

**For discussion
on 8 May 2012**

Bills Committee on Competition Bill

Responses to Committee Stage Amendments Proposed by Hon Albert Ho and Hon Ronny Tong

Purpose

This paper responds to the committee stage amendments (CSAs) proposed by Hon Albert Ho and Hon Ronny Tong.

Proposed CSAs

2. The CSAs proposed by Hon Albert Ho (see LC Paper No. CB(1)1770/11-12(04)) provide for the addition of a sunset clause so that clauses 3, 4 and 5 would cease to have effect three years after the coming into operation of these clauses.
3. The CSAs proposed by Hon Ronny Tong (see LC Paper No. CB(1)1770/11-12(05)) provide for the deletion of the definition of “statutory body” in clause 2 and the deletion of clauses 3, 4 and 5.

The Administration’s Views

4. Clause 3(1) of the Competition Bill (the Bill) provides that Part 2 and Schedule 7 (relating to the competition rules), and Parts 4 and 6 (relating to enforcement by the Competition Commission (Commission) and the Competition Tribunal (Tribunal)) would not apply to statutory bodies or their activities unless the Chief Executive in Council (CE in Council) determines otherwise by way of regulations to be made under clause 5(1)(a) of the Bill. Clause 4 and clause 5(1)(b) of the Bill also provide that the abovementioned parts and schedules will not apply to specified persons or their activities if the CE in Council makes regulations under clause 5(1)(b) of the Bill to disapply these provisions. Regulations made under clause 5 of the Bill will be subject to negative vetting by the Legislative Council (“LegCo”). Removal of clauses 3, 4 and 5 would effectively remove the exemption mechanism targeting at particular persons.

5. As explained in previous responses to the Bills Committee, the majority of statutory bodies in Hong Kong do not engage in economic activities or are engaged in an insignificant amount of economic activities. For the other statutory bodies engaging in economic activities, the economic activities concerned are directly related to the provision of an essential public service or the implementation of public policy.

6. Case law in overseas jurisdictions suggests that entities with no economic activities and economic activities of the abovementioned categories are usually excluded from the application of the competition law. The proposed exemption arrangement for statutory bodies is to ensure efficient implementation of public policies as well as that measures which are required to respond swiftly to the needs of the community would not be affected by the introduction of the competition law in Hong Kong. It would help eliminate the uncertainties as to whether certain activities of a statutory body, which may form part of its core statutory functions, might be alleged as anti-competitive, and hence ensure the un-interrupted provision of public service and/or implementation of public policy that the statutory body is tasked to perform.

7. Even though exempted bodies are not subject to the competition rules in the Bill, they are still required to adhere to the competition principle underpinning the rules. The Administration will ensure that these exempted bodies would not undertake anti-competitive activities unless there are justifiable causes. Exempted bodies found to have acted against the competition principle would be requested to rectify their anti-competitive behavior. As a final resort, the CE in Council may make regulation under clause 5(1)(a) to apply the competition rules and the enforcement provisions to a statutory body subject to the fulfillment of the criteria in clause 5(2), and repeal any regulation made under clause 5(1)(b) to remove the exemption for non-statutory bodies.

8. In light of the above, we could not accept the CSAs set out in paragraphs 2 and 3 above.

Advice Sought

9. Members are invited to note the content of the paper.