

**For discussion  
on 13 April 2011**

**Bills Committee on  
Competition Bill**

**Responses to Follow-up Questions  
Arising From the Meeting on 29 March 2011**

**Purpose**

This paper responds to questions raised by Members at the meeting on 29 March 2011.

**Canadian competition law model**

2. The Administration notes the comments made by some business sector stakeholders, including the Hong Kong General Chamber of Commerce (HKGCC), on the proposed adoption of the Canadian competition law model, in particular their “two-track approach” in tackling agreements between competitors (horizontal agreements).

3. Under sections 45 and 47 of the Canadian Competition Act (the Act), specifically defined categories of horizontal agreements, namely price fixing, market allocation, output control and bid-rigging will be subject to a strict “per se” criminal prohibition (i.e. such conducts are prohibited regardless of whether they have the object or effect to affect competition). The maximum sanctions for the first three types of conduct are 14 years of imprisonment or 25 million Canadian Dollars in fines (approximately equivalent to HKD 203 million) or both. For bid-rigging, a contravention will be subject to a fine in the discretion of the court or a maximum of 14 years of imprisonment or both. Meanwhile, other forms of agreements between competitors may be subject to review by the Canadian Competition Tribunal (the Tribunal), on application by the Commissioner of Competition, under a new non-criminal framework in section 90.1 of the Act. Where it is established that the agreements prevent or lessen, or are likely to prevent or lessen competition substantially in a market, the Tribunal may make an order (i) prohibiting any person, whether or not a party to the agreement

or arrangement, from doing anything under the agreement or arrangement; or (ii) requiring any person, whether or not a party to the agreement or arrangement, with the consent of that person and the Commissioner, to take any other action.

4. Although the scope of coverage of anti-competitive conduct in the Canadian competition law is generally similar to that of the Competition Bill (the Bill) and many competition regimes in other jurisdictions, the use of form-based “per se” prohibition and criminal sanction is very different from what has been proposed in the Bill. The Canadian approach to adjudication and remedies, including the imposition of more severe penalties on specific types of horizontal agreements, has been developed over many years to take into account Canada’s own circumstances. Since the Bill follows a model based solely on civil remedies, if we were to adopt the Canadian non-criminal review framework, we would significantly dilute the deterrent effect of the Bill. Therefore, we do not consider such an approach suitable for Hong Kong.

5. For the less serious infringements, the Bill provides for a commitment mechanism under which the Competition Commission (the Commission) is empowered to accept commitments from a person to take or refrain from taking certain actions to address the Commission’s concerns about a possible contravention of the competition rules in exchange for cessation of investigation and/or proceedings against the person. We consider such a commitment mechanism, which is meant to deal with possible contravention of a competition rule of lesser scale and severity, as comparable to the non-criminal review framework under section 90.1 of the Act.

### **The Herfindahl-Hirschman Index**

6. As pointed out in our earlier response (LC Paper No. CB(1)1684/10-11(02)), compilation of the Herfindahl-Hirschman Index (HHI) for a particular industry require individual firms’ market shares in that industry as inputs. In other words, whilst HHI is a useful indicator of the level of concentration in an industry, it has no particular reference value for the future Commission in calculating the market share of an undertaking.

7. It is also worth noting that the HHIs for selected economic sectors of Hong Kong regularly published by the Census and Statistics

Department (C&SD) are compiled on a broad “industry” basis classified according to the Hong Kong Standard Industrial Classification (HSIC)<sup>(1)</sup>. The relevant statistics in selected industry groups for 2007 and 2008 are given at **Appendix**. Given the general nature of the industry share data adopted in compiling the HHIs, the data would normally not be suitable for use to calculate the market share for the purpose of conducting competition analysis.

