For discussion
on 5 July 2011

Bills Committee on
Competition Bill

Responses to follow-up questions
arising from the meeting of 21 June 2011

Purpose

This paper responds to questions raised by Members at the meeting on 21 June 2011.

Issues relating to Part 2

Formulation of the conduct rules

2. We note Members' suggestions of stating explicitly in clauses 6 and 21 of the Competition Bill (the Bill) that the first and the second conduct rules apply only when the adverse effect on competition is appreciable. We will consider the proposal and will revert to Members in due course. We will also re-examine the Law Society's proposal to spell out explicitly in clause 7 that the inference of an undertaking's object of an agreement would be reached objectively.

3. Clause 6(2) of the Bill provides for a non-exhaustive list of examples of anti-competitive agreements to supplement the first conduct rule in clause 6(1). The three examples cited, namely price fixing, output restriction and market allocation, are often referred to as "hardcore" anti-competitive conduct, which almost always have an adverse effect on competition. These examples are nearly identical to those in paragraphs (a) to (c) of section 34(2) of the Singapore Competition Act [Note (1)] and

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[Note (1)] Section 34(1) of the Singapore Competition Act provides (known as section 34 prohibition) that agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempt. Subsection (2) further provides that agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

section 2(2) of the UK Competition Act 1998[Note (2)], which provide for the first conduct rule equivalent in these regimes. As regards the two other examples set out in section 34(2) of the Singapore Competition Act and section 2(2) of the UK Competition Act, unlike the hardcore conduct, whether they have an appreciable adverse impact on competition will depend on the circumstances of each case. Hence, for the purpose of providing illustrative and clear examples of anti-competitive conduct, we have cited price fixing, output restriction and market allocation in the non-exhaustive list in clause 6(2).

Territorial application of the first conduct rule

4. Clause 8 of the Bill is intended to capture conduct outside Hong Kong, so long as it may prevent, restrict or distort competition in Hong Kong. Section 33 of the Singapore Competition Act provides similar territorial application.[Note (3)] Incorporation of a provision akin to section 2(3) of the UK Competition Act, [Note (4)] to the effect that the first conduct rule applies only if the agreement is, or is intended to be, implemented in Hong Kong, would narrow the scope of the Bill and undermine the competition authorities' ability to tackle agreements or conduct which are not implemented in Hong Kong but nonetheless affect competition in Hong

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(b) limit or control production, markets, technical development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[Note (2)] Section 2(1) of the UK Competition Act 1998 (known as Chapter I prohibition) provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited unless they are exempt. Subsection (2) further provides that subsection (1) applies, in particular, to agreements, decisions or concerted practices which –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[Note (3)] Section 33(1) of the Singapore Competition Act provides, inter alia, that notwithstanding that an agreement referred to in section 34 (see footnote 1 above) has been entered into outside Singapore or any party to such agreement is outside Singapore, the competition rules apply to such party or agreement if such agreement infringes or has infringed the section 34 prohibition.

[Note (4)] Section 2(3) of the UK Competition Act 1998 provides that subsection (1) (see footnote 2 above) applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK.

Kong.

5. In the UK, apart from the domestic competition law which regulates agreement that is or is intended to be implemented in the UK, the competition regime of the EU applies in parallel. Article 101 of the Treaty on the Functioning of the EU prohibits anti-competitive agreements which may affect trade between Member States without requiring them to be implemented in the affected Member States.

International Cooperation

6. To our knowledge, reciprocity in enforcement of civil judgments is currently in force with jurisdictions such as Australia, Belgium, France, Germany, India, Israel, Italy, Malaysia, New Zealand and Singapore. Under the legal framework provided for by the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319), judgments from the above jurisdictions may be enforced in the HKSAR on a reciprocal basis. The reciprocity is not based on any international agreement signed with these jurisdictions but is based on their domestic legislation providing for reciprocal enforcement of judgments and are therefore subject to the relevant legislation in the respective jurisdictions. As such, the judgments of the future Competition Tribunal (Tribunal) may be enforced in overseas jurisdictions so long as they can satisfy the requirements of the relevant overseas legislation.

7. It is common for competition authorities to enter into administrative arrangements to promote cooperation in competition matters at a bilateral or multilateral level in a manner that is consistent with the parties' competition law. These may include conclusion of memorandum of understanding between competition authorities, structured dialogue or participation in fora such as the International Competition Network[Note (5)], as well as formal bilateral agreement between governments (e.g. as part of a Free Trade Agreement).

[Note (5)] The International Competition Network (ICN) is a dedicated international body for competition law enforcement providing an informal platform for networking and addressing practical competition concerns among competition authorities worldwide.

Application of the first conduct rule

(i) Vertical agreements

8. Vertical agreements are often pro-competitive through realizing efficiencies of the distribution chain and fostering more inter-brand competition. Nonetheless, certain vertical agreements may appreciably restrict competition if, for example, the parties to the agreement possess a substantial degree of market power and when the restrictive terms of the agreement foreclose a market or the vertical agreement may, in effect, be the means by which downstream direct competitors agree to limit competition between them. Hence, we consider it prudent not to exempt vertical agreements across-the-board, but to allow the future Competition Commission (Commission) to consult the stakeholders and the public on whether exemption for particular classes of vertical agreements is appropriate for Hong Kong.

