

Bills Committee on Competition Bill

List of outstanding issues that require action/consideration by the Administration
(position as at 7 October 2011)

| Date of Meeting | Outstanding Issues | Action/Consideration by the Administration |
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| Function of the proposed Competition Commission (the Commission) | | |
| 17 January 2011 | Hon LEUNG Kwok-hung requested the Administration to include a provision stating "法例的目的是為促進可持續競爭，以提升經濟效益和促進自由貿易，從而惠及商界和消費者。" in the objects of the Bill or to stipulate the recommended phrase as a new function of the Commission under clause 129 of the Bill. (CB(1)1133/10-11(02)) | The Administration agreed to stipulate the phrase as a new function of the Commission under the clause but consideration would need to be given to tally the new function with that in the existing provisions. The Administration will consider and revert to the Bills Committee. (CB(1)1865/10-11) |
| "De minimis" arrangement | | |
| 15 February 2011 | The Bill should – ➤ set out the relevant level(s) in a schedule to the Bill and | The Administration assured that they |

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| | <p>the level(s) might be amended in future by a delegated authority by way of subsidiary legislation subject to positive or negative vetting; or</p> <p>➤ empower a delegated authority to set out the relevant level(s) in a subsidiary legislation to be made under the Bill which would be subject to positive or negative vetting.</p> <p>(CB(1)1355/10-11(01))</p> | <p>would take into consideration the suggestions of the Bills Committee on the "de minimis" arrangement with a view to allowing the Commission to have the flexibility in tandem of market changes on one hand and protecting SMEs from being restricted by the Bill unnecessarily on the other.</p> <p>(CB(1)1355/10-11(02))</p> |
| Definition of undertakings | | |
| 15 February 2011 | <p>With reference to the Competition Act 2004 of Singapore in which "undertaking" was defined to mean "any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services", the Administration was requested to consider revising the definition of "undertaking" in clause 2 of the Bill to make it clearer. (CB(1)1355/10-11(01))</p> | <p>The Administration will carefully consider whether it would be appropriate to adopt the proposed definition of "undertaking" in the Bill.</p> <p>(CB(1)1355/10-11(02))</p> |

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| Definition of "shadow director" | | |
| 15 February 2011 | According to section 2(1) of the Companies Ordinance (Cap. 32), "shadow director", in relation to a company, meant "a person in accordance with whose directions or instructions the directors or a majority of the directors of the company are accustomed to act". Members requested that the phrase "or a majority of the directors" should be included in the definition of "shadow director". (CB(1)1355/10-11(01)) | The Administration provided a list of the definition of "shadow director" used in other Hong Kong ordinances (CB(1)1759/10-11(01)). It proposed to amend the expression "the directors of the company" to read as "the directors or a majority of the directors of the company". (CB(1)2796/10-11(02)) |
| 26 July 2011 | Members requested the Administration to consider amending the expression "the directors of the company" to read as "a majority of the directors of the company". | The Administration will consider and revert to the Bills Committee. |
| Exemption arrangement for statutory bodies and/or public bodies | | |
| 22 February 2011 | The Administration's proposal on which statutory bodies or their activities would be brought under the purview of the Bill should include – ➤ the nature of activities engaged by individual statutory | The Administration is working on which proposed statutory bodies or their activities should be brought under the purview of the Bill and will provide a proposed list to the Bills |

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| | <p>bodies and the benefits brought to the community;</p> <ul style="list-style-type: none"> ➤ the objectives of establishing the statutory bodies; ➤ their past performance especially during financial crisis as compared with similar service providers in the private sector; and ➤ whether counterparts in other competition jurisdictions (such as Singapore and South Korea) were exempted from the competition laws. <p>(CB(1)1523/10-11(01))</p> | <p>Committee when ready. (CB(1)1523/10-11(02))</p> |
| Removal from office of the Commission | | |
| 15 March 2011 | <p>In view of the discrepancy between the Chinese and English texts of proposed section 5(1)(d) of Schedule 5 to the Bill, the Administration was requested to consider amending the proposed section to achieve consistency. (CB(1)1523/10-11(01))</p> | <p>Taking note of the discrepancy, the Administration will rectify this through Committee Stage Amendment (CSA). (CB(1)1523/10-11(02))</p> |

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| Filling of vacancy of Commission member | | |
| 29 March 2011 | The Administration was requested to advise whether the term of office of a person appointed to fill a vacancy might be longer than the term of the member whose office became vacant or longer than the remainder of the term of that member, and review the drafting of the proposed section 7(2) of Schedule 5 accordingly. (CB(1)1868/10-11(01)) | The Administration will consider suitable amendments to both the English and Chinese texts of the section for clarity purpose. (CB(1)1868/10-11(02)) |
| Capping the number of members of the Commission | | |
| 29 March 2011 | The Administration was requested to provide examples of other statutory bodies which did not set any cap on the number of members and consider imposing an upper limit on the number of members of the Commission. (CB(1)1868/10-11(01)) | The Administration will consider members' suggestion of imposing a cap to increase certainty of the scale of operation of the Commission, taking into account the cap used in other ordinances. (CB(1)1868/10-11(02)) |
| Quorum for meetings of the Commission | | |
| 29 March 2011 | In respect of the proposed section 13(2) of Schedule 5 to the Bill, the Administration was requested to consider whether it was appropriate to use "為斷定法定人數" as the Chinese | The Administration indicated that for the sake of clarity, it would consider deleting the phrase "For the purpose of |

