

**For discussion
on 2 April 2012**

Bills Committee on Competition Bill

Amendments to Part 7 and Leave Requirement for Appeal

Purpose

This paper briefs Members on the proposed amendments to Part 7 of the Competition Bill (the Bill) and amendments related to the leave requirement for appeal.

Amendments to Part 7 of the Bill

Prevention of Forum Shopping

2. Part 7 of the Bill provides the legal framework for private actions to be brought by persons who have suffered loss or damage as a result of a contravention of a conduct rule. Clause 107 and clause 108(2) respectively provide that pure competition claims must not be brought in the Court of First Instance (CFI) and may only be brought in the Competition Tribunal (CT), while clause 108 allows composite claims, which are claims consisting of competition claims and other claims, to be brought in either the CFI or the CT.

3. The original intent of allowing both the CFI and the CT to hear composite claims is to provide more flexibility to cater for circumstances where the CFI is better placed to adjudicate the composite claims (such as when the other claims in the composite claims are substantial in nature). This notwithstanding, there have been concerns that a concurrent jurisdiction of the CFI and the CT over composite claims might lead to procedural complications such as “forum shopping” in that parties would choose either the CFI or the CT to litigate depending on perceived procedural advantages. There have also been suggestions that the concurrent jurisdiction might to some extent defeat the purpose of establishing a dedicated specialist court, that is the CT, to accumulate experience and expertise in the area of competition law.

4. In order to discourage “forum shopping” and give due recognition of the specialist court status of the CT, we propose introducing amendments to Part 7 of the Bill so that the CT would be given primary jurisdiction over all competition

matters (including pure competition claims, composite claims, and alleged contravention of conduct rule as a defence), and that the decision as to whether a claim should be heard in the CFI or in the CT should be a judicial one instead of being left to the parties of the proceedings. We propose the following arrangements -

- (a) pure competition claims must not be brought in the CFI;
- (b) composite claims consisting of competition claims and other claims should be brought in the CT. In the unlikely event that they are brought in the CFI, the CFI should transfer to the CT those claims that are within the jurisdiction of the CT. The CFI should also have the reserve power to retain, at its discretion, those claims that are closely connected to the competition claims in the composite claims (which means matters that arise out of the same or substantially the same facts as those of the competition claims), if it is in the interest of justice to do so;
- (c) for composite claims brought in the CT, the CT would have discretion to transfer to the CFI the proceedings that are closely connected to the competition claims in the composite claims, if it is in the interest of justice to do so. The competition claims in the composite claims must be retained in and heard by the CT;
- (d) in case of parallel proceedings¹, the CFI should transfer to the CT any claims that are closely connected to the competition claims brought in the CT, unless it is in the interest of justice to retain such claims in the CFI;
- (e) the jurisdiction of the CT should cover claims that are closely connected to competition claims as well as alleged contravention of a conduct rule raised as a defence; and
- (f) alleged contravention of a conduct rule raised as a defence in proceedings before the CFI will automatically be transferred to the CT; CT may transfer the defence back to the CFI if the CT considers it in the interest of justice.

The proposed amendments in mark-up version are at **Annex A**.

¹ Parallel proceedings refer to proceedings involving competition claims brought in the CT and other claims that are closely connected to the competition claims brought in the CFI.

Removal of Standalone Actions

5. As one of the proposed adjustments announced in October last year (see LC Paper No. CB(1)91/11-12(01)), the right of stand-alone actions would be removed so that enforcement of the Competition Bill would be carried out by the Competition Commission and be supplemented by follow-on actions for determined contravention. To give effect to this proposal, amendments to Part 7 of the Bill are required to take out the relevant provisions and references to stand-alone actions. The proposed amendments are also shown in mark-up version at **Annex A**.

Leave Requirement for Appeal to the Court of Appeal

6. Clause 153 of the Bill currently provides that an appeal against the CT's decision to the Court of Appeal (CA) may only be brought with the leave of the CA and that such leave may not be granted unless the CA is satisfied that 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. The purpose of having a leave requirement for appeal is to weed out unmeritorious appeals against decisions of the CT. Similar test is adopted in section 14AA of the High Court Ordinance and section 11AA of the Lands Tribunal Ordinance.

7. The issue of leave requirement was discussed at the Bills Committee meetings on 12 May 2011, 21 June 2011 and 26 July 2011. Members suggested that a lower threshold for appeal against decisions of the CT should be adopted, and that the leave requirement in clause 153 should be amended to bring it in line with that of the CFI, which is also a superior court of record as the CT.