(ii) Allocation of resources by private hospital to affiliated specialists

9. As explained in our previous response, generally speaking, an undertaking is free to decide how to allocate its resources (e.g. hospital beds and facilities amongst different specialists in the case of a hospital) independently as a matter of legitimate business decision. Based on the information provided, such conduct by the undertaking is unlikely to amount to an abuse of any market power under the second conduct rule.

(iii) Stipulating certain requirement in the tender

10. Tender exercise is designed to promote competition among the bidders within the parameters set out in the tender document. It is legitimate for an undertaking to stipulate in the tender document the conditions or requirements of the product or service expected of the bidding firms. These may cover the level of expertise or professional qualifications of the bidders or staff of the firm. Such conduct does not give rise to competition concerns.

Market definition

11. As explained in CB(1) 2420/10-11(03), market definition provides a framework for competition analysis and is a means to identifying the competitive constraints on a given market. The definition

will depend on the facts of each case; some entail obvious market boundaries while the others require more detailed analysis to identify the relevant product and geographical dimensions of a particular conduct/ agreement. As we understand, overseas competition authorities do not collate statistics on the average time taken to conduct market analysis or hypothetical monopolist test, which will vary widely between cases.

Decision mechanism

12. The decision mechanism provided for under clauses 9 to 14 of the Bill is designed to enable undertakings to seek consideration by the Commission as to whether any agreement or conduct is excluded or exempt from the Bill, if such cases involve novel issues or for which there is no clarification in case law or Commission's decisions. Similar arrangements are provided for in Singapore's Competition Act[Note (6)] and the UK's Competition Act as originally enacted in 1998.[Note (7)] The UK had abolished the system of notification of agreements to the competition authorities for guidance or a decision in 2004, mirroring similar changes to the EU regime. The authorities may still consider giving informal advice or opinion in respect of an agreement as a matter of discretion.

13. Conditions set out in clauses 9(2) and (3) of the Bill are essential to minimize the risk of over-burdening the Commission with applications for decisions on agreements well covered by the precedents or guidelines issued by the Commission, so that the Commission can focus its resources on its core function of combating anti-competitive conduct. While clause 9(1) delineates the types of agreements which may be considered by the Commission, clause 9(3) acts as an important safeguard against any hypothetical questions which may arise in relation to an agreement which an undertaking has made or given effect to, is giving effect to or proposing to make or give effect to. We consider clause 9(3) necessary to filter out any hypothetical questions or agreements.

Note (6) Section 43 of the Singapore Competition Act provides that a party to an agreement may apply to the Competition Commission of Singapore for guidance on whether or not the agreement is likely to infringe the section 34 prohibition (see footnote 1 above). Section 44 also provides that a party to an agreement may apply to the Commission for a decision as to whether an agreement has infringed the section 34 prohibition.

Note (7) When the Competition Act 1998 of the UK came into effect, sections 13 and 14 provided for the systems of notification of agreements to the Office of Fair Trading for guidance and a decision respectively as to whether the agreement is likely to infringe, or has infringed, the Chapter I prohibition (see footnote 2). The systems were abolished by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, following similar abolition of the notification systems in the EU.

Issues relating to Part 10

Right of appeal

14. It is noted that appeal from the judgment or order of the Court of First Instance in civil matter to the Court of Appeal (CA), save for certain cases, shall lie as of right under section 14(1) of the High Court Ordinance (Cap.4). As explained in our previous response, the leave to appeal requirement in clause 153 of the Bill is necessary to weed out unmeritorious appeals from a decision of the Tribunal. We consider that decisions of the Tribunal, as a special court tailor-made to handle competition cases, should be respected; an appeal from a decision of the Tribunal should only be permitted with leave when the appeal has a reasonable prospect of success or there is some other reason in the interests of justice why the appeal should be heard. Similar leave requirements and test of granting leave apply to an appeal from a decision of the Lands Tribunal to the CA under section 11AA of the Lands Tribunal Ordinance (Cap. 17)[Note (8)], as well as appeal from a judgment, order or decision of the District Court in any civil matter to the CA under sections 63(1) and 63A(2) of the District Court Ordinance (Cap. 336).[Note (9)]

Advice sought

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

Commerce and Economic Development Bureau
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[Note (8)] Section 11AA(6) of the Lands Tribunal Ordinance (Cap. 17) provides that leave to appeal from a decision of the Lands Tribunal to the Court of Appeal shall not be granted unless the Lands Tribunal, the Court of Appeal or the registrar hearing the application for leave is satisfied that (a) the appeal has a reasonable prospect of success; or (b) there is some other reason in the interests of justice why the appeal should be heard.

[Note (9)] Section 63(1) of the District Court Ordinance (Cap. 336) provides that an appeal can, with leave of a judge or the Court of Appeal, be made to the Court of Appeal from every judgment, order or decision of a judge in any civil cause or matter. Section 63A(2) further provides that leave to appeal shall not be granted unless the judge, the master or the Court of Appeal hearing the application for leave is satisfied that (a) the appeal has a reasonable prospect of success; or (b) there is some other reason in the interests of justice why the appeal should be heard.