

**For discussion
on 31 January 2012**

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 3 January 2012.

A. Leniency

2. Clause 80 of the Competition Bill (the Bill) provides that the Competition Commission (the Commission) must give all relevant undertakings a reasonable opportunity to make representations about the proposed termination of leniency agreement. Drawing reference from clauses 14 and 29 of the Bill relating to the rescission of decision on exclusions from the conduct rules, Members suggested that a minimum period should be specified for the purpose of making representations under clause 80. We have no problem with the proposal and will introduce an amendment to clause 80 to provide that a period of at least 30 days must be given for making representations.

3. Clause 78 provides for the interpretation of terms relating to the provisions on leniency. Under this clause, “*officer*”, in relation to a corporation, means a director, manager or secretary of the corporation, and any other person involved in the management of the corporation. While the meaning follows broadly that of the Companies Bill¹, for clarity sake we propose amending the expression “*secretary*” to “*company secretary*”. Likewise, we would introduce similar amendments to clauses 125(2)(c)(i), 167(3) and 174(1), and section 5(3)(a) of Schedule 5 to the Bill to enhance clarity of the expression “*secretary*” therein. It is noted that the Companies Bill also defines company secretary as “*includes any person occupying the position of company secretary (by whatever name called)*”. For the sake of clarity, we would also introduce an amendment to clause 2 of the Bill to add a definition of “*company secretary*” as “*company*

¹ Under clause 2 of the Companies Bill, “*officer*”, in relation to a body corporate, includes a director, manager or company secretary of the body corporate.

secretary has the meaning given by section 2(1) of the Companies Ordinance (of 2011).”

B. Commitment

4. Section 4 of Schedule 2 to the Bill concerns the publication of commitment or variation of a commitment. Similar to the proposed amendment to clause 63(3),² we will amend section 4 to Schedule 2 to require the Commission to make use of the Internet or other electronic means in publishing the commitment or variation.

5. If the Commission proposes to release a person from a commitment, the Commission must, pursuant to section 12 of Schedule 2, give notice to that person and consider any representations made to it. The policy intent is that the Commission should furnish the person concerned with all relevant information to facilitate the latter’s consideration of an appropriate response. Hence, we propose adding a paragraph to section 12(2), similar to paragraph (c) of section 7(2), to make it clear that the Commission should state in the notice to the person any other facts (in addition to the reasons of the proposed decision) that the Commission considers to be relevant to the proposed release.

C. Warning notice

6. Under the new clause 80A, the Commission will specify a period (the warning period) in the warning notice, which indicates the amount of time that the contravening undertaking is likely to require to cease the contravening conduct. In response to Members’ suggestion, we propose to add a subsection to clause 80A, modeling on clause 73 of the Bill, to the effect that the Commission may extend the warning period, either of its own volition or on application made to it before the expiry of the warning period, if there is a good reason for doing so.

7. As regards Members’ views on making the warning notice a reviewable determination under clause 81 of the Bill, we will give further consideration and revert in due course.

² In paragraph 10 of the Administration’s response discussed at the meeting of 16 January 2012 (Paper No. CB(1)823/11-12(01)), it is proposed that clause 63(3) of the Bill be amended to require the Commission to make available the register of commitments for inspection through the Internet or other electronic means. Similar amendments were proposed in respect of the register of decisions under Part 2 of the Bill.

D. Calculation of turnover

8. On Members' questions about the calculation of turnover for the de minimis arrangements under the new section 5 of Schedule 1 and the cap on pecuniary penalty under clause 91, our response is set out at **Appendix**.

E. Drafting issues

9. For the sake of consistency and clarity, we would propose amendments to the following provisions of the Bill:

(a) **New clause 80A(2)(c)**: to amend “**賴以支持**” to “**賴以支持**”;

(b) **Schedule 2**:

(i) to amend “*the person who made the commitment*” to “*that person*” in the English text of section 14(b); and

(ii) to amend “*is given by*” to “*must be given by*” in the first line of the English text of section 15.

Advice sought

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

Commerce and Economic Development Bureau
January 2012

Bills Committee on Competition Bill

Calculation of turnover

Purpose

This paper responds to questions on turnover calculation for de minimis arrangement under the new section 5 of Schedule 1 and for pecuniary penalty cap under clause 91 raised by Members at the meetings of 22 November 2011 and 3 January 2012 respectively.