8. After having critically reviewed the issue, we propose that the leave requirement in clause 153 be amended to bring it in line with that of the CFI as stipulated in sections 14 and 14AA of the High Court Ordinance (i.e. no leave is required except interlocutory appeals and against certain orders of the CT) on the following grounds –

- (a) competition law is a complex area and is new to Hong Kong without any local case law. Comparing with matters under the purview of other specialist tribunals (such as the Lands Tribunal and the Labour Tribunal), competition-related cases to be brought before the CT can involve more significant commercial and monetary interest. It would be in the interest of justice to allow a lower threshold for appeal applications so that aggrieved parties may seek the opinion of a higher court; and

- (b) under the proceedings transfer mechanism between the CFI and the CT proposed in paragraph 4 above, depending on the judicial decisions of the courts, certain proceedings in respect of composite claims could be heard by the CT or the CFI. The proposed amendments to clause 153 would ensure no disparity in the right of appeal regardless of whether these claims are heard in the CT or in the CFI.

9. As a related matter, we also propose adding an ouster clause to bar judicial review of the decisions, determinations or orders of the CT made under the Bill. This is to put things beyond doubt that any decision, determination or order of the CT as a superior court of record should only be reviewed by way of appeal to the CA, which is a higher court than the CT in the judicial hierarchy, under clause 153.

10. The proposed amendments mentioned in paragraphs 8 and 9 above are set out, in mark-up version, at **Annex B**.

Advice sought

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

Commerce and Economic Development Bureau
March 2012

PART 7

PRIVATE ACTIONS

Division 1 – General

104. Interpretation

In this Part –

“follow-on action” (後續訴訟) means an action brought by a person who has a right to bring the action under section 108(1);

~~“stand alone action” (獨立訴訟) means an action brought by a person who has a right to bring the action under section 111(1).~~

105. Persons involved in contravention of conduct rule

A reference in this Part to a person being involved in a contravention of a conduct rule means a person who –

- (a) attempts to contravene the rule;
- (b) aids, abets, counsels or procures any other person to contravene the rule;
- (c) induces or attempts to induce any other person, whether by threats or promises or otherwise, to contravene the rule;
- (d) is in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule; or
- (e) conspires with any person to contravene the rule.

106. No proceedings independent of this Ordinance

No person may bring any proceedings independently of this Ordinance, whether under any rule of law or any enactment, in any court in Hong Kong, if the

cause of action is or involves the defendant's contravention, or involvement in a contravention, of a conduct rule.

107. Pure competition proceedings not to be brought in Court of First Instance

No person may bring any proceedings in the Court of First Instance under this Part if the cause of action is only the defendant's contravention, or involvement in a contravention, of a conduct rule.

Division 2 – Follow-on Action

108. Follow-on right of action

(1) A person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule has a right of action under this section against –

- (a) any person who has contravened or is contravening the rule;
and
- (b) any person who is, or has been, involved in that contravention.

~~(2) Subject to subsection (3), a claim to which this section applies may only be made in proceedings brought before the Tribunal.~~

~~(3) A claim to which this section applies may be made in proceedings before the Court of First Instance if the cause of action in those proceedings is not solely the defendant's contravention, or involvement in a contravention, of a conduct rule.~~

(2) Subject to section 115, a claim to which this section applies may only be made in proceedings brought in the Tribunal, whether or not the cause of action is solely the defendant's contravention, or involvement in a contravention, of a conduct rule.

(4) For the purpose of subsection (1), an act is taken to have been determined to be a contravention of a conduct rule if –

- (a) the Tribunal has made a decision that the act is a contravention of a conduct rule;
- (ab) the Court of First Instance has decided, in any proceedings transferred to it by the Tribunal under section 115A(3), that the act is a contravention of a conduct rule;
- (b) the Court of Appeal has decided, on an appeal from a decision of the Tribunal or the Court of First Instance, that the act is a contravention of a conduct rule;
- (c) the Court of Final Appeal has decided, on an appeal from a decision of the Court of Appeal, that the act is a contravention of a conduct rule; ~~and~~ or
- (d) a person has made an admission, in a commitment that has been accepted by the Commission, that the person has contravened a conduct rule.

109. Commencement of follow-on actions

(1) The periods during which proceedings for a follow-on action may not be brought are –

- (a) in the case of a decision of the Tribunal ~~that conduct is a contravention of a conduct rule~~, the period during which an appeal may be made to the Court of Appeal under section 153;
- (ab) in the case of a decision of the Court of First Instance, the period during which an appeal may be made to the Court of Appeal; and
- (b) in the case of a decision of the Court of Appeal, the period during which a further appeal may be made to the Court of Final Appeal,

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

(2) Despite subsection (1), ~~the Court of First Instance or~~ the Tribunal may, on the application of ~~the Commission or of~~ the party seeking to bring the proceedings, permit proceedings for a follow-on action to be brought within any period specified in subsection (1).

