For discussion
on 20 December 2011

Bills Committee on Competition Bill

Responses to follow-up questions arising from previous meeting

Purpose

This paper responds to questions raised by Members at the meeting of 22 November 2011.

A. Second conduct rule

2. Regarding Members' views and suggestions about the de minimis threshold and the approach for assessing market power for the purpose of the second conduct rule under the Competition Bill (the Bill), we will give further consideration and submit our views to Members in due course.

B. Schedule 7

3. Section 7 of Schedule 7 to the Bill provides that the Competition Commission (the Commission) may only commence an investigation into a merger suspected of contravening the merger rule no later than 30 days after the day on which the Commission first became aware, or ought to have become aware, that the merger has taken place. The 30-day time limit is comparable to that set by overseas jurisdictions such as the UK [Note (1)] and Singapore [Note (2)] for

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Note (1) In the UK, while there is no mandatory requirement for a merger situation (completed merger or proposed merger) to be notified to the competition authorities, the Office of Fair Trading (OFT) has a duty under sections 22 and 33 of the UK Enterprise Act 2002 to refer to the Competition Commission (CC) for further investigation any relevant merger situation where it believes that it is or may be resulted in a substantially lessening of competition. Under section 96 of the Act, companies may choose to pre-notify the OFT of a merger for a decision of OFT as to whether to refer the case to the CC subject to a statutory time limit of 20 working days. The time limit may be extended for 10 working days for more complex case. No reference shall be made to the CC under sections 22 and 33 of the Act if the statutory period for considering the merger situation has expired.

Note (2) In Singapore, there is no mandatory requirement for merger parties to notify their merger situations to the Competition Commission of Singapore (CCS). Merger parties may however voluntarily notify their merger situations to the CCS and apply for a decision as to whether the merger prohibition has been or will be infringed. According to CCS Guidelines on Merger Procedures, the CCS will carry out a preliminary assessment, which is expected to be completed within 30 working days, to review and allow merger situations that clearly do not raise any competition concerns to proceed without undue delay. Once the CCS has issued a favourable decision, it will normally not take further action. If the case requires further investigation, the CCS will inform the party and proceed to carry out a more detailed assessment of the merger situation.

the competition authorities to make a preliminary assessment of a merger situation before proceeding to undertake a substantive investigation.

4. While examining Schedule 7, Members asked whether, pending a merger investigation by the Commission, a listed company proposing the merger with another undertaking might be unable to comply with the statutory requirement under the Securities and Futures (Amendment) Bill 2011 (the Amendment Bill) to disclose price sensitive information relating to the Commission's investigation. According to the provisions under the Amendment Bill, where a listed corporation enters into a merger negotiation which is yet to be concluded, the corporation may rely on a safe harbour to withhold disclosure of the information concerned provided that the confidentiality of the information is preserved. In such circumstances, if the corporation chooses to disclose the merger proposal under discussion/ negotiation to the Commission, it should identify the proposal as confidential. On the other hand, in situation whereby a merger negotiation or proposal has been concluded but is conditional upon regulatory clearance or expiry of the period during which an investigation of the transaction may be commenced, such a conditional agreement falls outside the safe harbour and should be disclosed under the Amendment Bill.

C. Fees charged for enforcing competition rules

5. Noting clause 163 which provides that the Commission may charge fees for the making of an application to, or the provision of any service by, the Commission, Members asked for information on fees charged by the Office of the Telecommunications Authority (OFTA) in enforcing competition provisions under the Telecommunications Ordinance (Cap. 106) (TO). Under sections 7P(12) and 7P(13) of the TO, the OFTA can charge for the processing of a formal consent application in relation to a merger. The maximum amount that may be charged now stands at HK$200,000 as specified under Schedule 3 to the TO. There are no other fees that may be charged by OFTA in connection with the enforcement of the competition provisions under the TO.

D. Schedule 1

Section 1: exclusion for agreements enhancing overall economic efficiency

6. We note the suggestion that section 1 of Schedule 1 to the Bill should be refined to ensure that agreements to the benefit of the consumers would be excluded by virtue of this section. While overseas jurisprudence shows that the analysis of exclusion on such grounds will inevitably involve the balancing of the

potential benefit and harm to consumers as one of the beneficiaries of enhanced economic efficiency, we will consider whether an explicit reference would enhance the clarity of the Bill.

Section 3: exclusion for services of general economic interest

7. Our earlier submission (Paper No. CB(1)518/11-12(01) has provided an overseas example to illustrate the application of the exclusion from competition law for the operation of a service of general economic interest. Having regard to the guidelines adopted by overseas competition authorities, we have previously elaborated on the key elements of section 3 exclusion, including the term "entrusted" and "services of general economic interest" in paragraphs 5.18 – 5.25 of the template guideline on the first conduct rule (Paper No. CB(1)2336/10-11(01)). The relevant section is reproduced at **Appendix**. Whether a particular agreement would be excluded by virtue of section 3 of Schedule 1 is a matter of fact.

