

Bills Committee on Competition Bill

Summary of views expressed by depositions on institutional arrangements¹ of the Bill and the Administration's responses

(as at 22 February 2011)

Concerns/Views	Administration's comments
<u>Competition Commission (Part 9 and Schedule 5)</u>	
<u>Functions and powers of the Competition Commission (Clauses 129 and 130)</u>	
<p>1. The proposed Competition Commission (the Commission) should play the role of regulator of anti-competitive behaviors, and not to promote competition. The Commission is expected to enforce and implement the law, while the power to make law should rest with the Legislative Council. (BCCHK and HKRMA)</p>	<p>We consider promotion of competition a complimentary yet important role of the Commission. Enhancing public understanding of the value of competition and promoting compliance with the law is part and parcel of the regulatory regime, which seeks to prevent and deter the occurrence of anti-competitive behavior. In this connection, the Commission will</p>
<p>2. The Commission (or the Government) should strengthen its promotion and public education efforts in order to enhance the understanding of the</p>	

¹ Matters relating to guidelines to be issued by the Commission (clause 35 in Part 2, and clauses 38, 40 and 58 in Part 3) and the enforcement powers of the Commission and Tribunal (Parts 4 to 6) will be separately dealt with under components 5, 7 and 8 of the work plan (CB(1)320/10-11(01)) endorsed by the Bills Committee.

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<p>business community, in particular the Small and Medium Enterprises (SMEs) as well as consumers, on the legal requirements of the Competition Ordinance, if enacted. (CGCC, HKMMA and HKSMEA)</p>	<p>conduct programmes on public education and promotion in order to raise public awareness of the law and facilitate their compliance. The Commission will also be required by law to issue guidelines on such matters as the competition rules, complaint and investigation procedures to increase transparency and facilitate compliance by the public.</p>
<p>3. Clause 129 of the Bill should be amended to : (a) require the Commission to consult with any body or association in Hong Kong that, under a Hong Kong Ordinance, is provided with regulatory, supervisory or representative functions or responsibilities in relation to an industry sector, before commencing any investigation or enforcement action in fulfillment of its function under clause 129(a) of the Bill; and (b) preclude the Commission from conducting market studies in respect of industry sectors that are already supervised by a sectoral regulator empowered to review and</p>	<p>As an independent regulatory body, the Commission should be able to perform its functions conferred by the Bill objectively and free from influence from parties whose interests might be affected by its investigations. In respect of the Commission's power to initiate an investigation into a competition-related</p>

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<p>respond to instances of market failure. (HKAB)</p>	<p>complaint, clause 39(2) of the Bill imposes a threshold requirement of reasonable suspicion that a contravention has taken place, is taking place or is about to take place. Clause 40 further provides that the Commission must issue guideline (after consulting any persons it considers appropriate) indicating the procedures it will follow in deciding whether or not to conduct an investigation. We consider that the Bill as currently drafted has ensured that the Commission's exercise of power is impartial, transparent and reasonable.</p> <p>As regards market studies, it is a common function of the competition authority in other overseas jurisdictions. It is</p>

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	<p>intended to enable the competition regulators to conduct systematic study to better understand the operation and the state of competition of a particular market, thereby helping the Commission to identify, and advise the sector on, the needs and ways to improve matters that affect competition in a particular segment of the economy. Clause 129 of the Bill is so drafted to reflect our policy intention. A sectoral regulator (except those with which the Commission has concurrent jurisdiction under the Bill) does not have the necessary expertise on competition and cannot replace the Commission in the performance of this function.</p>

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<p>4. In view of the considerable funding incurred for the operations of the Commission and the proposed Competition Tribunal (the Tribunal), the Administration should be prudent in determining their establishments, roles and duties, and ensure that the Commission will operate in the most cost-effective manner. The relevant financial information should also be made available for public inspection to enhance transparency of their operations. (CGCC and FHKI)</p>	<p>The Commission and the Tribunal will be funded by the Government as a statutory body and part of the Judiciary respectively. The financial provisions for the establishment and operation of the Commission and the Tribunal will be subject to approval of the Legislative Council (LegCo). Specifically, the Commission as a statutory body will be held accountable to the public, subject to regulation under the Prevention of Bribery Ordinance, the Ombudsman Ordinance and value-for-money audit by the Director of Audit. The Commission will be required to keep proper accounts and submit estimates to the Chief Executive</p>

