

**For discussion
on 17 April 2012**

Bills Committee on Competition Bill

Responses to outstanding issues arising from previous meetings

Purpose

This paper sets out the Administration's responses to questions raised by Members at the meeting on 2 April 2012 and other issues raised at previous meetings.

Questions raised at the meeting on 2 April 2012

Clause 106

2. At the meeting on 2 April 2012, some Members were concerned that the Administration's proposed amendments to clause 106 of the Competition Bill (the Bill) might have casted the net too wide and have covered common law actions (such as conspiracy to injure) that are based on facts which may involve a contravention of a conduct rule, but do not have any cause(s) of action being the defendant's contravention or involvement of a contravention of a conduct rule. Members were also concerned that if the above-mentioned action / proceedings were covered by the amended clause 106 and if they involved an alleged contravention of a conduct rule (though not as a cause of action), such actions / proceedings might effectively be prohibited by the Bill.

3. The purpose of clause 106 is to ensure that all private actions, which have any of their causes of action to be the defendant's contravention or the defendant's involvement in a contravention of a conduct rule, must be brought pursuant to and in accordance with the Bill. If there is a determined contravention of a conduct rule, a follow-on action (whether in a claim based purely on the contravention or in a composite claim in which one of the causes of action is the contravention) has to be brought by a private party pursuant to and in accordance with the Bill. With the Administration's proposed removal of stand-alone right of private action, clause 106 would preclude all stand-alone private actions, whether under the common law or any enactment, if any of their

causes of action is the defendant's alleged contravention or the defendant's involvement in an alleged contravention of a conduct rule. This is to reflect our policy intent that no stand-alone private action would be allowed and to prevent any "backdoor" for such action. However, at any time before or after a determination of contravention of a conduct rule, a private party may bring an action based purely on common law causes of action (i.e. independently of the Bill), even if the facts of the claim may support a finding of contravention of a conduct rule, as long as the contravention of a conduct rule is not pleaded as a cause of action in such claim.

4. In light of Members' concerns and in order to better reflect our policy intent, we suggest revising clause 106 as follows -

"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 =

(a) the cause of action is the defendant's contravention, or involvement in a contravention, of a conduct rule; or

(b) the proceedings are founded on more than one cause of action and any of the causes of action is the defendant's contravention, or involvement in a contravention, of a conduct rule."

5. Clause 106(a) concerns pure competition claims that have the defendant's contravention or involvement in a contravention of a conduct rule as the only cause of action. Clause 106(b) concerns composite claims that have the defendant's contravention or involvement in a contravention of a conduct rule as one of the causes of action. The revised clause 106 does not restrict the bringing of any common law claims which do not have a contravention of a conduct rule pleaded as a cause of action. Such proceedings may still be brought independently of the Bill. For example, if a claim by a private party against two or more defendants for their commission of conspiracy to injure is based on a set of facts that may support a finding of contravention of a conduct rule, but the contravention is not pleaded in the claim, the revised clause 106 will not require the claim to be brought under the Bill. However, if it is pleaded in the claim that tortious liability has arisen because the defendants have conspired

to act in contravention of a conduct rule, and this has resulted in loss to the plaintiff, the revised clause 106 will require the action to be commenced pursuant to the Bill.

Clauses 115, 115A, 115B and 115C

6. The proposed transfer mechanism set out in clauses 115, 115A, 115B and 115C aims to discourage forum shopping by giving the Competition Tribunal (CT), a specialist tribunal, primary jurisdiction over all competition matters, including pure competition claims, composite claims and alleged contravention of a conduct rule as a defence. Under the transfer mechanism, the decision as to whether a claim should be heard in the Court of First Instance (CFI) or the CT would be made by the courts and not by the parties of the proceedings. To facilitate Members' understanding of the transfer mechanism, we set out the different scenarios in the table at **Annex**.

7. Under the proposed mechanism, pure follow-on claims would be considered by the CT. This would enable the CT to accumulate experience and expertise in the area of competition law, which is important for the overall development of an effective regulatory framework for competition matters in Hong Kong. In the unlikely event that a composite claim is first brought in the CFI, the CFI would transfer to CT all competition-related parts of the claim (including those claims closely connected to the follow-on claims in that they arise out of the same or substantially the same facts), and would retain those closely connected claims only if it is in the interests of justice to do so. This would address Members' concern that it should be more desirable for as much as possible a composite claim to be heard by the same court.

