For discussion
on 8 May 2012

Bills Committee on Competition Bill

Responses to follow-up questions arising from previous meetings

Purpose

This paper responds to questions raised by Members at previous meetings.

Anti-competitive conduct of concern

2. At the Bills Committee meeting on 24 April 2012, some Members were concerned whether the Competition Bill (the Bill) would be able to tackle anti-competitive conduct that are of public concern, including price collusion in some industries and abusive behavior by major players in some markets.

3. The Bill adopts a general prohibition approach against anti-competitive agreements and conduct. It models on the corresponding competition provisions in the European Union (EU) and the United Kingdom (UK), which have proven track records in tackling anti-competitive agreements and conduct.

4. The first conduct rule of the Bill targets at anti-competitive agreements, concerted practice or decisions of an association of undertaking (collectively known as "agreements" in this paper) that have their object or effect to prevent, restrict or distort competition in Hong Kong. It covers many anti-competitive phenomena of major concern to the Hong Kong public. For example, an agreement between suppliers or retailers to fix the prices of fuel and petrol products in order to restrict price competition would be prohibited under the first conduct rule. A bid-rigging agreement through which tenderers agree not to compete genuinely with each other for building maintenance tenders invited by owners corporations would also be prohibited under the first conduct rule.

5. The second conduct rule of the Bill targets at abusive behaviour that has as its object or effect to prevent, restrict or distort competition in Hong Kong by an undertaking with a substantial degree of market power. Typical examples of such abusive behaviour include predatory pricing by, for example, chain stores such as supermarkets which have a substantial degree of market power to force their competitors out from the market; or the exertion of pressure by a major retailer with a substantial degree of market power on a supplier to cease supply to other retailers or on a shopping mall operator to refrain from renting to retailers selling products similar to theirs with a view to limiting competition from these competitors.

6. Comparing with the existing approach of discouraging anti-competitive conduct through voluntary compliance with administrative guidelines, the Bill provides a legal basis for the investigation and sanctioning of anti-competitive conduct. Without a competition law, there will be no enforcement agency and no power to stop those anti-competitive activities that are adversely affecting the daily livelihood of the Hong Kong people. The Bill also provides a statutory channel, namely the follow-on action, so that aggrieved parties may seek damages when a contravention of the conduct rule is determined.

7. Some Members were concerned that the amendments to the Bill proposed by the Administration in October 2011 and April 2012 might significantly affect the integrity and effectiveness of the Bill. As explained in our submissions to the Bills Committee (see LC Paper No. CB(1)91/11-12(01) and LC Paper No. CB(1)1506/11-12(02)), we are mindful that any proposed amendments to the Bill should not undermine the overall effectiveness of the Bill in addressing public concerns over anti-competitive conduct. Under the proposed amendments, the future Competition Commission will have the same power to take immediate investigative actions against suspected serious anti-competitive conduct (namely price fixing, bid-rigging, output control and market allocation) under the first conduct rule. Exclusion under “agreements of lesser significance” for the first conduct rule would not cover serious anti-competitive conduct, regardless of the combined turnover of undertakings participating in the agreement. As regards the exclusion threshold for “conduct of lesser significance” for the second conduct rule, despite our proposed increase from an annual turnover of HKD 11 million to HKD 40 million, undertakings with market power in sectors that are most concerned by the public, i.e. the giant chain stores and oil companies, would not be excluded as their annual turnover would be way above the proposed HKD 40 million threshold.

8. The early enactment of the Competition Bill is important as we need it to develop a fair competition culture in Hong Kong and address the concerns of the general public.

Threshold for agreements / conduct of lesser significance

9. Some Members suggested that the Administration should review the turnover threshold for "conduct of lesser significance" under the second conduct rule from time to time in light of statistics of the Census and Statistics Department (C&SD). Some Members also suggested setting out such intention in the Secretary for Commerce and Economic Development's concluding speech for the resumption of the second reading debate.

10. As explained in our submissions to the Bills Committee (see LC Paper No. CB(1)91/11-12(01) and LC Paper No. CB(1)1506/11-12(02)), the proposed turnover threshold for "conduct of lesser significance" has been drawn up with reference to the average turnover of small and medium enterprises on the basis of statistics from C&SD. We have also specified the threshold in Schedule 1 to the Bill so that it can be amended as and when necessary by way of an order of the Chief Executive in Council, subject to the approval of the Legislative Council. In light of the above, we have no objection to indicating in the concluding speech of the Secretary for Commerce and Economic Development that based on the same objective criteria, the Administration would review the turnover threshold for conduct of lesser significance from time to time having regard to updated statistics provided by C&SD.