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	every financial year. Its annual report and audited accounts will also be tabled at LegCo after each financial year. In addition, there are provisions in the Bill that govern the Commission's conduct of meetings, scope of delegation and powers to make house rules to ensure that its operation is transparent.
<p><u>Composition of Commission (Proposed section 2 of Schedule 5)</u></p> <p>5. The proposal as put forward in the public consultation paper entitled "Detailed Proposals for a Competition Law" issued by the Government in May 2008 set out that "at least one Commission member should have experience in SME matters", while the current drafting of the Bill only required the Chief Executive "may have regard" to that person's expertise or experience in SMEs rather than a pre-requisite of appointment. The Administration should consider amending the above provision to clearly set</p>	It is the policy intention that through appointment of members with business background, the Commission will be able to give due regard to the special needs and circumstances of the local industry, business and SMEs while enforcing the law. The reference to small and medium enterprises in section 2(2) of Schedule 5

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out the above proposal to ensure that a person truly representing SMEs would be appointed to the Commission. (LSD and NF)	of the Bill reflects our policy intention.
6. Representatives from SMEs, related chamber of commerce or business sector and consumers should be appointed to the Commission. (CGCC, HKCSMB, HKGCC and LSD)	
7. In making appointments to the Commission, consideration can be given to appointing person(s) with experience in SME matters but not representing the SMEs to avoid conflict of interests and to uphold impartiality when advising the Commission on the impact of its decisions on SMEs. (HKMMA)	
<u>Commission may establish committees (Proposed section 28 of Schedule 5)</u> 8. The Commission should be required to seek guidance before making policy decisions, and an independent "Competition Advisory Committee" is suggested to be set up to assist the Commission in matters which require	The Commission will perform its statutory role impartially according to the powers conferred by the law. There are a number of provisions in the Bill to ensure that the Commission could tap

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<p>specific expertise and guidance from the community. The pool of expertise will increase the efficient conduct of the Commission's business. (REDA)</p>	<p>relevant experience and expertise from members of the community in performing its statutory functions. For example, section 2 of Schedule 5 provides for a broad-based composition of the Commission, comprising members of different experiences and qualifications. Section 28 of the same Schedule also provides that the Commission may establish committees (which may include non-Commission member) to advise on specific matters or perform specific functions of the Commission</p>
<p><u>Competition Tribunal (Part 10)</u></p>	
<p><u>Procedures (Clause 143)</u></p> <p>1. Since the Tribunal is to be a superior court of record, the Rules of the Court</p>	<p>Clause 143 of the Bill provides that the Tribunal may decide its own procedures</p>

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<p>of First Instance should normally apply. Moreover, it is not clear what rights of audience will apply, for example, with regard to the parties' legal representatives (including solicitors) and whether corporate parties would be allowed to act in person generally; and if not, under what circumstances would they be so allowed; and with or without leave. In addition, it should also be clarified whether substantive hearings will be open to the public and whether or not held in Chambers. (Law Soc)</p>	<p>and may, in so far as it thinks fit, follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction. Clause 156 also empowers the Chief Judge, after consulting the President of the Tribunal, to make rules regulating and prescribing, amongst others, the practice and procedure to be followed in the Tribunal in all matters with respect to which the Tribunal has jurisdiction and any matters incidental to or relating to that practice or procedure.</p> <p>The “right of audience in the Competition Tribunal” and “whether substantive hearings will be open to the public and</p>

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	<p>whether or not held in Chambers” are to be governed by clause 143 of the Bill and the rules to be made by the Chief Judge of the High Court, after consulting the President of the Tribunal, under clause 156 of the Bill.</p>
<p>2. The establishment of the Tribunal within the Judiciary as a superior court of record may incur potentially high legal costs and SMEs may be disadvantaged if they are involved in the legal proceedings. (HKSMEA and TMAHK)</p>	<p>The work of the Tribunal involves a new area of law which would be applied in the circumstances of Hong Kong. What is at stake could be substantial. In view of the above, we consider that the Tribunal should be pitched at the CFI level to ensure that the competition law cases are dealt with by a specialized tribunal composed of judicial officers of considerable experiences. The policy</p>

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	<p>intention is that the Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice (clause 143(3) refers) to enable it to handle cases in a timely manner and at comparatively lower cost to all parties involved.</p> <p>Based on overseas experiences, regulation of SME conduct is seldom a priority of competition authorities. In addition, when dealing with cases of a minor nature, the Bill provides for a commitment mechanism under which the Commission will be empowered to accept commitments from an undertaking such as a SME and refrain from pursuing the case in the Tribunal.</p>

