

**For discussion
on 28 April 2011**

**Bills Committee on
Competition Bill**

**Responses to Follow-up Questions
Arising From the Meeting on 13 April 2011**

Purpose

This paper responds to questions raised by Members at the meeting on 13 April 2011.

Draft regulatory guidelines

2. The Administration notes Members' request for details on the interpretation and implementation of the proposed conduct rules during the scrutiny of the Competition Bill (the Bill). We shall prepare discussion papers on the key elements of the draft regulatory guidelines of the conduct rules and will present them to the Bills Committee when they are ready.

“De minimis” arrangements and commitment mechanism

3. We note Members' comments relating to the “de minimis” arrangements and the commitment mechanism under the Bill and will brief Members on the way forward in due course.

Impact of competition law enforcement

4. Based on the information available, we note that the UK Office of Fair Trading (OFT) has estimated in a recent evaluation report⁽¹⁾ that its

(1) Positive Impact 09/10 – Consumer benefits from the OFT's work, OFT 1251, July 2010.

work on competition enforcement had brought about average annual consumer savings amounting to £84 million over the period 2007 to 2010. The OFT considered this to be a lower range estimate of the direct financial benefits to consumers. It is worked out based on case-specific conservative assumptions on price overcharge and estimated duration of the overcharge, and does not include the significant deterrent effect of the OFT's competition enforcement actions⁽²⁾. If the deterrence effect is taken into account, the savings would have increased to £506 million. The OFT further noted that the wider benefits of competition law enforcement such as the boosting impact on consumer and business confidence, innovation and productivity, though not quantifiable, should not be ignored.

Issues relating to Schedule 5

Donations to the Competition Commission

5. As the Competition Commission (the Commission) would be fully funded by the Government, the Commission should not normally need to solicit donations. However, there may be gifts and donations to the Commission, in cash or in kind, that would be beneficial for the furtherance of the Commission's objectives, such as sponsorships from or co-operation with other organizations on public awareness campaigns. Hence, we consider that section 21 of Schedule 5 as presently drafted would allow the Commission such flexibility to consider receipt of gifts or donations on a case-by-case basis, taking account of its rules on conflict of interest to be made under section 32 of Schedule 5 and its accountability to the public. While some pieces of legislation governing statutory bodies are silent on the questions of gifts and donations, provisions in legislation expressly providing that resources of a statutory body or its welfare fund include donations are not uncommon. Examples include the legislation governing the Equal Opportunities Commission (EOC)⁽³⁾, the Independent Police Complaints Council

(2) See "The deterrent effect of competition enforcement by the OFT", OFT 962, November 2007. The research, based on surveys of competition lawyers and businesses, indicated the ratio of anti-competitive actions abandoned or modified because of the risk of an investigation to those resulting in a Competition Act 1998 decision for the period 2000-2006. According to the survey of Competition Lawyers the ratio was: five to one for cartels, seven to one for commercial agreements, and four to one for abuses of dominance.

(3) Section 15(1) of Schedule 6 to the Sex Discrimination Ordinance (Cap. 480) provides that the resources of the Equal Opportunities Commission shall consist of all money paid to the Commission by the Government or provided by the Government to the Commission, and all other money and property, including gifts, donations, fees, rent, interest and accumulations of income received by the Commission.

(IPCC)⁽⁴⁾, the Independent Commission Against Corruption (ICAC)⁽⁵⁾, the Legislative Council Commission⁽⁶⁾ and the Privacy Commissioner for Personal Data⁽⁷⁾. On the other hand, we are not aware of any statute that explicitly disallows a statutory body from receiving gifts and donations.

Establishment of committees under the Commission

6. The powers to establish, discharge or re-constitute committees, etc. of the Commission under section 28 of Schedule 5 are similar to other statutory bodies, including the EOC, the Financial Reporting Council, the IPCC, the Securities and Futures Commission, and the Urban Renewal Authority. Examples of the relevant legislative provisions are at **Appendix**.

