

**For discussion
on 12 May 2011**

**Bills Committee on
Competition Bill**

**Responses to Follow-up Questions
Arising from the Meeting on 28 April 2011**

Purpose

This paper responds to questions raised by Members at the meeting on 28 April 2011.

Issues relating to Schedule 5

Composition of committees under the Competition Commission

2. The policy intent of section 28 of Schedule 5 to the Competition Bill (the Bill) relating to the establishment of committees under the Competition Commission (the Commission) is to enable the Commission to tap the expertise and experience of individuals, including those who are not members of the Commission, to advise on specific matters or perform specific functions of the Commission. This would help the Commission to perform its statutory role more effectively and efficiently. Section 28 as currently drafted leaves flexibility to the Commission to decide on the appropriate composition of its committees. We take note of Members' views and suggestions for us to make reference to similar provisions in the Communications Authority Bill (CA Bill). The relevant clause 16(2) of the CA Bill is as follows –

Clause 16(2) of the CA Bill (with the Administration's proposed Committee Stage Amendments (CSAs) underlined)

“(2) The Authority may appoint a person to be a member of a committee appointed under subsection (1), whether or not the person is a member of the Authority, and may appoint a member of the Authority who is also a member of the committee to be the chairperson of the committee.”

We will amend section 28(3) of Schedule 5 to the Bill along the line adopted in the CA Bill.

Director of Audit's examination

3. The examination by the Director of Audit into the economy, efficiency and effectiveness with which a public organization has used its resources in performing its functions has its clearly defined scope and shall not be construed as entitling the Director of Audit to question the merits of the policy objectives of the public body concerned. For the sake of completeness and clarity, we accept Members' suggestion to include a provision in section 27 of Schedule 5 to reflect this scope in clear terms, similar to section 19(5) of Schedule 6 to the Sex Discrimination Ordinance (Cap. 480).^{Note (1)}

4. We also note the discrepancy between the Chinese and English texts of section 27(2)(c) of Schedule 5 and will introduce CSAs to rectify the difference accordingly.

Rules to be made by the Commission

5. Rules to be made by the Commission are for the purpose of regulating the internal procedures, administration and other related matters of the Commission. These rules neither have legislative effect nor are they subsidiary legislation. To address Members' concerns on the Commission's rules in respect of conflict of interest and disclosure of interests, we will add provisions similar to clause 13 of the CA Bill (with the Administration's proposed CSAs) to Part 4 (Meetings) of Schedule 5 to the Bill. The relevant part of the CA Bill is as follows -

Clause 13 of the CA Bill (with the Administration's proposed CSAs underlined (for additions) and strike through (for deletions))

“13. Disclosure of interests

(1) If a member of the Authority has —

(a) a pecuniary interest, whether direct or indirect; or

^{Note (1)} Section 19(5) of Schedule 6 to the Sex Discrimination Ordinance (Cap. 480) provides that subsection (1) (in relation to the Director of Audit's examination into the economy, efficiency and effectiveness with which the Equal Opportunities Commission has used its resources in performing its functions) shall not operate to entitle the Director of Audit to question the merits of the policy objectives of the Commission.

(b) a personal interest greater than that which the member has as a member of the general public,
 in any matter under discussion at a meeting of the Authority, ~~the Broadcast Complaints Committee or any committee appointed under section 16,~~ the member must disclose the nature of the interest at the meeting.

(2) The following provisions apply for the purposes of a disclosure under subsection (1)—

(a) the disclosure must be recorded in the minutes;

(b) if the disclosure is made by the member presiding, the member must vacate the chair during the discussion;

(c) the member (including one who has vacated the chair under paragraph (b)) must, if so required by ~~the member presiding~~ the majority of the other members present, withdraw from the meeting during the discussion and must not in any case, except as otherwise determined by ~~the member presiding~~ the majority of the other members present, vote on any resolution concerning the matter under the discussion or be counted for the purpose of establishing the existence of a quorum.