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| | <p>rendition of "[f]or the purpose of determining the quorum". (CB(1)1868/10-11(01))</p> | <p>determining the quorum" and "為斷定法定人數" in the English and Chinese texts of the section respectively. (CB(1)1868/10-11(02))</p> |
| <p>Decisions not invalidated by defects in appointment etc.</p> | | |
| <p>13 April 2011</p> | <p>In relation to the proposed section 18(d) of Schedule 5 to the Bill, the Administration was requested to –</p> <ul style="list-style-type: none"> ➤ explain the criteria for determining whether an irregularity in the procedures adopted by the Commission would affect the merit of the decision taken; ➤ provide examples of irregularities in the procedures which would/ would not affect the merit of the decision taken; and ➤ review the drafting of the proposed section, in particular the phrase "merit of the decision taken" and the Chinese rendition "所作決定的可取性". | <p>The Administration explained that the policy intent behind the proposed section was to ensure that decisions of the Commission would not be invalidated simply due to some minor technicality related to procedures.</p> <p>In order to address members' concerns, the Administration proposed the following two possible options to revise the drafting of the section –</p> <p>(i) replacing the words "<u>merit</u> of the decision taken" with "<u>outcome</u> of the decision taken" or simply "the decision taken" which is</p> |

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| | (CB(1)2018/10-11(01)) | <p>more objective; and/or</p> <p>(ii) including a validating mechanism as to whether the irregularity concerned affects the outcome of the decision, such as inserting the words "in the opinion of the Chairman of the Commission" into the sub-section.</p> <p>(CB(1)2018/10-11(02))</p> <p>At its meeting on 28 April 2011, the Bills Committee agreed to replace the words "merit of the decision taken" by "the decision taken" ("所作的決定") in the section. (CB(1)2417/10-11)</p> |
| Delegation by the Commission | | |
| 13 April 2011 | In relation to the proposed section 29 of Schedule 5 to the Bill, the Administration was requested to advise the | The Administration advised that since powers and functions of the |

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| | functions of the Commission that might be delegated to any person or committee established by the Commission. (CB(1)2018/10-11(01)) | Commission were covered by different clauses / sections scattered in the Bill, the Administration would compile a consolidated list and present it to the Bills Committee in due course. (CB(1)2018/10-11(02)) |
| Composition of committees under the Commission | | |
| 28 April 2011 | In relation to the proposed section 28 of Schedule 5 to the Bill, the Administration was requested to re-consider the composition of committees that may be established by the Commission such that the chairperson and the majority of members of the committees would be members of the Commission. (CB(1)2127/10-11(01)) | The Administration will amend the section along the line adopted in the Communications Authority Ordinance. (CB(1)2127/10-11(02)) |
| Director of Audit's examination | | |
| 28 April 2011 | The Administration was requested to consider including a provision in the proposed section 27 of Schedule 5 to the Bill stipulating that the Director of Audit's power to conduct the examination under subsection (1) shall not operate to entitle the Director to question the merits of the policy | The Administration agreed to include a provision in the section to reflect the scope of the examination by the Director of Audit in clear terms. The Administration will also introduce |

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| | objectives of the Commission. (CB(1)2127/10-11(01)) | CSAs to rectify the difference between the Chinese and English texts of the proposed section 27(2)(c) of Schedule 5 accordingly. (CB(1)2127/10-11(02)) |
| Rules to be made by the Commission | | |
| 28 April 2011 | In relation to the proposed section 32 of Schedule 5 to the Bill, the Administration was requested to review the use of the words "rules" and "regulating" in the section to avoid any misunderstanding that the "rules" would be subsidiary legislation to be made under the Bill. (CB(1)2127/10-11(01)) | The Administration clarified that the rules neither had legislative effect nor were they subsidiary legislation. (CB(1)2127/10/11(02)) |
| Disclosure of interest by members of the Commission | | |
| 28 April 2011 | In relation to the proposed section 32 of Schedule 5 to the Bill, the Administration was requested to provide information on the rules to be made by the Commission in respect of conflict of interest (including penalty for non-compliance) and consider setting out the rules regarding conflict of interest as well as disclosure of interests in the Bill. (CB(1)2127/10-11(01)) | The Administration will add provisions similar to section 13 of the Communications Authority Ordinance to Part 4 (Meetings) of Schedule 5 to the Bill. (CB(1)2127/10/11(02)) |

