For discussion
on 15 March 2011

Bills Committee on Competition Bill

Responses to Follow-up Questions Arising From the Meeting on 22 February 2011

Purpose

This paper responds to questions raised by Members at the meeting on 22 February 2011.

"Appreciable effect" and "De minimis" arrangements for restrictive agreements

2. As pointed out in our previous responses, case laws and regulatory guidelines available in other major competition jurisdictions suggest that a competition law should only be meant to catch conduct which has an "appreciable adverse effect" on competition. Indeed, the notion of "appreciable effect" forms part and parcel of "de minimis" arrangements under the competition laws of other jurisdictions, such as those of the European Union (EU), Singapore and United Kingdom (UK) etc. to which we have drawn reference when drafting the major prohibition provisions of the Competition Bill (the Bill).

European Union

3. In the EU, the arrangements for agreements of minor importance (which are similar to the "de minimis" arrangements) are set out in the guidelines instead of the Treaty on the Functioning of the European Union (TFEU). According to the European Commission's (EC) Notice on Agreements of Minor Importance (the Notice) [(1)], Article 101(1) of the

(1) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (2001/C 368/07).

TFEU[(2)] is not applicable where the impact of the agreement on competition is not appreciable. More specifically, agreements between undertakings which affect trade between Member States are considered not having an appreciable effect on competition within the meaning of Article 101(1) if –

(i) the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between competing undertakings (horizontal agreement); or

(ii) the market share of each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings (vertical agreement); or

(iii) in case where it is difficult to classify the agreement as either horizontal or vertical, the 10% threshold is applicable.

4. The Notice also states that agreements between small and medium-sized undertakings[(3)] are rarely capable of appreciably affecting trade between Member States.

5. However, certain "hard core" anti-competitive agreements, namely price-fixing, market allocation or output restriction, are not protected by the Notice. As regards vertical agreements, those aimed at (i) limiting a buyer's ability to determine its resale price[(4)]; or (ii) restricting a buyer operating at the retail level from selling to any end user in response to an unsolicited order; or (iii) restricting a supplier's ability to sell components as spare parts to end users or independent repairers not entrusted by a buyer with the repair or servicing of its products etc. are also not protected by the Notice.

6. For agreements covered by the Notice, the EC will not institute

---

(2) Article 101(1) of the TFEU (formerly known as Article 81(1)) prohibits agreements between undertakings which have as their object or effect the prevention, restriction, or distortion of competition within the common market.

(3) The Notice defines small and medium-sized undertakings as undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR40 million or an annual balance-sheet total not exceeding EUR27 million.

(4) Except that a supplier may impose a maximum resale price or recommend a resale price, provided that pressure from, or incentives offered by, any parties to the agreement does not result in that becoming a fixed or minimum price.

proceedings either upon application or on its own initiative.

Singapore

7. In Singapore, the Competition Act 2004 does not contain any express "de minimis" provisions and, as in the EC, the "de minimis" arrangements are also set out in the guidelines. The Competition Commission of Singapore (CCS) sets out in its "Guidelines on the Section 34 Prohibition" a "de minimis" approach, which is essentially the same as the EC's approach albeit with higher market share thresholds (20% and 25% for horizontal and vertical agreements respectively) and a different definition of small or medium enterprise (SME)(5). "Hard core" anti-competitive agreements, namely price-fixing, bid-rigging, market sharing or output restriction, are considered always to have an appreciable adverse effect on competition, notwithstanding that the market shares of the parties are below the threshold levels, and even if the parties to such agreements are SMEs.

United Kingdom

8. Given the parallel application of Article 101(1) of the TFEU and section 2(1) of the UK Competition Act 1998 (the Chapter I prohibition) in the UK, the UK Office of Fair Trading (OFT) in practice will largely follow the EC's "de minimis" approach as set out in the Notice.

9. In addition, a "small agreements" approach is stipulated in section 39 of the UK Competition Act 1998 which provides that "small agreements" between undertakings, the combined applicable turnover of which does not exceed GBP 20 million, are immune from pecuniary penalty. Price fixing agreements are nevertheless not protected by the immunity. The monetary value threshold is set by the Secretary of State in the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (Statutory Instruments 2000 No. 262).

10. However, it should be noted that if the OFT has investigated a small agreement, it may make a decision to withdraw the immunity if, as a result of its investigation, it considers that the agreement is likely to infringe the Chapter I prohibition. Prior notice must be given to the

(5) SMEs in Singapore are defined as follows: For manufacturing SMEs, if they have Fixed Asset Investment (FAI) of less than S$15 million; and for service SMEs, if they have less than 200 workers.

parties in respect of which the immunity is withdrawn. In determining the withdrawal date, the OFT will have regard to the amount of time which the parties are likely to require in order to secure that there is no further infringement of the Chapter I prohibition in respect of the agreement.