New section 5: exclusion of agreement of lesser significance

2. Under the newly proposed section 5 of Schedule 1, an agreement between undertakings is excluded from the application of the first conduct rule in any calendar year if the combined turnover of the undertakings in the year preceding that calendar year does not exceed \$100 million. In relation to an undertaking, turnover means the total gross revenues of the undertaking whether obtained in Hong Kong or outside Hong Kong. “Year” in this provision means the financial year of an undertaking, and if the undertaking does not have a financial year, “year” then means a calendar year.

3. The above formulation shall cover all undertakings that have been established for more than one year and have a financial year of 12 months ended in the preceding calendar year. For newly established undertakings, we accept that for the avoidance of doubt, further clarifications could be added to specify the turnover calculation for these undertakings. Following practices in the UK and Singapore, we suggest setting out details on the technicalities of turnover calculation, including calculation under different scenarios, in subsidiary legislation which will be subject to vetting by the Legislative Council (LegCo). To this end, we propose that section 5 of Schedule 1 be amended so that the turnover of newly established undertakings (e.g. those established in the current calendar year or those without a financial year of 12 months ended in preceding calendar year) shall be specified by way of subsidiary legislation to be made by the Secretary for Commerce and Economic Development. Similar amendments would also be made to the new section 6 of Schedule 1 which involves the calculation of turnover of an undertaking for de minimis arrangements under the second conduct rule. We propose amending the new sections 5 and 6 of Schedule 1 along the following lines -

“5. Agreements of lesser significance

(1) *The first conduct rule does not apply to –*

- (a) *an agreement between undertakings in any calendar year if the combined turnover of the undertakings for the ~~year preceding that calendar year~~ turnover period does not exceed \$100,000,000;*
- (b) *a concerted practice engaged in by undertakings in any calendar year if the combined turnover of the undertakings for the ~~year preceding that calendar year~~ turnover period does not exceed \$100,000,000; or*
- (c) *a decision of an association of undertakings in any calendar year if the turnover of the association for the ~~year preceding that calendar year~~ turnover period does not exceed \$100,000,000.*

(2) *Subsection (1) does not apply to an agreement, a concerted practice, or a decision of an association of undertakings, that involves serious anti-competitive conduct.*

(3) Subject to subsection (4), the turnover period of an undertaking is –

- (a) if the undertaking has a financial year, the financial year of the undertaking that ends in the preceding calendar year; or
- (b) if the undertaking does not have a financial year, the preceding calendar year.

(4) The turnover period of an undertaking is the period specified as such for the purpose of this subsection in the regulations made under section 162A(2) if –

- (a) for an undertaking that has a financial year –
 - (i) the undertaking does not have a financial year that ends in the preceding calendar year; or
 - (ii) the financial year of the undertaking that ends in the preceding calendar year is less than 12 months; or

- (b) for an undertaking that does not have a financial year –
- (i) the undertaking is not engaged in economic activity in the preceding calendar year; or
- (ii) the period in which the undertaking is engaged in economic activity in the preceding calendar year is less than 12 months.

(35) *In this section –*

“preceding calendar year” () means the calendar year preceding the calendar year mentioned in subsection (1)(a), (b) or (c);

“turnover” (營業額) –

- (a) *in relation to an undertaking that is not an association of undertakings, means the total gross revenues of the undertaking whether obtained in Hong Kong or outside Hong Kong; and*
- (b) *in relation to an association of undertakings, means the total gross revenues of all the members of the association whether obtained in Hong Kong or outside Hong Kong.*

~~“year” (年) means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.~~

6. Conduct of lesser significance

(1) *The second conduct rule does not apply to conduct engaged in by an undertaking the turnover of which does not exceed \$11,000,000 for the ~~year~~ preceding the ~~calendar year in which the conduct is engaged~~ turnover period.*

(2) Subject to subsection (3), the turnover period of an undertaking is –

- (a) if the undertaking has a financial year, the financial year of the undertaking that ends in the preceding calendar year; or
- (b) if the undertaking does not have a financial year, the preceding calendar year.