(3) When a matter is being dealt with by way of the circulation of papers under section 11, and a member of the Authority has—

(a) a pecuniary interest in the matter, whether direct or indirect; or

(b) a personal interest in the matter greater than that which the member has as a member of the general public,

the member must disclose the nature of the interest by attaching to the papers being circulated a note recording the disclosure.

(4) If a member has made a disclosure under subsection (3), the member's signature (if any) is not to be counted for the purpose of section 11(2) unless the chairperson of the Authority directs otherwise.

(5) If the member making a disclosure under subsection (3) is the chairperson of the Authority, the power under subsection (4) is to be exercised by the vice-chairperson of the Authority.

(6) If both the chairperson and the vice-chairperson of the Authority have made a disclosure under subsection (3) in respect of the same matter, section 11 does not apply to the matter.

(7) The validity of any proceeding of the Authority is not affected by the failure by a member of the Authority to comply with this section.

(8) Subsections (1), (2) and (7) apply to a member of the Broadcast Complaints Committee or a committee appointed under section 16, as if any reference to the Authority in subsections (1) and (7) were a reference to the Broadcast Complaints Committee or the committee appointed under section 16, as the case may be.”

Issues relating to Part 10

Competition tribunals in other competition jurisdictions

6. The proposed establishment of the Competition Tribunal (the Tribunal) is to separate the role of investigation, prosecution and adjudication under the Bill, thereby providing adequate checks and balances to the exercise of the statutory powers by the Commission. Having the Tribunal as a specialized court would also help accumulate judicial expertise in adjudicating competition matters and enable the Tribunal to conduct its proceedings with as much informality as is consistent with attaining justice.

7. We have examined the competition regimes in Australia, Singapore, the UK, and the US which do not have any specialized court for competition cases. Instead, their cases are adjudicated either by an administrative body or the general court. In Canada, the Competition Tribunal, composed of not more than six judicial members and not more than eight lay members, will hear an application relating to civil matters brought by the Competition Bureau of Canada or private actions. Most competition cases reviewable by the Competition Tribunal of Canada are heard by a panel of three members, including one judicial member and two lay members.

Appointment to fill a vacancy in office of President or Deputy President

8. To better reflect our policy intent, we will consider introducing CSAs to amend the phrase “*may* appoint one of the members of the Tribunal to be the President or Deputy President (as the case requires)” in section 139(2) to “*is to* appoint one of the members of the Tribunal to be the President or Deputy President (as the case requires)” to mandate the appointment of President or Deputy President when the office of President or Deputy President has become vacant.

Appointment of assessors by the Tribunal

9. The Tribunal may appoint specially qualified assessors under section 140 to assist in its disposal of proceedings. Similar arrangement is provided under section 53 of the High Court Ordinance (Cap. 4). The payment of remuneration to an assessor would be a judicial decision of the Tribunal.

Evidence admissible in the Tribunal

10. The policy intent is that the Tribunal should have the power to receive and consider any evidence, whether by way of oral evidence, written statements, documents or otherwise, in proceedings before the Tribunal. We are seeking legal advice and reviewing the implications of deleting the phrase “and whether or not it would be otherwise admissible in civil or criminal proceedings in a court of law” under section 142(2)(a) and similarly in section 146 in respect of the evidence admissible in the Tribunal. We will submit a separate response on this issue in due course.

Conduct of proceedings with informality

11. It is the Administration’s policy objective for the Tribunal to conduct its proceedings with as much informality as is consistent with attaining justice, with a view to providing a less formal framework and expeditious proceedings, thereby easing the burden on smaller enterprises involved in competition cases. The Chief Judge of the High Court may make rules, in consultation with the President of the Tribunal, to regulate and prescribe the practice and procedures to be followed in the Tribunal having regard to our policy intent for informality as currently manifest in section 143(3).