## **Issues relating to Schedule 5**

### *Filling of vacancy under section 7(2)*

8. Our policy intention is that the term of office of a person filling a vacancy of a Commission member under section 7 of Schedule 5 might be longer than the remainder of the term of that member. This is to allow flexibility in appointing member to fill a vacant office, having regard to all relevant factors and circumstances. As stipulated by section 2(3) of Schedule 5, the term of office of a Commission member should in any event not exceed three years. This maximum length of the term of office should also be applicable to a member filling a vacancy. We will consider suitable amendments to both the English and Chinese versions of section 7(2) for clarity purpose.

### *Upper limit on the number of Commission members in section 2(1)*

9. In response to Members’ request that we provide examples of other statutory bodies which do not set any cap on the number of members, it is noted that the Securities and Futures Ordinance (Cap. 571) does not impose a cap on the number of members of the Securities and Futures Commission (SFC)<sup>(2)</sup>. Similarly, there is no upper limit for the number of members of the Independent Police Complaints Council

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(1) HSIC is a statistical classification framework for classifying economic units into industry classes based on their major activities. The framework is modeled on the United Nations’ International Standard Industrial Classification of All Economic Activities.

(2) Section 1 of Schedule 2 to the Securities and Futures Ordinance (Cap. 571) provides that the SFC shall consist of a chairman, a chief executive officer and such number of other executive and non-executive directors as is determined by the Chief Executive (CE). The CE shall appoint not less than 8 members to the SFC, and the number of non-executive directors of the SFC shall exceed the number of executive directors of the SFC.

(IPCC)<sup>(3)</sup> and the Urban Renewal Authority (URA)<sup>(4)</sup>. On the other hand, some ordinances impose a cap on the number of members to be appointed to the statutory bodies set up by them. The number varies from less than 10 to over 20.

10. Section 2(1) of the Bill provides that the Commission is to consist of not less than 5 members appointed by the Chief Executive (CE). Flexibility is built in so that the CE may appoint more members to the Commission having regard to the actual operation and workload of the Commission, and other relevant considerations such as the availability of suitable candidates for appointment. We will further consider Members' suggestion of imposing a cap to increase certainty of the scale of operation of the Commission, taking into account the cap used in other ordinances.

*Appointment of a Chief Executive Officer under section 10*

11. In determining the level of remuneration for the Chief Executive Officer (CEO) of the Commission, considerations will be given to the statutory functions and duties of the Commission, the workload, the professional expertise and experience required, and the prevailing level of remuneration in the market for experts in relevant fields such as accounting, economics and law. In Hong Kong, there is no readily available benchmark for jobs comparable to the Commission's CEO given the unique ambit of the Bill. Nonetheless, it is noted that the CEO of the SFC, which has certain investigative powers similar to that of the Commission, was paid a salary of \$7,200,000 in 2010<sup>(5)</sup>. The Chairperson of the Equal Opportunities Commission, who is appointed on a full-time basis, is remunerated at D8 level of the Directorate Pay Scale of the Government, i.e. around \$3,600,000.

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(3) Section 5(1) of the Independent Police Complaints Council Ordinance (Cap. 604) provides that the IPCC consists of a Chairman and 3 Vice-Chairmen appointed by the CE, and not less than 8 other members appointed by the CE.

(4) Section 4(1) of the Urban Renewal Authority Ordinance (Cap. 563) provides that the Board of the URA comprises a Chairman, a Managing Director of the URA, 2 other executive directors, not less than 7 other non-executive directors (not being public officers), and 4 other non-executive directors who are public officers.

(5) The figure includes salaries, allowances and benefits in kind, and excludes discretionary pay and retirement scheme contribution. Information is extracted from the SFC 2009/10 Annual Report.

*Convening a meeting under section 12(3)*

12. The policy intention behind section 12(3) of Schedule 5 is to enable members of the Commission to convene a meeting to discuss matters of concerns. The threshold of two or more members of the Commission for the purpose of convening a meeting would strike a balance between the need of good governance and efficient operation of the Commission. Similar approach is adopted for the SFC<sup>(6)</sup> and the Airport Authority<sup>(7)</sup>.

