

## **Bills Committee on Competition Bill**

### **List of follow-up actions arising from the discussion at the meeting on 2 April 2012**

At the meeting on 2 April 2012, the Administration was requested to take the following actions –

- (1) provide a written response to the submission from PCCW Limited and HKT Limited regarding the treatment of the telecommunications industry under the Bill;
- (2) provide a response to the outstanding issues in the submissions from the Hong Kong General Chamber of Commerce, in particular its call to specify a market share percentage in the guidelines on what constituted "substantial degree of market power";

#### *Threshold for the de minimis arrangements*

- (3) formally report on its consideration of Mr WONG Ting-kwong's view that it was not sufficient to use HK\$ 11 million, being the average annual business turnover of small and medium enterprises, as the threshold for exclusion from the application of the second conduct rule under the proposed de minimis arrangements;

#### *Clause 21*

- (4) consider and respond to the proposal to set out in the Bill the relevant factors for determining "substantial degree of market power", by making reference to other laws, such as section 14 of the Broadcasting Ordinance (Cap. 562), section 7L of the Telecommunications Ordinance (Cap. 106), section 6 of Schedule 7 to the Bill, and the new section 7Q to be added to Cap. 106 by virtue of section 14 of Schedule 8 to the Bill;

#### *Clause 106*

- (5) members expressed concern that by adding the phrase "or involves" to clause 106 regarding "no proceedings independent of this ordinance" as presently proposed, the clause would become so broad that it might have the effect of prohibiting

proceedings to be brought independently of the enacted 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". The Administration was requested to refine the amendment in the light of the following views expressed at the meeting:

- (i) that the provisions on the stand-alone right of private action would, as already proposed, be taken out from the Bill;
- (ii) that the right to bring proceedings, e.g. those in relation to conspiracy to injure, currently available under the law might be affected if the case concerned "involved" the defendant's contravention, or involvement in a contravention, of a conduct rule. This was because, if amended as proposed, clause 106 would prohibit the bringing of proceedings independently of the enacted Ordinance if the case involved such contravention. However, while as a result of (i) above the right of private action would not be available under the Bill, according to clause 141 the Competition Tribunal (the Tribunal) would also not have the jurisdiction to hear and determine the above-mentioned proceedings in which conspiracy to injure was alleged; and
- (iii) that there was a need to clarify whether, even though none of the cause of action was the defendant's contravention, or involvement in a contravention, of a conduct rule, proceedings would still be prohibited from being brought independently of the enacted Ordinance if the facts of the case involved such contravention;

*Clause 115 and the new clause 115A*

- (6) in relation to the proposed amendments to clause 115 and the proposed new clause 115A, provide a paper to clearly explain:
  - (i) the circumstances under which proceedings would be transferred from the Tribunal to the Court of First Instance and vice versa, with particular reference to clause 115(3);

- (ii) whether there were restrictions on the number of transfers so made;
- (iii) the factors that would be considered and the procedures followed when making such transfers; and
- (iv) the likely consequences of such transfers on the complexity and cost of litigation;

*The new clause 153B*

- (7) provide details of the case of the United Kingdom (UK) that, according to the Administration, had given rise to the need to add an ouster clause, namely, the proposed new clause 153B, to the Bill to bar judicial review of the decisions, determinations or orders of the Tribunal made under the Bill, so as to put things beyond doubt that any decision, determination or order of the Tribunal as a superior court of record should only be reviewed by way of appeal to the Court of Appeal;
- (8) explain the differences, if any, between the Tribunal to be set up under the Bill and the tribunal of the UK involved in the case mentioned in (7) above, in particular whether it was similarly a superior court of record, whether any application for judicial review of its decision was granted and if so, the justifications; and
- (9) with reference to the following views expressed at the meeting, consider and advise on the appropriateness of adding the proposed new clause 153B to the Bill:
  - (i) that the proposed new clause 153B might be unnecessary if clauses 133 to 135 were sufficiently clear to establish the Tribunal as a superior court of record, on a par with the Court of First Instance;
  - (ii) that addition of the proposed new clause 153B might have the unintended consequence of causing people to apply for judicial review of the decisions, determinations or orders of other tribunals so far not challenged, if similar ouster clauses were not provided in the relevant legislation; and

- (iii) that it might be undesirable to expressly prohibit judicial review in any legislation, as learnt from the mistake of a similar move in the UK.

Council Business Division 1  
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