Hearing and determination of applications

12. Section 144 provides that an application to the Tribunal may be heard and determined by a Tribunal constituted by the President alone, the President and one or more other members, or one or more other members appointed by the President. The provision is so drafted to provide the Tribunal with the flexibility to decide on the number of members sitting having regard to the nature of each case, which may be a substantive hearing and determination of application concerning the alleged contravention of competition rules, or an application relating to a relatively straightforward procedural matter. The

proposed second or casting vote of the President or the member presiding over the sitting in section 144(3) is aimed to ensure that there will always be a decision in the event of an equality of votes. Similar provision can be found in section 9(5) of the Lands Tribunal Ordinance (Cap. 17).^{Note (2)} We are reviewing this provision in consultation with the Judiciary and will submit a separate response in due course.

Decisions of the Tribunal

13. Section 151(2) of the Bill is premised on the understanding that decisions of the Tribunal may include those concerning a simple determination or interlocutory matters, which may or may not contain reasons. Having consulted the Judiciary, we consider it appropriate to reserve the power for the Tribunal to decide whether it is appropriate to give reasons for a decision.

Impact of competition law enforcement

14. As requested, we have conducted further research and note that competition authorities in other jurisdictions, including Australia,^{Note (3)} the EU,^{Note (4)} and Singapore^{Note (5)} will report their work, manpower and achievement in their annual reports. Most of these reports provide generally broad statements and qualitative description of the outcomes of enforcing the competition law to the benefits of the consumers, including reduced barriers to market entries, more choices for the consumers, heightened public awareness, and advocacy for competition. Only a few attempt to quantify their performance in terms of consumer savings. For example, the US Federal Trade Commission reported that they exceeded its performance target by achieving consumer savings of US\$508 million through non-merger actions and US\$586 million through merger actions taken to maintain competition in

^{Note (2)} Section 9(5) of the Lands Tribunal Ordinance (Cap. 17) provides that any difference between the members exercising the jurisdiction of the Tribunal shall be decided by the majority of votes, and in the event of an equality of votes the member presiding at the hearing shall be entitled to a second or casting vote.

^{Note (3)} The Annual Report 2009-10 of the Australian Competition & Consumer Commission (at <http://www.accc.gov.au/content/index.phtml/itemId/953971>).

^{Note (4)} The European Commission's "Report on Competition Policy 2009" (at http://ec.europa.eu/competition/publications/annual_report/index.html) and "EU Competition Policy and the Consumer" (at http://ec.europa.eu/competition/publications/consumer_en.pdf).

^{Note (5)} The Annual Report 09-10 of the Competition Commission of Singapore (at http://app.ccs.gov.sg/AboutUs_Annual_reports.aspx).

2010.^{Note (6)} On the other hand, the Dutch Competition Authority quantified the direct and future effects of its enforcement's actions in 2009 as a savings of EUR 328 million to the society.^{Note (7)} The Organization for Economic Cooperation and Development (OECD) also reviews member nations' competition law regimes, focusing on qualitative assessment of the policy and institutional framework.^{Note (8)} We are not aware of there being any study by competition authorities in overseas jurisdictions into the economic effects of competition law regimes, that suggested the introduction and/or enforcement of competition law has resulted in consumer harm or net negative impact on the economy.

Advice sought

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

**Commerce and Economic Development Bureau
May 2011**

^{Note (6)} The figures are quoted from the Performance Section of the US Federal Trade Commission's Performance and Accountability Report for 2010 (page 39 at www.ftc.gov/opp/gpra/index.shtm).

^{Note (7)} The figures are quoted from the 2009 Annual Report of the Dutch Competition Authority (NMa) (page 8 at http://www.nmanet.nl/nederlands/home/jaarverslag_2009/index.html).

^{Note (8)} A full list of country reviews of competition policy frameworks undertaken by OECD can be accessed from http://www.oecd.org/document/43/0,3746,en_2649_37463_2489707_1_1_1_37463,00.html.