Responses to other issues

a) Clause 2 (definition of statutory body)

11. At the Bill Committee meeting on 24 April 2012, some Members raised the question of whether courts in Hong Kong fall within the definition of "statutory body" in clause 2 of the Bill[1]. Since courts in

[1] Clause 2 defines "statutory body" as "a body of persons, corporate or unincorporate, established or constituted by or under an Ordinance or appointed under an Ordinance, but does not include a company incorporated under the Companies Ordinance (Cap. 32), a corporation of trustees incorporated under the Registered Trustees Incorporation Ordinance (Cap. 306), a society registered under the Societies Ordinance (Cap. 151), a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33), or a trade union registered under the Trade Union Ordinance (Cap. 332)".

Hong Kong, including the Court of Final Appeal, the High Court, the District Courts, Magistrates' Courts and other special courts, are established in the Hong Kong Special Administrative Region by enactment, we are of the view that they fall within the definition of "statutory body" for the purpose of the Bill. As explained in our previous submission (see LC Paper No. CB(1)1573/11-12(02)), given that the classification of courts as statutory bodies for the purpose of the Bill is in conformity with the constitutional requirement under the Basic Law and that the Judiciary has no objection to this arrangement, we do not suggest amending the definition of "statutory body" to exclude courts from the definition.

b) Clause 6(2)

12. At the Bills Committee meeting on 24 April 2012, some Members queried the need for the proposed revised clause 6(2). The original clause 6(2) has been included to provide an illustrative list of examples of anti-competitive conduct to supplement the general prohibition provisions (i.e. the first conduct rule) and to enhance the clarity of the Bill. Similar provisions also exist in the competition law in the UK and Singapore where a general prohibition approach is adopted. We have proposed a committee stage amendment (CSA) to clause 6(2) merely to replace the three examples with the serious anti-competitive conduct that is defined in clause 2 in order to enhance clarity and ensure consistency.

13. Apart from clause 6(2), the relationship between the first conduct rule and the serious anti-competitive conduct has also been provided for in the relevant provisions such as the new clauses 66(1)(a)(i) and 80A(1) as well as the new sections 5(1) and 5(2) of Schedule 1 to the Bill. Having regard to these references to the serious anti-competitive conduct, we agree that the examples in clause 6(2) would not be necessary, and have no objection to deleting the original clause 6(2) without replacement.

c) Clause 118

14. It is our policy intent that a finding of contravention of conduct rules by either the Court of First Instance (CFI) or the Competition Tribunal (Tribunal) should be binding on subsequent proceedings under part 7 before the CFI or the Tribunal. The purpose is to provide a ground for follow-on action arising from such finding of contravention of

conduct rule. Since this arrangement is different from the common law rules of binding precedent[2], an express provision, that is clause 118, is required to give effect to this policy intent. The finding of contravention of conduct rule should however be differentiated from the finding of fact by the Tribunal and the CFI. Clauses 148 and 149 respectively provide that a finding of fact by the Tribunal or the CFI is merely admissible as evidence in proceedings in the Tribunal or the CFI.

15. Some members have suggested several drafting-related amendments to clause 118. We accept Members' suggestions and have revised the clause accordingly as shown at **Annex A**.

d) Clause 153

16. At the Bills Committee meeting on 17 April 2012, some Members suggested the Administration to review the appropriateness of clause 153(2)(b) taking account of the Court of Final Appeal's past judgment on finality provision.

17. By way of background, the proposed amendments to clause 153 have been made in response to Members' request for bringing the leave requirement for appeal against decisions of the Tribunal on a par with that of the CFI. The proposed clause 153(2)(b) is modeled on the existing section 14(3)(c) of the High Court Ordinance (Chapter 4)[3]. On the appropriateness of clause 153(2)(b), while the Court of Final Appeal judgment concerned (*Mok Charles Peter v Tam Wai Ho & another* FACV 8/2010) has ruled that the finality aspect of section 67(3) of the Legislative Council Ordinance (Cap 542) is unconstitutional as being inconsistent with Article 82 of the Basic Law, this does not mean that all finality provisions in the law are or would be unconstitutional. It is clearly indicated in the same judgment that access to the Court of Final Appeal is not unrestricted under Article 82 of the Basic Law, though any restriction or limitation on the power of final adjudication must satisfy the proportionality test. Thus, we consider that it is necessary to retain clause 153(2)(b) as an empowering section to preserve the rule making power under clause 156 to the effect that certain decisions, determinations or orders of the Tribunal is final for the purpose of an appeal under

[2] Under the doctrine of judicial precedent (in Latin, *stare decisis*), a court lower in the hierarchy is bound by (i.e. must follow and apply) decisions of courts higher in the hierarchy within the same jurisdiction.