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<p><u>Concurrent jurisdiction relating to telecommunications and broadcasting (Part 11) and Matters that may be provided for in Memorandum of Understanding (Schedule 6)</u></p>	
<p><u>Concurrent jurisdiction with Telecommunications Authority (Clause 158)</u></p> <ol style="list-style-type: none"> 1. Concurrent jurisdiction is unnecessary and dangerous as having two sets of bodies looking at essentially the same issues and conduct invites inconsistency and conflicts in approaches and decisions, and adds substantially to the costs and burdens of defendants. It also creates a situation where a limited body of expertise would be divided between regulatory bodies, with thus neither obtaining a critical mass expertise. (PCCW) 2. The existing powers vested by the sector-specific regulators should be abolished and transferred to the Commission to ensure that anti-competitive conduct in all sectors of the economy be treated equally and the law be applied consistently. It should also be noted that competition issues may cross different sectors, for example, an 	<p>The proposed concurrent jurisdiction is intended to retain the specialist knowledge of the Broadcasting Authority (BA) and the Telecommunications Authority (TA) in competition regulation and for them to initially share some of the Commission's workload in investigation and bringing of proceedings of competition cases in the broadcasting and telecommunications sectors. The BA and the TA only have jurisdiction in relation to the conduct of undertakings which are their respective licensees. While enforcing the law, the Commission, the BA and the TA will adopt the same</p>

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<p>anti-competitive conduct in the content sector may have an impact on the telecommunications sector in the upstream market for the supply of content to telecommunications operators. Jurisdictional overlap between the Commission and the sector-specific regulator can be eliminated if the power of enforcing the new competition law is only vested with the Commission. (CSL)</p>	<p>regulatory guidelines so the question of inconsistent application of the law should not arise. Clauses 160 and 161 of the Bill also require the three competition regulators to enter into a Memorandum of Understanding (MOU) and agree on the transfer of competition matters between them to ensure coordination and clarity in the exercise of the concurrent jurisdiction.</p>
<p><u>Memorandum of Understanding (Clause 161)</u></p> <p>3. The terms of the memorandum of understanding pursuant to the concurrent jurisdiction over carrier licensees should be made available for public consultation to ensure transparency of how competition investigations in the telecommunications sector are to be coordinated and carried out. (HTHK)</p>	<p>The MOU is largely concerned about the detailed arrangements between the Commission, the BA and the TA to co-ordinate the performance of functions under the Ordinance. It should be of no significant interest to the general public. Hence, we consider it appropriate to leave</p>

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	flexibility to the regulators in respect of the preparation of the MOU, which will be published when it is finalized and signed by the regulators.

Abbreviations (in alphabetical order)

LC Paper No.

BCCHK	- The British Chamber of Commerce in Hong Kong	CB(1)814/10-11(01)
CGCC	- The Chinese General Chamber of Commerce	CB(1)622/10-11(04)
CSL	- CSL Limited	CB(1)592/10-11(05)
FHKI	- Federation of Hong Kong Industries	CB(1)592/10-11(01)
HKAB	- The Hong Kong Association of Banks	CB(1)516/10-11(22)
HKCSMB	- The Hong Kong Chamber of Small and Medium Business Ltd.	--
HKGCC	- The Hong Kong General Chamber of Commerce	CB(1)516/10-11(03) / CB(1)743/10-11(01)
HKMMA	- Hong Kong Metal Merchants Association	CB(1)516/10-11(07)
HKRMA	- Hong Kong Retail Management Association	CB(1)592/10-11(04)
HKSMEA	- Hong Kong Small and Medium Enterprises Association	CB(1)592/10-11(03)

HTHK	- Hutchison Telecommunications (Hong Kong) Limited	CB(1)516/10-11(16)
Law Soc	- The Law Society of Hong Kong	CB(1)516/10-11(06)
LSD	- League of Social Democrats	--
NF	- New Forum	CB(1)622/10-11(06)
PCCW	- PCCW Limited	CB(1)592/10-11(02)
REDA	- The Real Estate Developers Association of Hong Kong	CB(1)622/10-11(08)
TMAHK	- The Toys Manufacturers Association of Hong Kong	CB(1)516/10-11(02)

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