

**For discussion
on 11 October 2011**

**Bills Committee on
Competition Bill**

**Responses to follow-up questions
arising from the meeting of 26 July 2011**

Purpose

This paper responds to questions raised by Members at the meeting on 26 July 2011.

A. Overseas competition cases involving SMEs

Investigation of SMEs by Competition Commission of Singapore

2. Members asked for the number of small and medium enterprises (SMEs) which were respondents of competition cases not substantiated by the Competition Commission of Singapore (CCS). The information is not available because the CCS only published decisions on cases that were substantiated; neither is there any information on the number of unsubstantiated cases, nor details of those investigations or preliminary enquiries completed by the CCS.

Substantiated competition cases in overseas jurisdictions

3. As requested by Members, the number of cases substantiated by the competition authorities in Canada for the period of 2008 – 2010 is at **Appendix A**. In Canada, competition cases are investigated by the independent Competition Bureau. Depending on the matters under review, competition cases are adjudicated either by a superior court of criminal jurisdiction (for prosecution of criminal offences involving hardcore cartel activities) or the Canadian Competition Tribunal (for civil reviewable matters including agreements among competitors not falling within the criminal provisions as newly introduced by the amendments to the Canadian Competition Act in 2009). All the substantiated cases during the period

concern prosecution of hardcore cartel offences before the criminal courts.

4. We have already provided a summary of substantiated competition cases in the EU, Singapore and the UK in 2008 – 2010 involving SMEs in Paper No. CB(1)2796/10-11(01). Similar to the analysis in respect of Canada at Appendix A, all those substantiated cases in the EU, Singapore and the UK involving SMEs concern hardcore anti-competitive agreements, namely price fixing, bid rigging and market sharing.

B. Legal fees incurred for compliance with the UK competition law

5. Regarding Members' enquiry on the annual legal fees incurred by undertakings for compliance with the competition law in the UK, we are unable to identify any published reports or independent analyses in relation to such information. As with any other new laws, the introduction of the competition law may give rise to costs as affected parties may need to seek professional advice to ensure they are complying with the requirements of the law. Such advice may include legal costs. Small businesses would unlikely incur significant costs because they are generally not the target of competition regulation unless they are involved in hardcore anti-competitive activities. For large or multi-national businesses, many of them would already have to comply with competition regulatory regime elsewhere and should be able to adapt to the new competition regime in Hong Kong without incurring significant additional costs.

C. Reciprocal arrangements of enforcement of judgments with the Mainland/ Taiwan

6. Reciprocal arrangements of enforcement of judgments between the Mainland and Hong Kong are provided under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597), which seeks to implement the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region pursuant to Choice of Court Agreements between Parties Concerned*, signed in Hong Kong on 14 July 2006. Under Cap. 597, provisions were made for the enforcement in Hong Kong of certain judgments in civil or commercial matters that are given in the Mainland and for facilitating the enforcement in the Mainland of certain judgments in civil or commercial matters that are given in Hong Kong. There is no similar arrangement between Taiwan and Hong Kong.

D. Right of appeal

Overseas experience

7. **Appendix B** shows the requirements (if any) for leave to appeal against the decisions of the competition authorities to a court or the specialized appeal tribunal in selected overseas jurisdictions. Most of these jurisdictions adopt an administrative enforcement model whereby decisions of the competition authorities are reviewable by a specialized appeal body; appeal from the decisions of these review bodies usually lies before the courts.

Leave requirement under clause 153

8. In light of Members' views, we are reviewing the leave requirement for appeal before the Court of Appeal against the decision, determination or order of the Competition Tribunal (Tribunal) under clause 153 of the Bill. We will provide a separate response in this regard.

E. Vertical agreements

9. As we have explained in previous submissions, we consider it more appropriate for the first conduct rule to apply to all types of agreements, including vertical agreement, and for the future Competition Commission (the Commission) to consider issuing block exemption order to exempt certain types of vertical agreements having regard to the circumstances of Hong Kong after enactment of the Bill. This approach is the same as that in the EU and the UK. We see merits in adopting this approach at the infancy stage of implementing the Bill in Hong Kong, in order to ensure the most effective regulation of all potentially anti-competitive agreements. It is also more prudent for the Commission to take into account its operational experience, public views and the actual circumstances of different economic sectors before considering the grant of block exemption to a specified category of vertical agreements that yield pro-competition benefits.

F. Shadow directors (clause 2)

10. Under clause 2 of the Bill, "shadow director", in relation to a company, means a person in accordance with whose directions or instructions

the directors of the company are accustomed to act, but a person is not to be regarded as a shadow director by reason only that the directors act on advice given by that person in a professional capacity. Members asked whether two persons who jointly gave directions or instructions to a majority of the directors of the company would be considered as a shadow director of the company under the Bill.