*Section 13(2) and section 15(1)*

13. It is our intention that members who participate in a meeting of the Commission by telephone, video conferencing or other electronic means would be regarded as being present for the purpose of both determining the quorum under section 13(2) and voting under section 15(1). Similar provision appears in section 17 of Schedule 2 to the Securities and Futures Ordinance (Cap. 571)<sup>(8)</sup> relating to the conduct of meetings of the SFC. For the sake of clarity, we will consider deleting the clause “*For the purpose of determining the quorum*” and “*為斷定法定人數*” in the English and Chinese version of section 13(2) respectively.

14. We have also reviewed the use of the phrase “other electronic means” in section 13(2) and consider it appropriate from a drafting perspective. This expression has been used consistently in the same context in other ordinances such as the Securities and Futures Ordinance (Cap. 571) (see footnote 8) and the Financial Reporting Council

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(6) Section 14 of Schedule 2 to the Securities and Futures Ordinance (Cap. 571) provides that meetings of the Commission shall be held as often as may be necessary for the performance of its functions, and may be convened by the chairman, deputy chairman, chief executive officer, or any 2 other members, of the Commission.

(7) Section 11(12) of the Airport Authority Ordinance (Cap. 483) provides that a meeting of the Board may be convened by the Chairman or any other 2 members of the Authority.

(8) Section 17 of Schedule 2 to the Securities and Futures Ordinance (Cap. 571) provides that a member of the SFC shall be regarded as being present at a meeting of the SFC if he participates in the meeting by telephone, video conferencing or other electronic means, provided he is able to hear the other members present at the meeting and they are able to hear him.

Ordinance (Cap 588)<sup>(9)</sup>.

15. As regards the provision relating to the use of telephone, video conferencing or other electronic means, we believe that this will facilitate the conduct of business of the Commission if the circumstances so require. It is noted that this provision is common in legislation governing other statutory bodies such as the SFC, the Hong Kong Deposit Protection Board<sup>(10)</sup>, and the Financial Reporting Council (see footnote 9). The Commission may determine the manner of conducting its meeting (including through electronic means) and devise internal rules to regulate the procedures, taking account of the relevant confidentiality obligations under Part 8 of the Bill.

*Section 18(d)*

16. We note Members' concerns about section 18(d) of Schedule 5, and are seeking legal advice and reviewing the drafting of this particular sub-section. We would separately respond to Members' enquires in our subsequent submission.

**Advice sought**

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

**Commerce and Economic Development Bureau  
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(9) Section 6(5) of Schedule 2 to the Financial Reporting Council Ordinance (Cap. 588) provides that a member of the Council is regarded as being present at a meeting of the Council if (a) he participates in the meeting by telephone, video conferencing or other electronic means; and (b) he is able to communicate with the other members present at the meeting and they are able to communicate with him.

(10) Section 5(1) of Schedule 2 to the Deposit Protection Scheme Ordinance (Cap. 581) provides that meetings of the Hong Kong Deposit Protection Board are to be held at such times and places, and in such manner (including by electronic means), as the Chairman of the Board may decide.

**Appendix**

**Herfindahl-Hirschman Indices (HHIs) in  
selected industry groups of Hong Kong, 2007 and 2008**

<u>Industry group</u>	<u>Year</u>	<u>Number of establishments</u>	<u>HHI</u>
<i>Manufacturing</i>			
Food	2007	745	0.025
	2008	768	0.015
Wearing apparel (except knitwear and footwear)	2007	1 044	0.022
	2008	967	0.023
Textiles (including knitting)	2007	1 157	0.013
	2008	1 069	0.016
Paper products, printing and publishing	2007	3 954	0.015
	2008	3 943	0.012
Basic metals, fabricated metal products, machinery and equipment	2007	2 730	0.186
	2008	2 642	0.326
Electrical and electronic products	2007	494	0.159
	2008	511	0.066
<i>Construction</i>			
New construction works – Pre-erection works at construction sites	2007	113	0.080
	2008	118	0.096
New construction works – Architectural and civil engineering works at construction sites	2007	431	0.019
	2008	524	0.022
Decoration, repair and maintenance	2007	7 608	0.003
	2008	6 607	0.003