(3) Proceedings for a follow-on action may not be brought more than 3 years after the earliest date on which the action could have been commenced following the expiry of a relevant period specified in subsection (1).

110. Tribunal orders in follow-on actions

The Tribunal in a follow-on action may make any one or more of the orders specified in Schedule 3.

~~Division 3—Stand-alone Action~~

~~111. Stand-alone right of action~~

~~(1) A person who has suffered loss or damage as a result of a contravention of a conduct rule has a right of action under this section against—~~

~~(a) any person who has contravened or who is contravening the rule; and~~

~~(b) any person who is, or has been, involved in that contravention.~~

~~(2) Subject to subsection (3), a claim to which this section applies may only be made in proceedings brought before the Tribunal.~~

~~(3) A claim to which this section applies may be made in proceedings before the Court of First Instance if the cause of action in those proceedings is not solely the defendant's contravention, or involvement in a contravention, of a conduct rule.~~

~~(4) An action may be brought under this section even if—~~

~~(a) a leniency agreement has been made by the Commission regarding the contravention; or~~

~~(b) — a commitment has been accepted by the Commission regarding the contravention.~~

~~112. Commencement of stand-alone actions~~

~~(1) — A stand alone action may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered by the claimant.~~

~~(2) — Despite subsection (1), a stand alone action may not be commenced more than 5 years beginning after the day on which the cause of action accrued.~~

~~113. Tribunal orders in stand-alone actions~~

~~The Tribunal in a stand alone action may make any one or more of the orders specified in Schedule 3.~~

Division 4 – Procedure

~~114. Tribunal may adjourn proceedings pending completion of Commission investigation~~

~~(1) — The Tribunal may, either of its own motion or on application by the Commission or a party to the proceedings, adjourn the hearing of a stand alone action in order to allow the Commission to complete any current or proposed investigation, before proceeding with the hearing.~~

~~(2) — The Tribunal may adjourn the hearing of a stand alone action under subsection (1) on such terms as it thinks fit —~~

~~(a) — for a fixed period; or~~

~~(b) — until the investigation by the Commission has been completed.~~

~~(3) — The Tribunal may, in relation to an adjournment made under this section, either of its own motion or on application by the Commission or a party to the proceedings —~~

~~(a) — extend the period of the adjournment; or~~

~~(b) — vary the terms of the adjournment.~~

115. Transfer of proceedings from Court of First Instance to Tribunal

~~(1) This section applies to proceedings with respect to an alleged contravention of a conduct rule only where neither the Court of First Instance nor the Tribunal has made a decision that the rule has been contravened.~~

~~(2) The Court of First Instance may transfer to the Tribunal so much of any proceedings brought in the Court which—~~

~~(a) are within the jurisdiction of the Tribunal; and~~

~~(b) the Court considers should, in the interests of justice, be transferred to the Tribunal.~~

~~(3) If the Court of First Instance transfers proceedings under subsection (2), the practice and procedure of the Tribunal apply after the transfer.~~

~~(4) If the Court of First Instance does not transfer proceedings to the Tribunal under subsection (2), the Court has the same power in the proceedings as the Tribunal has in a follow on or stand alone action.~~

(1) Subject to subsection (2), the Court of First Instance must transfer to the Tribunal so much of the proceedings before the Court that are within the jurisdiction of the Tribunal.

(2) Subsection (1) does not apply to any proceedings that –

(a) are within the jurisdiction of the Tribunal under section 141(1)(f); and

(b) the Court considers should not, in the interests of justice, be transferred to the Tribunal.

(3) Subject to section 115B(2), if, in any proceedings before the Court of First Instance, a contravention, or involvement in a contravention, of a conduct rule is alleged as a defence, the Court must, in respect of the allegation, transfer to the Tribunal so much of those proceedings that are within the jurisdiction of the Tribunal.

(4) The practice and procedure of the Tribunal apply to the proceedings transferred by the Court of First Instance under subsection (1) or (3).

115A. Transfer of proceedings from Tribunal to Court of First Instance

(1) The Tribunal must transfer to the Court of First Instance so much of the proceedings brought in the Tribunal that are within the jurisdiction of the Court but are not within the jurisdiction of the Tribunal.

