

**立法會**  
*Legislative Council*

LC Paper No. CB(4)166/14-15(04)

Ref: CB4/PL/EDEV

**Panel on Economic Development  
Meeting on 24 November 2014**

**Background brief on the subsidiary legislation proposals  
under the Competition Ordinance**

**Purpose**

This paper summarizes the views and concerns expressed by Members on the following subsidiary legislation proposals to be made under the Competition Ordinance (Cap. 619) ("the Ordinance"):

- (a) regulation to be made by the Chief Executive in Council ("CE-in-Council") under section 5(1)(a) to apply the provisions set out in section 3(1) to a number of statutory bodies;
- (b) regulation to be made by the CE-in-Council under section 5(1)(b) to disapply the provisions set out in section 3(1) to a number of non-statutory bodies; and
- (c) regulation to be made by the Secretary for Commerce and Economic Development ("SCED") under section 163 for determining the turnover of undertakings.

**Background**

2. The Ordinance was passed by the Legislative Council ("LegCo") on 14 June 2012 and published in the Gazette on 22 June 2012. The objective of the Ordinance is to prohibit and deter undertakings in all sectors from adopting abusive or other anti-competitive conduct which has the object or effect of preventing, restricting and distorting competition in Hong Kong. In this context,

an "undertaking" is defined as any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity and includes a natural person engaged in economic activity.

3. The Ordinance provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule, the second conduct rule and the merger rule) as well as the institutional arrangements and penalty provisions for their enforcement. It also provides the arrangements for the exemption of statutory bodies and non-statutory bodies.

### **Regulations under section 5(1)(a) and (b) of the Ordinance to apply and disapply the provisions set out in its section 3(1) to a number of statutory bodies and non-statutory bodies respectively**

#### Exemption arrangements for statutory bodies

4. Activities of many statutory bodies are considered non-economic and regulatory in nature or involve provision of essential public services. To this end, the Ordinance provides for the exemption arrangements for statutory bodies, specified persons and persons engaged in specified activities. These exemption arrangements are to ensure efficient implementation of public policies as well as measures which are required to respond swiftly to the needs of the community.

5. On this basis, 575 statutory bodies are exempted in their entirety. Among them, 415 do not engage in economic activities or have insignificant amount of economic activities. Most of them are advisory, regulatory, adjudicative/quasi-judicial/appellate or administrative/governing bodies. The remaining 160 are statutory bodies engaging in economic activities that are directly related to the provision of essential public services or the implementation of Government policy in such areas as education, healthcare, social welfare, public housing and trade promotion. Six statutory bodies are identified not to be exempted. They are as follows:

- (a) Federation of Hong Kong Industries;
- (b) Federation of Hong Kong Industries General Committee;
- (c) Helena May;
- (d) Kadoorie Farm and Botanic Garden Corporation;
- (e) Matilda and War Memorial Hospital; and
- (f) Ocean Park Corporation.

Hyperlink to the list of statutory bodies with no economic activities or insignificant amount of economic activities is provided in the **Appendix**.

#### Exemption arrangements for non-statutory bodies

6. The CE-in-Council may, under section 5(1)(b) of the Ordinance, make regulations to disapply the provisions relating to the competition rules and enforcement to non-statutory bodies or their specified activities. Regulations made under section 5 of the Ordinance are subject to negative vetting by the LegCo.

#### Members' views expressed at previous discussions

##### *Concerns about broad exemption of statutory bodies*

7. The Bills Committee on Competition Bill held a total of 38 meetings between 2010 and 2012. During the discussions, some members expressed concern about exempting nearly all statutory bodies from the Bill and considered that such a broad exemption was unfair to the private sector. They urged that the list of exempted bodies should be reviewed after implementation of the Ordinance for a certain period of time. The Administration advised that the majority of statutory bodies in Hong Kong did not engage in economic activities or engaged in economic activities that had insignificant effect on the market or the economic activities were directly related to the provision of an essential public service/implementation of public policy.

8. Views on exemption of the Hong Kong Trade Development Council ("TDC") varied. Bills Committee members noted that a majority of deputations indicated support for the exemption of TDC from the Bill because if TDC was made subject to the Bill, its performance of the role of promoting trade for Hong Kong and providing essential non-profit making trade services to SMEs might be hampered. Members who did not support opined that while TDC's conduct relating to the discharge of its statutory functions could be exempted, its profit-making economic activities should be subject to regulation of the Bill. Also, other statutory bodies such as the Ocean Park, which similarly helped implement Government policies was not exempted. In response, the Administration advised that the proposed exemption would help eliminate any uncertainties in organizing trade promotion activities that might be alleged as anti-competitive to ensure TDC's uninterrupted support to local industries and SMEs. Despite the exemption, TDC would be requested to adhere to the competition principles and to rectify any of its anti-competitive behaviour.

9. Some Bills Committee members moved Committee Stage amendments ("CSAs") on the Bill. Hon Albert HO moved a CSA to add a sunset clause in order that the proposed sections 3 to 5 on exemption of statutory bodies would cease to have effect three years after the coming into operation of these sections. Hon Ronny TONG moved CSAs to delete proposed sections 3 to 5 and to amend the definition of statutory body in proposed section 2. Hon Regina IP moved CSAs on exemption of statutory bodies. All these CSAs were negated.

10. At the council meeting on 9 April 2014, Hon Charles Peter MOK raised a question on the implementation of the Ordinance enquiring, among others, whether the Commission would monitor any anti-competitive phenomenon caused by the economic activities of exempted statutory bodies, so as to ensure that these bodies did not abuse the exemption arrangement. In reply, the Administration advised that the statutory bodies exempted from the Ordinance should adhere to the competition rules despite that they did not come under the regulatory preview of the Commission. The Government would seek to ensure that unless there were justifiable causes, the exempted statutory bodies would not engage in anti-competitive activities.