<u>Industry group</u>	<u>Year</u>	<u>Number of establishments</u>	<u>HHI</u>
<i>Wholesale, retail and import and export trades, restaurants and hotels</i>			
Wholesale of food, alcoholic drinks and tobacco	2007	2 686	0.015
	2008	2 590	0.008
Wholesale of clothing, footwear and allied products	2007	2 678	0.005
	2008	2 780	0.004
Wholesale of other commodities, not elsewhere classified	2007	8 875	0.006
	2008	9 300	0.005
Retail of food, alcoholic drinks and tobacco	2007	14 303	0.071
	2008	13 982	0.071
Retail of fuel	2007	251	0.058
	2008	260	0.026
Retail of clothing, footwear and allied products	2007	10 366	0.014
	2008	10 962	0.016
Retail of other durable goods and consumer goods, not elsewhere classified	2007	21 382	0.010
	2008	22 284	0.011
Retail of transport equipment	2007	683	0.080
	2008	687	0.064
Import and export of food, alcoholic drinks and tobacco	2007	3 828	0.005
	2008	3 656	0.003
Import and export of clothing, footwear and allied products	2007	14 053	0.010
	2008	15 976	0.015
Import and export of other durable goods and consumer goods	2007	38 946	0.003
	2008	38 840	0.003
Chinese restaurants	2007	5 264	0.003
	2008	6 084	0.003



<u>Industry group</u>	<u>Year</u>	<u>Number of establishments</u>	<u>HHI</u>
Fast food shops	2007	1 105	0.069
	2008	1 341	0.094
Hotels and boarding houses	2007	832	0.020
	2008	840	0.019
<i><u>Transport, Storage and Communications</u></i>			
Land passenger transport	2007	14 214	0.125
	2008	14 084	0.208
Land freight transport	2007	7 958	0.002
	2008	7 528	0.002
Ocean and coastal water transport	2007	326	0.202
	2008	330	0.179
Inland water transport	2007	374	0.051
	2008	329	0.045
Air transport	2007	91	0.435
	2008	96	0.467
Storage	2007	250	0.025
	2008	293	0.040
Telecommunications	2007	258	0.079
	2008	330	0.071
<i><u>Financing, insurance, real estate and business services</u></i>			
Banking	2007	197	0.069
	2008	196	0.075
Investment and holding companies	2007	2 654	0.140
	2008	2 305	0.129

<u>Industry group</u>	<u>Year</u>	<u>Number of establishments</u>	<u>HHI</u>
Stock and share companies and commodity futures and gold bullion brokers/dealers	2007	597	0.050
	2008	659	0.056
Insurers	2007	155	0.079
	2008	160	0.082
Insurance agents, brokers and insurance services, not elsewhere classified	2007	1 762	0.021
	2008	2 058	0.019
Real estate development and/or leasing	2007	3 134	0.021
	2008	4 287	0.017
Real estate maintenance management	2007	581	0.048
	2008	470	0.031
Real estate brokerage and agency	2007	1 411	0.157
	2008	1 333	0.088
Legal services	2007	1 859	0.018
	2008	2 117	0.027
Accounting, auditing and bookkeeping services	2007	3 648	0.077
	2008	2 832	0.092
Information technology related services	2007	3 898	0.009
	2008	3 048	0.019
Architectural, surveying and project engineering services related to construction and real estate activities	2007	1 304	0.034
	2008	1 445	0.021
Advertising and related services	2007	3 929	0.013
	2008	4 148	0.021