New section 4: exclusion of merger

8. As explained at the meeting on 22 November 2011, the extent to which the relevant agreement or conduct that results in a merger is excluded from the application of the first or second conduct rule is already set out clearly in the new section 4 of Schedule 1. The provision as currently drafted cannot be read as excluding the whole agreement or conduct just because part of the agreement or conduct results in, or if carried out would result in, a merger.

New section 5: exclusion of agreement of lesser significance

9. Regarding Members' question on how the annual turnover of an undertaking is to be worked out, we are conducting research into the subject and will submit our views to Members in due course.

E. Confidential information

10. The term "confidential information" in clause 34(2) of the Bill has the same meaning given in clause 122. Such information may be omitted from an entry made in the register of decisions and block exemption orders under clause 34.

F. Drafting issues

11. For the sake of consistency and clarity, we would propose amendments to the following provisions in Part 2 and Schedule 7 of the Bill:

(a) ***Clause 35 in Part 2***: to add subclauses to –

(i) make clear that the guidelines issued by the Commission and all amendments to them are not subsidiary legislation but are admissible in evidence in any legal proceedings if the guidelines are relevant to determining a matter that is in issue;

(ii) state that the Commission must consult LegCo before issuing the guidelines or amendments to them for the purpose of clause 35(4); and

(iii) state that the Commission must publish the guidelines through the Internet or a similar electronic network;

(b) ***Section 3(4) of Schedule 7***: to amend the term "自動經濟實體" in the Chinese text to "自主經濟實體";

(c) ***Section 6 of Schedule 7***: to amend the phrase " *to be* considered" ("須考慮") to "*that may be* considered" ("可考慮") to clarify the policy intent;

(d) ***Section 10 of Schedule 7***: to amend the Chinese text in subclauses (3) & (5) "下一屆會期" in order to enhance clarity of the English equivalent of "in the next session; and

(e) ***Section 11(1)(a) of Schedule 7***: to amend the English phrase "*carries* out a merger" to "*has carried* out a merger" to achieve consistency with similar phrases in clauses 9(1) and 24(1) in Part 2 of the Bill.

Advice sought

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

Commerce and Economic Development Bureau
December 2011

Appendix

Extract from the template guideline on the first conduct rule (LegCo Paper No. CB(1)2336/10-11(01))

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(c) An Undertaking Entrusted by the Government with the Operation of Services of General Economic Interest in so far as the First Conduct Rule would Obstruct the Performance, in Law or in Fact, of the Particular Tasks Assigned to It.

5.18 We expect that the Commission will interpret this exclusion strictly. The onus is on the undertaking seeking to benefit from the exclusion, to demonstrate that all the requirements of the exclusion are met. The undertaking will have to (i) satisfy the Commission that it has been entrusted with the operation of a service of general economic interest; and (ii) show that the application of the first conduct rule would obstruct the performance, in law or in fact, of the particular task entrusted to it.

Entrusted

5.19 The undertaking will need to demonstrate that it has been entrusted with the service in question by the Government. The act of entrustment can be made by way of legislative measures such as regulation, or the grant of a licence governed by public law. It can also be done through an act of the Government. However, mere approval by the Government of the activities carried out by the undertaking will not suffice.

5.20 The exclusion applies only to the particular tasks entrusted to the undertaking and not to the undertaking or its activities generally. Further, the exclusion applies only to obligations linked to the subject matter of the service of general economic interest in question and which contribute directly to that interest.

Services of General Economic Interest

5.21 The definition of services in this context is broad and may include the distribution of goods as well as the provision of services. Services of general economic interest are different from ordinary services in that public authorities consider they should be provided in all cases, whether or not there is sufficient economic incentive for the private sector to do so.

5.22 The term **economic** refers to the nature of the service itself, rather than the interest. For examples, services of an economic nature may include activities in the cultural, social, public health and educational fields if their aim is to make an economic profit.

5.23 Further, to be considered a service of **general** economic interest, the service must be widely available and not restricted to managing private interests or to a certain class, or classes, of customers. However, this does not exclude selective criteria in the supply of service. For example, a service of general economic interest may include the

provision of services which aids regional development and are restricted to certain geographical areas.

Restrictions on Competition

5.24 Restrictions on competition from other economic operators must be allowed only insofar as they are necessary to enable the undertaking entrusted with the service of general economic interest to provide the service in question. It would be necessary to consider the economic conditions in which the undertaking operates and the constraints placed on it, in particular the costs which it has to bear.

5.25 It would not be sufficient for the undertaking to show that it has been entrusted with the provision of a public service in order to benefit from this exclusion. An undertaking seeking to benefit from this exclusion would have to show that the application of the first conduct rule would require it to perform the task entrusted to it in economically unacceptable conditions. For instance, the undertaking may be required to meet a ”universal service obligation”[1]. Without the benefit of the exclusion, competition would allow new entrants to target profitable customers (so called “cherry-picking”), while leaving unprofitable customers to the incumbent. Such a risk may compromise the incumbent’s economic viability and thus obstruct the performance of its obligations.

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[1] This refers to an obligation to provide a minimum set of services of specified quality to all users at an affordable price, independent of their geographical locations. This includes guaranteeing services to non-profitable areas.