(3) The turnover period of an undertaking is the period specified as such for the purpose of this subsection in the regulations made under section 162A(2) if –

(a) for an undertaking that has a financial year –

(i) the undertaking does not have a financial year that ends in the preceding calendar year; or

(ii) the financial year of the undertaking that ends in the preceding calendar year is less than 12 months; or

(b) for an undertaking that does not have a financial year –

(i) the undertaking is not engaged in economic activity in the preceding calendar year; or

(ii) the period in which the undertaking is engaged in economic activity in the preceding calendar year is less than 12 months.

(24) In this section –

“preceding calendar year” () means the calendar year preceding the calendar year in which the conduct mentioned in subsection (1) is engaged in;

“turnover” (營業額) means the total gross revenues of an undertaking whether obtained in Hong Kong or outside Hong Kong.

“year” (年) means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.”

4. To empower the Secretary for Commerce and Economic Development to make the subsidiary legislation upon enactment of the Bill, we propose adding a new empowering provision of clause 162A along the following lines -

“162A. Determination of turnover of undertaking

(1) *For the purposes of this Ordinance, the turnover of an undertaking is to be determined in accordance with the regulations made by the Secretary for Commerce and Economic Development under subsection (2).*

(2) *The Secretary for Commerce and Economic Development may, by regulations published in the Gazette, provide for the determination of the turnover of an undertaking.*

(3) *Without limiting subsection (2), the regulations made under that subsection may –*

- (a) specify a period as the turnover period of an undertaking for the purpose of section 5(4) or 6(3) of Schedule 1;*
- (b) provide for different ways for the determination of the turnover of an undertaking obtained in Hong Kong or outside Hong Kong; and*
- (c) provide for different ways for the determination of the turnover of an undertaking in respect of different periods, including –*
 - (i) a calendar year;*
 - (ii) a financial year; and*
 - (iii) a period specified as the turnover period of the undertaking under paragraph (a).”*

Clause 91 Cap on Pecuniary Penalty

5. As explained in our paper to the Bills Committee for discussion on 25 October 2011 (Paper No. CB(1)91/11-12(01)), the policy intent of the amendments we have proposed to clause 91 is to provide a pecuniary cap of 10% of the local turnover for each year of infringement, up to a maximum of three years. If the infringement lasts for more than three years, the three years of infringement with the highest turnover would be chosen.

6. Following this policy intent, 10% of the local turnover of a financial year (or calendar year if the concerned undertaking does not have a financial year) will be taken into account in the calculation of the pecuniary penalty cap if the contravention occurred in that financial year. If the contravention occurred in more than one financial year but less than three financial years, 10% of the local turnover for each financial year will be added up. If the contravention occurred in more than three financial years, only the three financial years with the highest turnover would be chosen for the calculation. If the contravention straddles two financial years (regardless the actual duration of the contravention), 10% of the local turnover of each of the two financial years would be counted, subject to the ceiling of three financial years. For the avoidance of doubt, we propose further amending clause 91 along the following line to clearly reflect our policy intent -

“91. Tribunal may impose pecuniary penalty

(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate.

(2) Without limiting the matters that the Tribunal may have regard to, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters –

- (a) the nature and extent of the conduct that constitutes the contravention;*
- (b) the loss or damage, if any, caused by the conduct;*
- (c) the circumstance in which the conduct took place; and*
- (d) whether the person has previously been found by the Tribunal to have contravened this Ordinance.*

~~*(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total –*~~

- ~~*(a) 10% of the turnover of the undertaking concerned, for the year in which the contravention occurred; or*~~
- ~~*(b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in which the contravention has continued.*~~

(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total –

(a) subject to paragraph (b), 10% of the turnover of the undertaking concerned for each year in which the contravention occurred; or

(b) if the contravention occurred in more than 3 years, 10% of the turnover of the undertaking concerned for the 3 years in which the contravention occurred that saw the highest, second highest and third highest turnover.

(4) In this section –

~~“turnover” (營業額) means the total gross revenues of an undertaking whether obtained in Hong Kong or outside Hong Kong;~~

“turnover” (營業額) means the total gross revenues of an undertaking obtained in Hong Kong;

“year” (年) means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.”

7. It should be stressed that the turnover so determined under clause 91 would only serve as the cap of pecuniary penalty. According to experience in overseas jurisdictions, the starting point of penalty calculation is usually the turnover of products / services affected by the contravention. The calculation of the cap is the last step in penalty calculation to ensure that the determined penalty would not exceed the ceiling set out in the legislation.

Advice sought

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