(2) Subject to subsection (1), the Tribunal may transfer to the Court of First Instance any proceedings brought in the Tribunal but only if –

(a) those proceedings are within the jurisdiction of the Tribunal under section 141(1)(f); and

(b) the Tribunal considers that those proceedings should, in the interests of justice, be transferred to the Court.

(3) If the Court of First Instance transfers any proceedings to the Tribunal under section 115(3), the Tribunal may transfer back to the Court so much of those proceedings that the Tribunal considers should, in the interests of justice, be transferred back to the Court.

(4) The practice and procedure of the Court of First Instance apply to the proceedings transferred by the Tribunal under subsection (1), (2) or (3).

115B. No further transfer of proceedings from Court of First Instance to Tribunal

(1) If the Tribunal transfers any proceedings to the Court of First Instance under section 115A(2), the Court must not transfer back those proceedings to the Tribunal.

(2) If the Tribunal transfers any proceedings to the Court of First Instance under section 115A(3) –

(a) section 115(3) does not apply to those proceedings; and

(b) the Court must not transfer back those proceedings to the Tribunal.

115C. No further transfer of proceedings from Tribunal to Court of First Instance

If the Court of First Instance transfers any proceedings to the Tribunal under section 115(1), the Tribunal must not transfer back those proceedings to the Court.

116. Costs in transferred proceedings

(1) If the Court of First Instance makes an order transferring proceedings to the Tribunal under section 115, it may make an order for costs prior to the transfer and of the transfer.

(2) If the Tribunal makes an order transferring proceedings to the Court of First Instance under section 115A, it may make an order for costs prior to the transfer and of the transfer.

~~(2) — The costs of the whole proceedings, both before and after the transfer, are in the discretion of the Tribunal, subject to any order made by the Court of First Instance.~~

~~(3) — The Tribunal may make —~~

~~(a) — an order for costs; and~~

~~(b) — an order as to the scales on which the costs of the proceedings are to be taxed,~~

~~as if the proceedings were originally brought in the Tribunal.~~

~~(4) — The costs of the whole proceedings are to be taxed in the Tribunal.~~

117. Reference by Court of First Instance or Tribunal to Commission for investigation

(1) In any proceedings ~~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, the Court or the Tribunal may, either of its own motion or on application by a party to the proceedings, refer the alleged contravention or involvement to the Commission for investigation under this Ordinance.

(2) Where the Court of First Instance or the Tribunal has referred an alleged contravention, or involvement in a contravention, of a conduct rule to the Commission for investigation, it may stay the proceedings before it pending –

- (a) in the case of a referral by the Tribunal, the completion of the Commission’s investigation; or
- (b) in the case of a referral by the Court, the completion of the Commission’s investigation and any subsequent proceedings in the Tribunal brought as a result of the investigation.

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 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 earlier decision of the Court or Tribunal that the act in question is a contravention, or involvement in a contravention, of the conduct rule.

- (3) The period mentioned in subsection (2) 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 appeal or further appeal is made, the period specified in paragraph (a) or (b) includes the period before the appeal is determined.

119. Intervention by Commission

(1) This section applies to proceedings involving an alleged contravention, or involvement in a contravention, of a conduct rule, before the

specified Court or the Tribunal ~~or any other court~~, that are brought by a person other than the Commission.

(2) The Commission may, with the leave of the specified Court or the Tribunal ~~or other court~~, and subject to any conditions imposed by the specified Court or the Tribunal ~~or other court~~, intervene in any such proceedings.

(3) An application for leave under this section must be made in the prescribed form and must be served by the Commission on each party to the proceedings.

(4) If the Commission intervenes in proceedings under this section, the Commission becomes, as from the date of the grant of leave, a party to the proceedings and has all the rights, duties and liabilities of a party to the proceedings.

(5) In this section –
“specified Court” (指明法院) means –

- (a) the Court of Final Appeal;
- (b) the Court of Appeal; or
- (c) the Court of First Instance.

120. Commission may participate in proceedings

(1) The Commission may, with the leave of or at the invitation of the specified Court or the Tribunal ~~or other court~~ (as the case requires), participate in proceedings before the specified Court or the Tribunal ~~or any other court~~ involving an alleged contravention, or involvement in a contravention, of a conduct rule that have been brought by another person and, in particular may –

- (a) make written submissions to the specified Court or the Tribunal ~~or other court~~; or
- (b) apply for, or join an application for, the adjournment of the proceedings pending the completion of the Commission’s investigation into the alleged contravention or involvement that is in issue in the proceedings.

(2) In this section –

“specified Court” (指明法院) means –

(a) the Court of Final Appeal;

(b) the Court of Appeal; or

(c) the Court of First Instance.