8. Parallel proceedings in CFI and CT may not necessarily lead to higher legal costs because the focuses of the respective proceedings are likely to be different. Also, the CFI and the CT may be expected to take into account such factors as costs and convenience when examining whether it is in the interests of justice to transfer part(s) of a claim to the other court or retain such part(s) in the original court.

9. As regards the restrictions on the number of transfers, clauses 115B and 115C provide finality on the transfer of proceedings from the CFI to the CT and vice versa. The principle is that once the CFI or the CT decides that, in the interests of justice, proceedings should be transferred to the other, the receiving court must not transfer such proceedings back. These express provisions would provide certainty on the transfer of proceedings between the CFI and CT.

Clause 153B

10. The proposed clause 153B aims to ensure that any decisions, determinations, or orders of the CT as a superior court of record should only be reviewed by way of appeal to the Court of Appeal (CA), which is a higher court.

11. The proposal originated from a recent UK's Supreme Court of England's judgment in *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2011] 3 WLR 107 (a copy of the judgment has been submitted to the Bills Committee vide LC Paper No. CB(1)1506/11-12(03)). It was held that notwithstanding that the UK Upper Tribunal is a "superior court of record", which has "the same powers, rights and privileges and authority as the High Court" and is manned by High Court and Court of Appeal judges, in the absence of provisions in the legislation creating the tribunal to oust the High Court's judicial review jurisdiction, its decisions are still amenable to judicial review. Judicial review is allowed on the ground of outright excess of jurisdiction or a denial of the right to a fair hearing. Any statutory attempt to oust the High Court's judicial review jurisdiction has to be made by "the plainest possible statutory language".

12. Clause 133 of the Bill provides that the CT is a superior court of record. Clause 134 further provides that the CT consists of the judges of the CFI.

13. In light of the UK's case and the similarities between the CT and the UK's Upper Tribunal, the Judiciary considers that it is arguable that the CT's decisions are amenable to judicial review in the CFI in the same or similar extent.

14. The Judiciary also considers that hierarchically and administratively, it is not desirable to subject the CT's decisions to judicial review, which is heard by a CFI judge. As such, the Judiciary considers it advisable to channel challenges against the CT's decisions, including in particular challenges based on the CT's alleged want or excess of jurisdiction or denial of procedural justice (which may be grounds for judicial review), to the CA via the appellate process laid down in clause 153 of the Bill. In the view of the Judiciary, the proposed clause 153B does **not** represent any removal of the right of the relevant parties to challenge the CT's decisions on the basis of the usual grounds for judicial review. It only means that challenges, including those on the grounds which would have otherwise been made by way of judicial reviews, will be made to the CA by way of appeal.

15. We note Members' concerns that the proposed clause 153B might seem to be banning judicial review of the CT's decisions altogether. Having carefully considered Members' views and after consulting the Judiciary, we now propose to remove clause 153B in order to avoid any misunderstanding.

Questions raised at previous meetings

Clause 3

16. At the meeting on 19 March 2012, some Members suggested that Hong Kong's courts should not be defined as statutory bodies and that there should be a separate exemption clause for courts in Hong Kong. We have consulted the Judiciary on this issue. The Judiciary has expressed no objection to having Hong Kong's courts embraced by the definition of statutory bodies since there could be no constitutional objection or difficulty in fitting courts and tribunals under the Judiciary within the definition of "statutory body" in the Bill, for the purposes of the Bill. Whilst the Judiciary is specifically provided for in the Basic Law (BL), the courts, including the Court of Final Appeal, the High Court, the District Courts, Magistrates' Courts and other special courts, are to be established in the Hong Kong Special Administrative Region (Article 81 of the BL) and their structure, powers and functions shall be prescribed by law (Article 83 of the BL). The Judiciary considers that the BL envisages the establishment of courts at all levels by enactments, and the classification of courts as statutory bodies under the Bill is not in conflict with this constitutional requirement. In light of the Judiciary's comments, we do not propose to amend the definition of "statutory body" in clause 2 or provide a separate exemption clause for courts in Hong Kong under the Bill.