[3] Section 14(3)(c) of the High Court Ordinance provides that no appeal shall lie from a judgment or order of the Court of First Instance, where it is provided by any Ordinance or by rules of court that the same is to be final.

Clause 153. It should be noted that rules under clause 156 will be made by the Chief Judge in consultation with the President of the Competition Tribunal. The Chief Judge would no doubt give due consideration to the above Court of Final Appeal judgment in making rules under Clause 156.

18. Some Members also suggested amendments to the Chinese text of clause 153 to enhance clarity and ensure consistency with the English text. We accept Members' suggestions and propose amending clause 153 as follows -

(a) clause 153(2)(b) – to amend the phrase "訂明審裁處的決定、裁定或命令屬終局命令的情況下" to read "訂明審裁處的決定、裁定或命令屬終局的情況下" and

(b) clause 153(2)(c) – to delete "上訴" from "該命令是在有關各方同意下作出的上訴".

The latest version of clause 153 with amendments shown in mark-up version is at **Annex B**.

Advice sought

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

Commerce and Economic Development Bureau
May 2012

Annex A

118. Findings of contravention of conduct rules

(1) This section applies to proceedings under this Part ~~brought in~~ before the Court of First Instance or ~~in~~ the Tribunal in which a contravention, or involvement in a contravention, of a conduct rule is alleged in relation to a particular act.

(2) ~~In any~~ Subject to subsection (2A), in such proceedings the Court of First Instance or the Tribunal (as the case requires) is bound~~, once any period specified in subsection (3) has expired,~~ by ~~any~~ an earlier decision of the Court or Tribunal that the act in question is a contravention, or involvement in a contravention, of the conduct rule.

(2A) Subsection (2) does not apply in relation to a decision of the Court of First Instance or the Tribunal until the period specified in subsection (3) has expired.

(3) The period mentioned in subsection ~~(2)~~ (2A) is –

(*a*) the period during which an appeal may be made to the Court of Appeal under section 153; and

(*b*) where an appeal has been made to the Court of Appeal, the period during which a further appeal may be made to the Court of Final Appeal,

and, where ~~any~~ such an appeal or further appeal is made, the period specified in paragraph (*a*) or (*b*) includes the period before the appeal is determined.

Annex B

153. 向上訴法庭上訴

(1) 除第(2)款及第 153A 條另有規定外，針對審裁處根據本條例作出的決定(包括就補償性制裁或罰款款額作出的決定)、裁定或命令~~的~~而向上訴法庭提出上訴，屬當然權利~~，須向上訴法庭提出~~。

(2) 任何人—

(*a*) 不得針對具以下效力的審裁處命令而提出上訴：容許延長針對審裁處的決定、裁定或命令提出上訴的期限；

(*b*) 不得在任何條例或根據第 156 條訂立的規則訂明審裁處的決定、裁定或命令屬終局的情況下，針對該決定、裁定或命令提出上訴；或

(*c*) 不得在未經上訴法庭或審裁處許可下，針對符合以下說明的審裁處命令而提出上訴：該命令是在有關各方同意下作出的，或純粹關乎交由審裁處酌情決定的訟費。

(3) 根據第 156 條訂立的規則，可規定屬訂明類別的決定、裁定或命令就與上訴至上訴法庭相關連的訂明目的而言，須視其為終局決定、裁定或命令或非正審決定、裁定或命令。

(3A) 如上訴法庭就任何審裁處決定、裁定或命令，作出是否與上訴至上訴法庭相關連的目的而言，屬終局決定、裁定或命令或非正審決定、裁定或命令的決定，任何人不得針對該後述的決定提出上訴。

~~(2) 本條所指的針對審裁處在法律程序中作出的決定、裁定或命令的上訴僅可—~~

~~(*a*) 由屬該程序的一方的人提出；及~~

~~(*b*) 在得到上訴法庭的許可下提出。~~

~~(3) 除非上訴法庭信納——~~

~~(*a*) 有關上訴有合理勝算；或~~

~~(*b*) 有其他有利於秉行公義的理由，因此該上訴應予聆訊，~~

~~否則不可根據第(2)(*b*)款批出上訴許可。~~

(4) 上訴法庭有聆訊和裁定第(1)款所指的上訴的司法管轄權，並可 —

(*a*) 確認、推翻或更改審裁處的決定、裁定或命令；

(*b*) 在審裁處的決定、裁定或命令被推翻的情況下，以上訴法庭認為適當的其他決定、裁定或命令代替；或

(*c*) 將有關事宜發還審裁處，以因應上訴法庭的決定作重新考慮。

(5) 根據本條提出上訴，不具有暫援執行該上訴所關乎的決定、裁定或命令的效力，但針對罰款的施加或款額而提出的上訴則屬例外。