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| 12 May 2011 | The Administration was requested to consider including in the Bill a provision for establishing and maintaining a register of interests such that members of the Commission and its committees would be required to register his or her interest as appropriate and relevant meeting documents of the Commission would not be passed to that member having a conflict of interest in the matter under consideration. (CB(1)2283/10-11(01)) | The Administration is considering whether to add another clause to the Bill, modeling on section 38 of the West Kowloon Cultural District Authority Ordinance (Cap. 601) to provide for a register of interests and govern disclosure of interests by members of the Commission more generally. (CB(1)2283/10-11(02)) |
| Appointment to fill a vacancy in office of President or Deputy President | | |
| 28 April 2011 | In relation to clause 139 of the Bill, the Administration was requested to amend subclause (2) in order to tally with other similar provisions in the Bill. (CB(1)2127/10/11(01)) | The Administration will consider introducing CSAs to revise the subclause. (CB(1)2127/10/11(02)) |
| Evidence admissible in the Competition Tribunal (the Tribunal) | | |
| 28 April 2011 | The Administration was requested to consider taking out the phrase "and whether or not it would otherwise be admissible in civil or criminal proceedings in a court of law" under clause 142(2)(a) and a similar one under clause 146. (CB(1)2127/10/11(01)) | To put beyond doubt that the power of the Tribunal to receive evidence is not confined to the formal rules of evidence in a court of law, the Administration considered it necessary |

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| | | <p>to expressly provide in clause 142(2)(a) and clause 146 that the Tribunal might receive and consider any evidence, whether or not it would be otherwise admissible in a court of law. The Administration will introduce amendments to delete the words "in civil or criminal proceedings" in clause 142(2)(a) to align the wordings of the relevant phrase in these two provisions to ensure consistency. (CB(1)2283/10-11(02))</p> |
| Memorandum of Understanding (MOU) | | |
| 12 May 2011 | <p>In respect of clause 161(2) of the Bill, the Administration was requested to –</p> <ul style="list-style-type: none"> ➤ consider replacing the word "may" with "shall" as all the matters set out in Schedule 6 to the Bill are considered necessary to be addressed in the MOU to be signed by the Commission, the Broadcasting Authority (BA) and | <p>The Administration agreed to amend the term "may" in clause 161(2) of the Bill and the heading of Schedule 6 from "Matters that <u>may</u> be provided for</p> |

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| | <p>the Telecommunications Authority (TA);</p> <ul style="list-style-type: none"> ➤ consider submitting the draft MOU prepared by the TA, BA and the Commission for scrutiny by the Panel on Economic Development; and ➤ consider making copies of the MOU available at the offices of the Commission during ordinary business hours and in other manners, and review the drafting of clause 161(4). <p>(CB(1)2283/10-11(01))</p> | <p>in Memorandum of Understanding" to "Matters that <u>must</u> be provided for in Memorandum of Understanding".</p> <p>The Panel on Economic Development will be consulted before the signing of the MOU.</p> <p>The Administration will amend the clause to require the Commission to make available copies of the signed MOU at its offices and in other manners.</p> <p>(CB(1)2283/10-11(02))</p> |

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| Concurrent jurisdiction | | |
| 12 May 2011 | <p>The Administration was requested to –</p> <ul style="list-style-type: none"> ➤ consider deleting clause 157 regarding the interpretation of "concurrent jurisdiction" and review the drafting of clause 160(2) of the Bill to incorporate the interpretation; and ➤ amend the Chinese text of clause 159(1)(c) of the Bill. <p>(CB(1)2283/10-11(01))</p> | <p>The Administration will delete clause 157 and amend clause 160(2). (CB(1)2283/10-11(02))</p> <p>The Administration will introduce CSA to amend the Chinese text of the clause (CB(1)2626/10-11)</p> |
| Merger agreements | | |
| 7 June 2011 | <p>Despite Schedule 7 to the Bill provided for a limited scope of application of the merger rule to mergers in relation to carrier licences issued under TO, the Administration was requested to advise whether anti-competitive agreements relating to mergers would still be covered by clause 6(1) of the Bill, and if yes, consider explicitly excluding such agreements from the application of clause 6(1). (CB(1)2420/10-11(01))</p> | <p>The Administration will consider the need for amendments to clarify the scope of application of clause 6(1) so as to give effect to the policy objective on mergers. (CB(1)2420/10-11(02))</p> |

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| Formulation of the conduct rules | | |
| 21 June 2011 | <ul style="list-style-type: none"> ➤ The Administration was requested to consider stating expressly in the Bill the policy intent that only conduct which "had an appreciable adverse effect" on competition would be caught by the conduct rules. (CB(1)2631/10-11(01)) ➤ In relation to clause 7 of the Bill concerning the "object" of an agreement, the Administration was requested to consider the proposal of the Law Society of Hong Kong (Law Soc) to revise the drafting of subclause (2) to spell out explicitly that the inference of an undertaking's object would be reached objectively. (CB(1)2631/10-11(01)) | <ul style="list-style-type: none"> ➤ The Administration will consider the proposal and revert to the Bills Committee in due course. (CB(1)2631/10-11(02)) ➤ The Administration will re-examine the proposal. (CB(1)2631/10-11(02)) |

Council Business Division
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