Clause 5

17. There was suggestion that the criterion set out in clause 31 for granting exemption on public policy grounds (i.e. exceptional and compelling reasons of public policy) should also apply and be incorporated into clause 5(1)(b) as a criterion for the Chief Executive in Council in exercising his power to exempt a non-statutory body from the Bill. In this regard, unlike statutory bodies where their services or activities are usually regulated by the ordinances by or under which they are established or constituted, the types and functions of non-statutory bodies as well as the nature of their activities could vary widely. While the exemption criterion adopted in clause 31 would be relevant in considering whether the making of any regulation under clause 5(1)(b) is justified, 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. We consider that clause 5(1)(b) as currently drafted provides the necessary flexibility for catering for unforeseen circumstances under which non-statutory bodies may warrant exemption. All regulations made

under clause 5(1)(b) will be subject to vetting by the Legislative Council.

Advice sought

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

**Commerce and Economic Development Bureau
April 2012**

Transfer Mechanism under Clauses 115, 115A, 115B and 115C

Types of claims	For proceedings brought in the Competition Tribunal (CT)	For proceedings brought in the Court of First Instance (CFI)
(A) Pure follow-on claims	Pure follow-on claims should be brought in the CT. (<i>c.f. clause 108(2)</i>) No transfer from the CT to the CFI is allowed.	Pure follow-on claims cannot be brought in the CFI. (<i>c.f. clause 107</i>)
(B) Composite claims : composite claims may consist of the following elements – (i) follow-on claims; (ii) claims closely connected to the follow-on claims (i.e. matters arising out of the same or substantially the same facts as those of the follow-on claims); and (iii) non-competition claims (i.e. claims that are not related to any competition matters).		
(B)(i) <i>follow-on claims in composite claims</i>	The CT should hear the claims. No transfer from the CT to the CFI is allowed.	The CFI must transfer the follow-on claims to the CT and has no discretion to retain the claims. (<i>c.f. clause 115(1)</i>) The CT must not transfer the follow-on claims back to the CFI. (<i>c.f. clause 115C</i>)

Types of claims	For proceedings brought in the Competition Tribunal (CT)	For proceedings brought in the Court of First Instance (CFI)
<p>(B)(ii) <i>closely connected claims in composite claims</i></p>	<p>The CT may –</p> <p>(a) hear the claims; or</p> <p>(b) transfer them to the CFI if the CT considers that it is in the interest of justice to do so. <i>(c.f. clause 115A(2))</i></p> <p>If the CT transfers the claims to the CFI, the CFI must not transfer them back to the CT. <i>(c.f. clause 115B(1))</i></p>	<p>The CFI may –</p> <p>(a) transfer the claims to the CT; <i>(c.f. clause 115(1))</i> or</p> <p>(b) hear the claims if the CFI considers that it is in the interest of justice to do so <i>(c.f. clause 115(2))</i>.</p> <p>If the CFI transfer the claims to the CT, the CT must not transfer them back to the CFI. <i>(c.f. clause 115C)</i></p>
<p>(B)(iii) <i>non-competition claims in composite claims</i></p>	<p>The CT must transfer the non-competition claims to the CFI. <i>(c.f. clause 115A(1))</i></p>	<p>The CFI should hear the non-competition claims. No transfer is allowed. <i>(c.f. clause 115(1))</i></p>
<p>(C) Parallel proceedings (i.e. a private plaintiff bringing follow-on claims in the CT and other closely connected claims in the CFI, at the same time)</p>		
<p>(C)(i) <i>follow-on claims brought in the CT</i></p>	<p>Same arrangements as in scenario (B)(i) above</p>	<p>N/A</p>

Types of claims	For proceedings brought in the Competition Tribunal (CT)	For proceedings brought in the Court of First Instance (CFI)
<i>(C)(ii) other closely connected claims brought in the CFI</i>	N/A	Same arrangements as in scenario B(ii) above.
(D) Alleged contravention / alleged involvement in a contravention of a conduct rule as a defence	The CT should adjudicate on the defence. No transfer from the CT to the CFI is allowed.	<p>The CFI must transfer the defence to the CT and has no discretion to retain it in the CFI. <i>(c.f. clause 115(3))</i></p> <p>After the transfer, the CT may –</p> <ul style="list-style-type: none"> (a) adjudicate on the defence; or (b) transfer the defence back to the CFI if the CT considers that it is in the interest of justice to do so. <p><i>(c.f. clause 115A(3))</i></p> <p>If the CT exercises its discretion to transfer the defence back to the CFI, the CFI must adjudicate on the defence and must not transfer it again to the CT. <i>(c.f. clause 115B(2))</i></p>