11. At the meeting of Panel on the Economic Development ("the Panel") on 26 May 2014, some members pointed out that in case a private company collaborated with the Government or a public organization in carrying out certain activities which were considered contrary to the Ordinance, the private company might be liable to penalty but the Government or the public organization concerned would be immune.

12. In reply, the Commission advised that they could take action in respect of commercial activities undertaken by a private company collaborating with the Government or a public organization when the activities were in breach of the Ordinance. The Commission would consult the LegCo on the procedures by which a certain conduct would become exempted under the Ordinance.

#### *Exemption of non-statutory bodies*

13. When the Bills Committee deliberated the Competition Bill, some members suggested that the criterion for granting exemption on public policy grounds (i.e. exceptional and compelling reasons of public policy) should also apply and be incorporated into proposed section 5(1)(b) as a criterion for the CE-in-Council in exercising the power to exempt non-statutory bodies.

14. The Administration advised that unlike statutory bodies where their services or activities were usually regulated by the ordinances by or under which they were established or constituted, the types and functions of non-

statutory bodies as well as the nature of their activities could vary widely. As it would not be practicable to provide a common set of general criteria in the provision for determining exemption, in particular given the vast number of non-statutory bodies in Hong Kong, the Administration considered that proposed section 5(1)(b) provided the necessary flexibility for catering for unforeseen circumstances under which non-statutory bodies might warrant exemption.

## **Regulation under section 163 of the Ordinance for determining the turnover of undertakings**

### The first and second conduct rules

15. The first conduct rule under section 6 prohibits undertakings from making or giving effect to arrangements or decisions or engaging in concerted practices that have as their object or effect the prevention, restriction or distortion of competition in Hong Kong.

16. The second conduct rule under section 21 prohibits undertakings that have a substantial degree of market power in a market from engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

### Thresholds for exclusion from the first and second conduct rules

17. The Ordinance is provided with de minimis arrangements so that agreements or conduct below certain thresholds, usually expressed in combined market share or turnover of the parties involved, are generally not considered to have an appreciable impact on competition and not subject to enforcement action by the competition authorities.

18. As market share requires a definition of the relevant market for each and every agreement, turnover is more easily determined as the threshold of concerned undertakings. As such, undertaking's turnover is adopted as the threshold for exclusion from the first and second conduct rules for agreements and conduct of lesser significance.

19. Under section 5(1) of Schedule 1, the first conduct rule does not apply to an agreement between undertakings, a concerted practice engaged in by undertakings or a decision of an association of undertakings in any calendar year if the combined turnover of the undertakings or the turnover of the

association for the turnover period does not exceed HK\$200 million and if serious anti-competitive conducts are not involved.

20. Under section 6(1) of Schedule 1, the second conduct rule does not apply to conduct engaged in by an undertaking the turnover of which does not exceed HK\$40 million for the turnover period.

#### Calculation of turnover

21. According to the Administration, an agreement between undertakings would be excluded from the application of the first conduct rule in any calendar year if the combined turnover of the undertakings in the year preceding that calendar year does not exceed HK\$200 million. In relation to an undertaking, "turnover" means the total gross revenues of the undertaking whether obtained in Hong Kong or outside Hong Kong, "year" means the financial year of an undertaking, and if the undertaking does not have a financial year, "year" then means a calendar year. This formulation should cover all undertakings that have been established for more than one year and have a financial year of 12 months ended in the preceding calendar year.

#### Members' views expressed at previous discussions

22. During the discussions of the Bills Committee on Competition Bill, members considered that it was necessary to clarify the turnover calculation for newly established undertakings. To address members' concern, the Administration advised that the turnover of newly established undertakings (e.g. those established in the current calendar year or those without a financial year of 12 months ended in the preceding calendar year) should be specified by way of subsidiary legislation to be made by SCED. It also undertook to review the turnover thresholds from time to time having regard to updated statistics provided by the Census and Statistics Department.

23. During the deliberation of the Competition Ordinance (Commencement) Notice 2012, the Administration took note of members' view that the Competition Commission ("the Commission") and relevant stakeholders should be consulted when determining the calculation of turnover of an undertaking.

#### **Latest development**

24. The Administration will brief the Panel at the meeting on 24 November 2014 on its plan to introduce subsidiary legislation proposals in relation to exemption arrangements for statutory and non-statutory bodies and

determination of turnover of undertakings which are necessary before the full commencement of the Ordinance.

**Relevant papers**

25. A list of the relevant papers which are available on the LegCo Website (<http://www.legco.gov.hk>) is in the **Appendix**.

Council Business Division 4  
Legislative Council Secretariat  
18 November 2014

## Appendix

### List of relevant papers

Issued by	Meeting date/ Issue date	Paper
Bills Committee on Competition (Amendment) Bill 2014	8 October 2014	<a href="#">Background brief Report</a>
Panel on Economic Development	26 May 2014	<a href="#">Agenda</a> <a href="#">Minutes</a> <a href="#">Background brief</a> <a href="#">Information paper issued by the Administration</a>
Council meeting	9 April 2014	<a href="#">Written reply by the Secretary for Commerce and Economic Development to a question on "Implementation of Competition Ordinance" raised by the Hon Charles Peter MOK</a>
Subcommittee on Competition Ordinance (Commencement) Notice 2012	10 December 2012	<a href="#">Background brief Report</a>
Bills Committee on Competition Bill	23 May 2012	<a href="#">Background brief Report</a>
	14 February 2012	<a href="#">Information paper issued by the Administration (The list of statutory bodies with no economic activities or insignificant amount of economic activities)</a>
Legislative Council Brief on Competition Bill	2 July 2010	<a href="#">Legislative Council Brief</a>