Delegation by the Commission

7. It is common in provisions specifying the scope of delegations by other statutory bodies to provide a list of functions that are not delegable. We follow similar formulation in section 29(2) of Schedule 5 in order to set out clearly the limits of the Commission's power to delegate. Those non-delegable functions relate to the core functions of the Commission that have substantial and read-across implications to both the Commission and the undertakings concerned, such as bringing of proceedings before the Competition Tribunal (except those relating to

(4) Section 25 of Schedule 1 to the Independent Police Complaints Council Ordinance (Cap. 604) provides that the resources of the Council consist of all money paid to the Council by the Government, and all other money and property, including fees, gifts, donations, interest and accumulations of income received by the Council.

(5) Section 17A of the Independent Commission Against Corruption Ordinance (Cap. 204) provides for the establishment of a welfare fund of the Commission, which shall consist of such donations and voluntary contributions as may be made thereto.

(6) Section 12 of the Legislative Council Commission Ordinance (Cap. 443) provides that the resources of the Commission shall consist of all money paid to the Commission by the Government or provided by the Government to the Commission, and all other money and property, including gifts, donations, fees, rent, interest and accumulations of income received by the Commission.

(7) Section 1(1) of Schedule 2 to the Personal Data (Privacy) Ordinance (Cap. 486) provides that the resources of the Privacy Commissioner for Personal Data shall consist of all money paid to the Commissioner by the Government or provided by the Government to the Commissioner, and all other money and property, including gifts, donations, fees, rent, interest and accumulation of income received by the Commissioner.

interim order) and the issue of block exemption orders that apply to a class of agreements.

8. We note that the request of Members for a list of power and functions of the Commission in the Bill that can be delegated under section 29 of Schedule 5. Since power and functions of the Commission are covered by different clauses / sections scattered in the Bill, we will compile a consolidated list and present it to the Bills Committee in due course.

Irregularity in procedures adopted by the Commission

9. Our policy intent behind section 18(d) of Schedule 5 is to ensure that decisions of the Commission would not be invalidated simply due to some minor technicality related to procedures. In order to address Members' concerns about legal clarity of this sub-section raised at the meeting on 29 March 2011, we could consider the following two possible options: (i) replacing the words "*merit of the decision taken*" with "*outcome of the decision taken*" or simply "*the decision taken*" which is more objective; and (ii) instead of or in addition to (i), including a validating mechanism as to whether the irregularity concerned affects the outcome of the decision, such as inserting the words "*in the opinion of the Chairman of the Commission*" into the sub-section. We welcome views from Members on this.

Advice sought

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

**Commerce and Economic Development Bureau
April 2011**

**Provisions relating to the establishment of committees
by selected statutory bodies**

Statutory Body	Legislative Provision
Equal Opportunities Commission under the Sex Discrimination Ordinance (Cap. 480)	<p>Section 64. Functions and powers of Commission</p> <p>2) The Commission may do all such things as are necessary for, or incidental or conducive to, the better performance of its functions and in particular but without prejudice to the generality of the foregoing, may-</p> <p>(a) establish such committees as it thinks fit; ...</p> <p><u>Schedule 6</u></p> <p>12. Members of committees</p> <p>The Commission-</p> <p>(a) may appoint members of the Commission, and persons who are not such members, to be members of a committee; and</p> <p>(b) shall appoint the chairman of a committee and determine the number of members of a committee.</p>

