

Bills Committee on Competition Bill

Responses to follow-up questions arising from the meeting on 8 May 2012

Purpose

This paper responds to questions raised by Members at the meeting on 8 May 2012.

Exemption Arrangements

2. Some Members suggested that the Administration should keep the exemption arrangements for statutory bodies under review so as to ensure that the arrangements would be reasonable and that statutory bodies not suitable for exemption would be excluded from the exemption arrangements as appropriate.

3. As explained at the meeting, the exemption arrangements for statutory bodies aim to ensure that the provision of public services and / or the implementation of public policies by statutory bodies would not be interrupted by the introduction of a competition law in Hong Kong. These exempted statutory bodies are still required to adhere to the competition principles underpinning the competition law and should not engage in anti-competitive conducts unless there are justifiable causes. The Administration will require exempted statutory bodies engaged in anti-competitive conducts to rectify their acts. The Competition Bill (the Bill) also empowers the Administration to exclude such statutory bodies from the exemption arrangements as a last resort. In light of the above, we consider that there are sufficient checks and balances on the exemption arrangements. We will keep in view whether there will be problems arising from the exemption arrangements and review them as we gain more experience and expertise in enforcing the new competition law in Hong Kong and in dealing with cases concerning exempted statutory bodies.

Conduct Rules

4. Some Members suggested that the wordings of the first conduct rule in clause 6(1) and the exclusion for the first conduct rule in section 1 of Schedule 1 to the Bill should be replaced by those adopted in the merger rule in section 3(1) of Schedule 7 and in the exclusion for the merger rule in section 8(1) of Schedule 7 of the Bill respectively.

5. As explained in our previous responses to the Bills Committee, the current formulation of both the first conduct rule and the merger rule as well as their corresponding exclusion clauses are modelled on the corresponding competition provisions in the European Union, the United Kingdom and Singapore. There are plenty of case law and a wealth of jurisprudence in these overseas jurisdictions from which the future Competition Commission and the Competition Tribunal can draw reference in enforcing the competition law. Moving away from the current formulation of conduct rules and exclusion clauses would lead to the loss of application of a large pool of case law and jurisprudence, thereby creating uncertainty for the business sector in Hong Kong. With the introduction of the warning notice for alleged contravention of the first conduct rule for agreements not involving serious anti-competitive conduct (which are defined in the Bill), the concerns over legal certainty in the application of the general prohibitions should have been addressed. The Bill also requires the Competition Commission to issue regulatory guidelines on the conduct rules which would also help the business sector have a clearer understanding on the application of these rules. In light of the above, we do not suggest amending the current formulation of the first conduct rule and the corresponding exclusion clause in section 1 of Schedule 1 to the Bill.

Drafting Issues

6. At the meeting of 8 May 2012, some Members also suggested that amendments should be made to the Chinese text of clauses 106, 117(1) and related clauses (clauses 117(2), 119(1), 120(1) and 141(1)(a)), clauses 141(1)(f), section 6(1) of Schedule 1, as well as the English text of clause 153A(2). We accept Members' suggestions and propose to amend the clauses and sections as follows -

- (a) clause 106 – to further amend the Chinese text of clause 106 as follows to enhance clarity -

“106. 不得在本條例以外提起法律程序

在以下情況下，任何人不可在香港的任何法院，以被告人違反或牽涉入違反行為守則為訴訟因由，在本條例以外另行提起法律程序，不論是根據任何普通法法則或是根據成文法則亦然。—

(a) 有關訴訟因由是被告人違反或牽涉入違反行為守則；或

(b) 有關法律程序基於多於一個訴訟因由，而其中任何訴訟因由是被告人違反或牽涉入違反行為守則。”；

(b) clauses 117(1), 117(2), 119(1), 120(1) and 141(1)(a) – to amend the phrase “或牽涉入指稱的違反” in the Chinese text of clauses 117(1), 117(2), 119(1), 120(1) and 141(1)(a) to read “或指稱牽涉入違反” to better correspond to the English equivalent “alleged involvement in a contravention”;

(c) clause 141(1)(f) – to amend the phrase “實際上” in the Chinese text of clause 141(1)(f) to read “實質上”;

(d) section 6(1) of Schedule 1 – to further amend the Chinese text of section 6(1) to read “如某業務實體在營業期的營業額不超過\$40,000,000，第二行為守則不適用於該業務實體從事的行為。” to enhance clarity; and

(e) clause 153A(2) - to amend the phrase “*interlocutory order*” after “of any prescribed description” in the English text of clause 153A(2) to read “*interlocutory decision, determination or order*” to enhance clarity.

The proposed amendments to these clauses and sections have been included in the full set of the Committee Stage Amendments, which has been provided to Members separately.

Advice Sought

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

**Commerce and Economic Development Bureau
May 2012**