

Bills Committee on Competition Bill

**List of follow-up actions arising from the discussion
at the meeting on 22 November 2011**

At the meeting on 22 November 2011, the Administration was requested to provide written responses to the following concerns/requests –

- (a) regarding the recently proposed threshold of HK\$ 11 million for exclusion from the application of the second conduct rule under the proposed de minimis arrangements –
 - (i) consider the call to adjust the above exclusion threshold upwards;
 - (ii) provide justifications for using the average annual business turnover of small and medium enterprises (SMEs) from 2005 to 2009 as the proposed exclusion threshold considering that the companies in the data from which the figure was derived included data of shell companies and "one-man" companies; and
 - (iii) consider using the highest level of SME annual business turnover derived from the Annual Survey of Economic Activities conducted by Census and Statistics Department as the exclusion threshold;
- (b) consider the proposal to address concerns about the uncertainty of adopting the threshold of "substantial degree of market power" by adopting instead the threshold of a market share of, say, 25% to 30%, to decide whether an undertaking had a "dominant position";
- (c) provide a paper to explain what types of "confidential information" might be omitted from an entry made in the register of decisions and block exemption orders, as stated in clause 34(2);
- (d) check whether fees similar to those under clause 163 were also charged by the Office of the Telecommunications Authority in enforcing competition rules under the Telecommunications Ordinance (Cap. 106);

- (e) check whether the 30-day time limit for commencement of investigation of merger under section 7 of Schedule 7 was comparable to similar deadlines imposed in other jurisdictions;
- (f) in consultation with the bureau/department responsible for the Securities and Futures (Amendment) Bill 2011 presently under scrutiny, examine how to address the concern that a listed company planning to merge with other company/companies might be unable to comply with the requirement upon listed companies to disclose such price sensitive information as the planned merger, since the listed company would not be able to ascertain whether the merger would eventually be carried out pending the completion of the Competition Commission's investigation on whether the merger would substantially lessen competition;

Drafting issues

- (g) clause 35 (guidelines)
 - (i) consider introducing amendments to clause 35 to clarify the Competition Commission's legal basis to issue regulatory guidelines and the consultation process, and to specify that the guidelines were not subsidiary legislation but were admissible as evidence in legal proceedings involving the guidelines; and
 - (ii) introduce amendments to clause 35(5) to ensure that the Competition Commission would make use of the latest technology available, in particular the Internet, to publish the electronic copy of all guidelines issued under clause 35 and of all amendments made to them;
- (h) Schedule 1 (general exclusions from conduct rules)
 - (i) consider the view that section 1 should be refined to ensure that apart from "agreements enhancing overall economic efficiency", agreements benefitting consumers or not making consumers worse off would also be excluded from the first conduct rule;

- (ii) clarify, with examples, the scope of "entrusted by the Government" and "services of general economic interest" which would be excluded from the conduct rules by virtue of section 3, and to consider and report back on the view that the section should be refined to clearly reflect the legislative intent;
 - (iii) refine the new section 4(1) to clarify that the first conduct rule would only not apply to "the relevant part of" the agreement that "results in, or if carried out would result in, a merger";
 - (iv) as suggested by the legal adviser to the Bills Committee and Hon Ronny TONG, clearly explain in the new section 5 how to work out the annual turnover of an undertaking, in particular that of a newly established undertaking having been in operation for less than one year, and provide a paper on relevant examples; and
 - (v) refine the new section 5 to address concerns about the unfairness that might arise if an undertaking deliberately committed an anti-competitive act at the beginning of its financial year, or after having operated for only a few months, so as to ensure its annual turnover would not exceed the exclusion threshold; and
- (i) Schedule 7
- (i) amend the phrase "自動經濟實體" in the Chinese text of section 3(4) to reflect the phrase "autonomous economic entity" in the English text of this section;
 - (ii) amend the Chinese heading of section 6 to reflect that the matters stated therein were matters that "may be" and not "shall be" taken into account in determining whether competition had been or might be substantially lessened;
 - (iii) amend the phrase "下一屆會期" in the Chinese text of sections 10(3) and 10(5) to "下一會期"; and

- (iv) amend the phrase "carries out a merger (已作出有關合併)" in section 11(1)(a). In so doing, the Administration may wish to make reference to the wording of clause 9(1) of the Bill.

Council Business Division 1
Legislative Council Secretariat
25 November 2011