11. Clause 2 of the Bill provides that “person”, in addition to the meaning given by section 3 of Interpretation and General Clauses Ordinance (Cap. 1), includes an undertaking. Section 3 of Cap. 1 provides, inter alia, that “person” includes any public body and any body of persons, corporate or unincorporated. By virtue of section 7(2) of Cap. 1, words and expressions in the singular include the plural. Hence, it follows that two persons may constitute a “person” within the meaning of “shadow director” as defined by clause 2 of the Bill.

12. We proposed, vide Paper No. CB(1)2796/10-11(02), to amend the expression “the directors of the company” in the definition of “shadow director” in clause 2 of the Bill to read as “the directors or a majority of the directors of the company”. For the sake of clarity and having regard to Members’ suggestion, we propose to elaborate the earlier reference to “the directors” to read as “all the directors” as follows (with our proposed amendments underlined):

‘ “shadow director”, in relation to a company, means a person in accordance with whose directions or instructions all the directors, or a majority of the directors, of the company are accustomed to act, but a person is not to be regarded as a shadow director by reason only that all the directors, or a majority of the directors, act on advice given by that person in a professional capacity’

G. Application for decisions (clauses 9 and 11)

Time limit for processing an application

13. Clauses 9 and 24 of the Bill provide that the Commission may consider an application for a decision in respect of exclusion/ exemption of certain agreement or conduct from the conduct rules. As the time required for processing each application would depend on the subject matter, available information and complexity of each case, we consider it appropriate not to

specify in the Bill a time limit within which the Commission must make a decision, but to give the Commission the flexibility to advise the applicant on the estimated timeframe on a case-by-case basis. We envisage that the Commission might indicate some targets or performance pledge for handling these applications in the guidelines to be issued under clause 35 of the Bill.

14. The above arrangements are consistent with the practices adopted by the competition authorities in Canada, the EU, Singapore and the UK where no statutory time limits relating to applications for a decision or an opinion are provided under the respective competition law.

Notification of the decisions

15. Clause 11 of the Bill provides that the Commission must inform the applicant in writing of its decision made in respect of application under clause 9; such decision must also be published in a register maintained by the Commission under clause 34 of the Bill. Publication of decisions on a public register is the common practice adopted across jurisdictions, including Singapore and the UK, to enhance transparency of the exercise of powers by the competition authorities and help the public understand better the application of competition law. While the Commission may choose to individually notify obviously interested parties of a decision as a matter of discretion, the suggestion of creating a statutory obligation upon the Commission to inform all who made representations on an application for decision is unnecessarily burdensome. On the whole, we consider the current arrangements proposed under clauses 11 and 34 appropriate and in line with international best practice.

Chinese text of clause 9(2)(c)

16. We have reconsidered the Chinese text of clause 9(2)(c) at Members' request. We are of the view that the Chinese text has accurately reflected the meaning of the English text and thus, no amendment is necessary.

Advice sought

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

**Commerce and Economic Development Bureau
October 2011**

Appendix A

**Information on competition cases
substantiated by the competition authorities in Canada
(2008 – 2010)**

| | 2008 | 2009 | 2010 |
|---|----------------------------|-----------------------------|------------------------------|
| Total No. of substantiated competition cases | 1 ⁽¹⁾ | 1 ⁽²⁾ | 4 ⁽³⁾ |
| Estimated number of SMEs which were respondents of the substantiated cases | 0 (out of 1 respondent) | 0 (out of 5 respondents) | 5 (out of 20 respondents) |

¹ The substantiated case is a price-fixing case.

² The substantiated case is a price-fixing case.

³ The four substantiated cases involve three price-fixing cases and one bid-rigging case.

Appendix B

Information on requirements for leave to appeal against the decisions of the competition authorities to a tribunal/ court in overseas jurisdictions

| Jurisdiction | Appeal against decisions of the competition authority to a review body | Appeal against decisions of the review body |
|---------------------|---|--|
| Canada | <p><i>Criminal cartel offences</i>: automatic right of appeal from any conviction to the provincial Court of Appeal or the Federal Court of Appeal.</p> <p><i>Civil reviewable matters</i>: appeal from the decision of the Competition Tribunal goes directly to the Federal Court of Appeal (except for an appeal on a question of fact alone which requires leave of the Federal Court of Appeal).</p> | |
| EU | Review of the administrative decision of the European Commission by the European General Court (GC) as of right. | Appeal against the judgment of the GC lies before the European Court of Justice, without leave, on points of law only. |
| Singapore | Review of the administrative decision of the Competition Commission of Singapore by the Competition Appeal Board (CAB) as of right. | Appeal against the decision of the CAB lies before the High Court without leave, on either a point of law or the decision as to the amount of penalty available only to a person who was a party to the proceedings in which the decision of the CAB was made. |
| UK | Review of the administrative decision of the Office of Fair Trading by an appeal tribunal under the Competition Commission as of right. | Appeal against the decision of the appeal tribunal, on either a point of law arising from a decision or against any decision of the appeal tribunal as to the amount of a penalty, lies in the Court of Appeal, and is subject to leave of the court. |