PART 10

COMPETITION TRIBUNAL

141. Jurisdiction of Tribunal

- (1) The Tribunal has jurisdiction to hear and determine –
- (a) applications made by the Commission with regard to alleged contraventions, or involvements in contraventions, of the competition rules;
 - (b) applications for the review of reviewable determinations;
 - (c) private actions in respect of contraventions, or involvements in contraventions, of the conduct rules;
 - (ca) proceedings in which contraventions, or involvements in contraventions, of the conduct rules is alleged as a defence;
 - (d) applications for the disposal of property;
 - (e) applications for the enforcement of commitments; and
 - (f) any matter related to a matter referred to in ~~paragraphs~~ paragraph (a), (b), (c), (ca), (d) and or (e) if the matters arise out of the same or substantially the same facts.
- (2) In the exercise of its jurisdiction, the Tribunal has the same jurisdiction to grant remedies and reliefs, equitable or legal, as the Court of First Instance.

149. Findings of fact by Court of First Instance

- (1) A finding of any fact by the Court of First Instance in any proceedings transferred to it by the Tribunal under section 115A(3), which is relevant to an issue arising in any other proceedings, either in the Court or in the Tribunal, relating to a contravention, or involvement in a contravention, of a conduct rule, is evidence of that fact in those proceedings if –

- (a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal; or
- (b) the final decision of a court on such appeal has confirmed the finding.

(2) In this section—

“relevant party” (有關一方) has the meaning given by section 148(2).

153. Appeal to Court of Appeal

(1) ~~An~~ Subject to subsection (2) and section 153A, an appeal lies as of right to the Court of Appeal against any decision (including a decision as to the amount of any compensatory sanction or pecuniary penalty), determination or order of the Tribunal made under this Ordinance.

~~(2) — An appeal under this section may only be brought —~~

~~(a) — by a person who was a party to the proceedings in which the decision, determination or order of the Tribunal was made; and~~

~~(b) — with the leave of the Court of Appeal.~~

~~(3) — Leave to appeal may not be granted under subsection (2)(b) unless the Court of Appeal 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.~~

(2) An appeal does not lie —

(a) against an order of the Tribunal allowing an extension of time for appealing against a decision, determination or order of the Tribunal;

(b) against a decision, determination or order of the Tribunal if it is provided by any Ordinance or by the rules of the Tribunal made under section 156 that the decision, determination or order is final; or

(c) without the leave of the Court of Appeal or the Tribunal, against an order of the Tribunal made with the consent of the parties or relating only to costs that are left to the discretion of the Tribunal.

(3) Rules of the Tribunal made under section 156 may provide for decisions, determinations or orders of any prescribed description to be treated for any prescribed purpose connected with appeals to the Court of Appeal as final or interlocutory.

(3A) An appeal does not lie against a decision of the Court of Appeal as to whether a decision, determination or order of the Tribunal is, for any purpose connected with an appeal to the Court, final or interlocutory.

(4) The Court of Appeal has jurisdiction to hear and determine an appeal under subsection (1) and may –

- (a) confirm, set aside or vary the decision, determination or order of the Tribunal;
- (b) where the decision, determination or order of the Tribunal is set aside, substitute any other decision, determination or order it considers appropriate; or
- (c) remit the matter in question to the Tribunal for reconsideration in the light of the decision of the Court.

(5) Except in the case of an appeal against the imposition, or the amount, of a pecuniary penalty, the making of an appeal under this section does not suspend the effect of the decision, determination or order to which the appeal relates.

153A. Leave to appeal required for interlocutory appeals

(1) Except as provided by the rules of the Tribunal made under section 156, an appeal does not lie to the Court of Appeal against any interlocutory decision, determination or order of the Tribunal unless leave to appeal has been granted by the Court of Appeal or the Tribunal.

(2) Rules of the Tribunal made under section 156 may specify an interlocutory decision, determination or order of any prescribed description as being an interlocutory decision, determination or order to which subsection (1)

does not apply and accordingly an appeal lies as of right against the decision, determination or order.

(3) Leave to appeal for the purpose of subsection (1) may be granted –

(a) in respect of a particular issue arising out of the interlocutory decision, determination or order; and

(b) subject to any conditions that the Court of Appeal or the Tribunal considers necessary in order to secure the just, expeditious and economical disposal of the appeal.

(4) Leave to appeal may only be granted under subsection (1) if the Court of Appeal or the Tribunal 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.

153B. Decisions of Tribunal not subject to judicial review

No application for judicial review may be made under 21K of the High Court Ordinance (Cap. 4) in respect of any decision, determination or order of the Tribunal made under this Ordinance.