or individuals engaged in consumer protection activities with at least fifteen years' experience.

Australia

9. Pursuant to the Competition and Consumer Act 2010, the Australian Competition and Consumer Commission (ACCC) shall consist of a Chairperson and such number of other members as are from time to time appointed on a full-time basis by the Governor-General. Before the Governor-General appoints a person as a member or as Chairperson of the ACCC, the Minister for Competition Policy and Consumer Affairs must be satisfied that the person qualifies for the appointment because of the person's knowledge of, or experience in, industry, commerce, economics, law, public administration or consumer protection. A member of the ACCC holds office for such period, not exceeding 5 years, as is specified in the instrument of his or her appointment and is eligible for re-appointment.

Terms of appointment of members of the Competition Commission

10. According to our legal advice, there is no material difference between the terms "remuneration" and "honorarium". The term "remuneration" in section 3(1) of Schedule 5 of the Competition Bill (the Bill) is more commonly used in other ordinances involving appointment of members of bodies that are established by or appointed under statutes in Hong Kong. Examples include the Airport Authority Ordinance (Cap. 483), the Securities and Futures Ordinance (Cap. 571), the Telecommunications Ordinance (Cap. 106) and the Urban Renewal Authority Ordinance (Cap. 563)⁽⁴⁾. We therefore consider that the term "remuneration" in section 3(1) of Schedule 5 is appropriate in relation to the appointment of members of the Competition Commission

(4) Please refer to section 11(4) of the Airport Authority Ordinance (Cap. 483), section 12 of Schedule 2 to the Securities and Futures Ordinance (Cap. 571), section 32M(9) of the Telecommunications Ordinance (Cap. 106), and section 1(2) of the Schedule to the Urban Renewal Authority Ordinance (Cap. 563).

(Commission).

11. In determining the level of remuneration and allowances for Commission members, considerations will be given to the statutory functions and duties of the Commission, the workload, the demand on members' time, and the recognition of professional expertise and experience required. Reference may also be drawn from arrangements of other statutory bodies.

12. Some examples of appointment arrangements of statutory bodies are given at **Appendix**.

Other drafting issues

13. Our legal advice suggests that the law makes no distinction between the duties of non-executive directors and directors. In so far as a company is concerned, all directors are equally responsible for the management of that company. In light of that, we consider it appropriate to cover independent non-executive director by the definition of "officer" under section 5(3) of Schedule 5 to the Bill.

14. We take note of the discrepancy between the Chinese and English texts of section 5(1)(d) of Schedule 5 to the Bill and will rectify this through Committee Stage Amendment when we resume second reading debate of the Bill.

Advice sought

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

**Commerce and Economic Development Bureau
March 2011**

Remuneration for non-official members of selected statutory bodies^{Note}

No.	Name of Board/Committee	No. of non-officials	Average no. of meetings per year	Remuneration for non-officials	
				Rate	Approving Authority/ Relevant Legislation, if applicable
1.	Airport Authority	13	4 Board meetings + variable number of committee meetings	<u>Chairman</u> \$220,000 per annum <u>Member</u> \$110,000 per annum	Chief Executive/ Airport Authority Ordinance (Section 11(4), Cap. 483)
2.	Board of the Urban Renewal Authority (URA)	18 (Non-executive directors)	17 (the Chairman and members also attend other sub-committee meetings)	<u>Chairman</u> \$100,000 per annum <u>Members</u> \$65,000 per annum	Chief Executive/ Paragraph 1(1) of the Schedule, Urban Renewal Authority Ordinance (Schedule, Cap. 563) Financial Secretary/ Paragraph 2(1) of the Schedule, Urban Renewal Authority Ordinance (Schedule, Cap. 563) Remuneration will be funded by the URA.

^{Note} The information is extracted from a document titled “List of Advisory and Statutory Bodies with Remuneration for Non-Official Members (as at 30-09-2010)” issued by the Financial Services and the Treasury Bureau, which is accessible at website <http://www.fstb.gov.hk/tb/eng/info/payment.html>

No.	Name of Board/Committee	No. of non-officials	Average no. of meetings per year	Remuneration for non-officials	
				Rate	Approving Authority/ Relevant Legislation, if applicable
3.	Equal Opportunities Commission (EOC)	1 EOC Chairperson and 16 EOC Members	25 (covering both EOC and its committee meetings)	Members: Not remunerated The Chairperson is remunerated at D8 of the Directorate Pay Scale.	Chief Executive/ Sex Discrimination Ordinance (Para 1(1) of Schedule 6, Cap. 480)
4.	Independent Police Complaints Council	18	18	<u>Chairman:</u> \$3,630 per month <u>Vice-Chairman:</u> \$2,260 per month <u>Member:</u> \$1,960 per month	Chief Executive/ Section 6 of Schedule 1 to the Independent Police Complaints Council Ordinance, Cap. 604.

No.	Name of Board/Committee	No. of non-officials	Average no. of meetings per year	Remuneration for non-officials	
				Rate	Approving Authority/ Relevant Legislation, if applicable
5.	Securities and Futures Commission	1 Chairman 7 Non-Executive Directors	12 regular meetings + variable number of special meetings	<u>Chairman</u> \$58,500 per month <u>Non-Executive Directors</u> \$19,500 per month	Chief Executive/ Securities and Futures Ordinance (Section 1 of Part 1 of Schedule 2, Cap. 571). The expenses are funded by the Securities and Futures Commission.
6.	Telecommunications (Competition Provisions) Appeal Board	1 Chairman 1 Deputy Chairman 10 panel members	4	<u>Chairman</u> \$400,000 annual retainer \$4,000 per hour (service payment) <u>Deputy Chairman</u> \$300,000 annual retainer \$4,000 per hour (service payment) <u>Panel Members</u> \$770 per attendance	Financial Secretary / Telecommunications Ordinance (Section 32M(9), Cap. 106)