Statutory Body	Legislative Provision
<p>Independent Police Complaints Council under the Independent Police Complaints Council Ordinance (Cap. 604)</p>	<p><u>Schedule 1</u></p> <p>17. Establishment of committees The Council may from amongst its members establish committees, panels or sub-groups to assist the Council in the performance of any of its functions under this Ordinance.</p> <p>18. Chairman of committee (1) The chairman of a committee must be elected from amongst its members. (2) The chairman of a committee must preside at a meeting of the committee. (3) If the chairman of a committee is absent or vacates the chair, a member of the committee elected from amongst the members of the committee present must preside at the meeting.</p> <p>24. Committee may determine its own procedure Subject to the other provisions of this Ordinance, each committee may determine its own procedure.</p>
<p>Financial Reporting Council under the Financial Reporting Council Ordinance (Cap. 588)</p>	<p><u>Schedule 2</u></p> <p>8. Committees (1) The Council may establish committees for any general or special purposes as it thinks fit. (2) The Council shall appoint one of its members to be the chairman of such a committee. (3) The Council may appoint other members of such a committee. The number of such other members who are members of the Council is to exceed the number of those who are not. (4) The procedure for convening meetings of such a committee and for the conduct of business at those meetings is, subject to any direction of the Council, to be determined by the committee.</p>

Statutory Body	Legislative Provision
<p>Securities and Futures Commission under the Securities and Futures Ordinance (Cap. 571)</p>	<p>Section 8. Commission may establish committees</p> <p>(1) The Commission may establish-</p> <ul style="list-style-type: none"> (a) standing committees; and (b) special committees. <p>(2) The Commission may refer a matter to a committee established under this section for consideration, inquiry or management.</p> <p>(3) The Commission may appoint a person to be a member of a committee established under this section, whether or not the person is a member of the Commission, and may appoint a member of the committee to be the chairman of the committee.</p> <p>(4) A reference of a matter to a committee under subsection (2) does not prevent the Commission from performing any of its functions.</p> <p>(5) The Commission may-</p> <ul style="list-style-type: none"> (a) withdraw a reference under subsection (2) from a committee; (b) revoke an appointment of a member or chairman of a committee under subsection (3). <p>(6) A committee established under this section may elect one of its members-</p> <ul style="list-style-type: none"> (a) to be its chairman if a chairman has not been appointed by the Commission under subsection (3); or (b) to act as its chairman for any period during which a chairman appointed by the Commission under subsection (3) is unable to act as chairman due to illness, absence from Hong Kong or any other cause, <p>and may at any time remove the member so elected from the office of the chairman.</p> <p>(7) A committee established under this section may, subject to the provisions of this Ordinance, regulate its own procedure and business.</p>

Statutory Body	Legislative Provision
	<p>(8) A committee established under this section shall meet when and where the chairman of the committee determines, subject to any procedure fixed by the committee and any direction given by the Commission under subsection (9).</p> <p>(9) The Commission may give directions to a committee established under this section, whether generally or in any particular case, and whether regarding the manner in which it shall act or otherwise, and the committee shall act in accordance with any such directions.</p>
<p>Urban Renewal Authority under the Urban Renewal Authority Ordinance (Cap. 563)</p>	<p><u>Schedule</u></p> <p>5. Board of Authority may establish committees</p> <p>(1) The Board of the Authority may create, and appoint the members of, such committees for the better carrying out of the purposes and powers of the Authority as it thinks fit.</p> <p>(2) Persons who are not members of the Board of the Authority are eligible for appointment to committees.</p> <p>(3) The chairman of a committee created under subsection (1) shall be appointed by the Board of the Authority and the number of members of a committee shall be determined by the Board of the Authority.</p> <p>(4) Subject to the terms of any delegation by the Board of the Authority, or to any directions of the Board of the Authority, a committee-</p> <ul style="list-style-type: none"> (a) may exercise and perform the delegated powers and duties with the same effect as if it were the Board of the Authority itself; (b) shall be presumed to be acting in accordance with the terms of the delegation in the absence of proof to the contrary; (c) may regulate its own procedure.

Statutory Body	Legislative Provision
	<p>(5) The proceedings of any committee created under subsection (1) shall not be invalidated by any defect in the appointment of any member thereof, the absence of any such member from the meeting at which any such proceedings occurred or any vacancy among such members.</p>