Other jurisdictions

11. **Appendix I** provides examples of "de minimis" thresholds or arrangements adopted by other competition jurisdictions for Members' reference.

Exemption arrangement for statutory bodies and/or public bodies

12. The Administration is working on which proposed statutory bodies or their activities should be brought under the purview of the Bill. As there are a large number of statutory bodies with very diverse functions in Hong Kong and the need for internal consultation, we have yet to complete the study. We will brief Members on the proposals as soon as we are ready to do so.

13. As regards public bodies which are set up voluntarily or at the advice of the Government to, inter alia, supervise the industry sector and respond to instances of market failure, should they fall within the definition of statutory bodies under clause 2 of the Bill, the competition rules and the related enforcement provisions will not apply to them or their activities unless otherwise specified in regulations to be made by the Chief Executive (CE) in Council under clause 5(1).

14. In the event that these public bodies do not qualify as statutory bodies but there are public policy grounds which warrant an exemption of the agreement or conduct of these public bodies from the application of the conduct rules, clause 31 of the Bill empowers the CE in Council to exempt by order a specified agreement or conduct from the conduct rules if the CE in Council is satisfied that there are exceptional and compelling reasons of public policy that the conduct rule ought not to apply.

Briefings to trade associations

15. Extensive public consultation has been conducted on the

introduction of a cross-sector competition law in 2006 and 2008. Since the introduction of the Competition Bill into the Legislative Council in July 2010, the Administration has been reaching out to stakeholders and the community at large to brief them on the objectives and key elements of the Bill. The list of trade associations, most of them comprising small and medium enterprises, for which briefings and meetings on the Bill have been conducted is at **Appendix II**.

Advice sought

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

Commerce and Economic Development Bureau
March 2011

Appendix I

"De minimis" arrangements for restrictive agreements under the competition laws of selected jurisdictions

Jurisdiction	Brief description
Denmark	Pursuant to section 7 of the Competition Act (Consolidation Act) No. 1027 of 2007, the prohibition against anti-competitive agreements do not apply to: (a) agreements between undertakings with an aggregate turnover of less than DKK1 billion (approx EUR 133.3 million); and (b) an aggregate market share of less than 10% of the product or service market concerned; or (c) an aggregate annual turnover of less than DKK 150 million (approx EUR 20 million). The de minimis carve-outs do not apply in cases where undertakings agree to fix prices, restrict sales, share markets or customers or fix bids.
Sweden	Pursuant to a Notice on Agreements of Minor Importance (KKVFS 2004:1), agreements between actual or potential competitors where the parties' combined market share does not exceed 10%; and agreements between non-competitors where none of the parties has a market share exceeding 15% would normally fall outside of the anti-competitive agreements restriction. Where the individual turnover of each of the parties does not exceed 30 million krona (approximately EUR 3.2 million), the 15% threshold applies irrespective of the type of agreement. The "de minimis" principles do not apply to agreements which contain hard core restrictions.

Jurisdiction	Brief description
Japan	According to guidelines issued by the Japan Fair Trade Commission, where market shares for all participants to a joint R&D project in the relevant market is no more than 20%, this agreement would “usually present no problem under the Anti-monopoly Act”.
South Korea	The Guidelines for Cartel Review issued by the Fair Trade Commission state: “when the total market share of businesses participating in the cartel is below 20%, the cartel is deemed not to cause the competition restriction effect”.
Mainland China	None. (enacted in August 2007)
Malaysia	None. (enacted in June 2010)

Appendix II

Trade Associations or Business Representatives [Note] for which briefings on Competition Bill were conducted July 2010 - February 2011

1. American Chamber of Commerce
2. Asian College of Knowledge Management
3. Business Facilitation Advisory Committee
4. Federation of Hong Kong Industries*
5. Hong Kong Business Community Joint Conference *
6. Hong Kong Chamber of Small & Medium Businesses*
7. Hong Kong Chinese Importers' & Exporters' Association*
8. Hong Kong General Chamber of Commerce*
9. Hong Kong Small & Medium Enterprises Association*
10. International Business Committee
11. Junior Chamber International Hong Kong
12. Small and Medium Enterprises Committee
13. Some 100 representatives of the small and medium enterprises attending a seminar organized by the Consumer Council
14. Textiles Advisory Board
15. The Chinese General Chamber of Commerce*
16. The Chinese Manufacturers' Association of Hong Kong*
17. The Federation of Trade Unions
18. Trade and Industry Advisory Board
19. Hong Kong Tsuen Wan Industries and Commerce Association Ltd

---

Note The list includes briefings to organizations comprising representatives from trade and business sectors, including the small and medium enterprises.

* Denotes organizations for which more than one briefings/ meetings were conducted.