

**For discussion
on 31 May 2011**

**Bills Committee on
Competition Bill**

**Responses to Follow-up Questions
arising from the Meeting on 12 May 2011**

Purpose

This paper responds to questions raised by Members at the meeting on 12 May 2011 and provides supplementary information on a few outstanding issues arising from previous discussions.

Issue relating to Part 10

Role and functions of members of the Competition Tribunal

2. Clause 134 of the Competition Bill (the Bill) provides that the Competition Tribunal (the Tribunal) consists of the judges of the Court of First Instance by virtue of their appointments as such judges. Hence, members of the Tribunal are members of the court when performing their functions under the Bill. As for the President and the Deputy President of the Tribunal whom shall be appointed by the Chief Executive (CE) from among members of the Tribunal, they are carrying out a judicial function under the Bill. Providing a specific term of appointment for the President and the Deputy President of the Tribunal would facilitate the appointment (or re-appointment) of suitable members of the Tribunal to be the President or the Deputy President on a regular basis. The fixed-term appointment would be made by the CE on the recommendation of the Judicial Officers Recommendation Commission and would automatically lapse upon expiration of the term. Such arrangements would avoid any possible impression of arbitrary appointments and is consistent with the independence of the Judiciary.

Rights of audience

3. Clause 156 of the Bill empowers the Chief Judge of the High Court, after consulting the President of the Tribunal, to make rules regulating and

prescribing, amongst others, the practice and procedure to be followed in the Tribunal in all matters with respect to which the Tribunal has jurisdiction and any matters incidental to or relating to that practice or procedure, having regard to our policy intent for informality in the conduct of proceedings in the Tribunal under clause 143(3). These rules may cover the rights of audience in the Tribunal. In addition, clause 143 provides that the Tribunal may, in so far as it thinks fit, follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction. The right of audience in the Court of First Instance are provided in Order 5, rule 6^{Note (1)} and Order 9, rule 6^{Note (2)} of the Rules of the High Court (Cap. 4A), which are made by the Rules Committee chaired by the Chief Judge .

Admissibility of evidence

4. The policy intent is that the Tribunal should have the power to receive and consider any evidence, whether by way of oral evidence, written statements, documents or otherwise, in proceedings before the Tribunal. To put beyond doubt that the power of the Tribunal to receive evidence is not confined to the formal rules of evidence in a court of law, we consider it necessary to expressly provide in clause 142(2)(a) and clause 146 that the Tribunal may receive and consider any evidence, *whether or not it would be otherwise admissible in a court of law*. We would introduce amendments to delete the words “*in civil or criminal proceedings*” in clause 142(2)(a) to align the wordings of the relevant phrase in these two provisions to ensure consistency.

Rights of appeal

5. We are considering Members’ suggestions about removing or adjusting the leave requirement in clause 153 and will provide a separate response on the issue in due course.

^{Note (1)} Order 5, rule 6 of the Rules of the High Court (Cap. 4A) provides that any person may begin and carry on proceedings in the High Court by a solicitor or in person. A body corporate may not begin or carry on any such proceedings in the Court otherwise than by a solicitor except (a) as expressly provided by or under any enactment; or (b) where leave is given under paragraph (3) of this Order for it to be represented by one of its directors.

^{Note (2)} Order 9, rule 6 of the Rules of the High Court (Cap. 4A) provides that a respondent to proceedings begun by petition may defend the proceedings by a solicitor or in person. Where the respondent to such proceedings is a body corporate, except as expressly provided by or under any enactment or where leave is given under paragraph (3) of this Order for such respondent to be represented by one of its directors, such respondent may not take any step in the proceedings otherwise than by a solicitor.

Comparison with the Securities and Futures Appeals Tribunal

6. A comparison of the powers, structure and functions of the Tribunal with the Securities and Futures Appeals Tribunal established under section 216 of the Securities and Futures Ordinance (Cap. 571) is at **Appendix A**.

Issues relating to Schedule 5

Disclosure of interest by members

7. We proposed in LC Paper No. CB(1)2127/10-11(02) that we will add provisions similar to clause 13 of the Communications Authority Bill to regulate disclosure of interests at a meeting by members of the Competition Commission (the Commission). Having regard to Members' views on our proposal, we are considering whether we should add another clause to the Bill, modeling on section 38 of the West Kowloon Cultural District Authority Ordinance (Cap. 601), to provide for a register of interests and govern disclosure of interests by members of the Commission more generally. The relevant provision of Cap. 601 is as follows -

Clause 38 of the West Kowloon Cultural District Authority Ordinance

“38. Disclosure of interests

(1) A Board member or a committee member shall disclose to the Authority any interest that he has which is of a class or description determined by the Authority under subsection (2) –

- (a) on his first appointment;*
- (b) at the beginning of each calendar year after the appointment;*
- (c) on becoming aware of the existence of an interest not previously disclosed under this subsection; and*
- (d) after the occurrence of any change to any interest previously disclosed under this subsection.*

(2) The Authority may, for the purposes of this section –

- (a) determine the class or description of the interest required to be disclosed;*
- (b) determine the details of the interest required to be disclosed and the manner in which such interest is to be disclosed; and*
- (c) from time to time change any matter determined under*

paragraph (a) or (b).

(3) The Authority shall establish and maintain a register relating to any disclosure required to be made under subsection (1) (“the register”) at its principal office.

(4) Where a Board member or a committee member makes a disclosure as required by subsection (1), the Authority shall cause his name and the particulars of the disclosure to be recorded in the register, and if a further disclosure is made, the Authority shall cause particulars of the further disclosure to be recorded in the register.

(5) For the purpose of enabling any member of the public to ascertain the particulars of any disclosure required to be made under subsection (1), the Authority shall, by such means as it considers appropriate, make available the register for inspection by the public at any reasonable time.”

Issues relating to Part 11 & Schedule 6

Comparison of competition regulatory frameworks

8. At present, competition matters relating to the broadcasting and the telecommunications sectors are regulated under the Broadcasting Ordinance (Cap. 562) (BO) and the Telecommunications Ordinance (Cap. 106) (TO) respectively. To reconcile the new law with the existing competition regulatory framework in the broadcasting and telecommunications sectors, the competition-related provisions in the BO and the TO will be repealed upon the commencement of the competition rules of the Bill. Transitional arrangements have been provided for under Schedule 9 to the Bill. A comparison of the competition regulatory regimes under the BO and the TO (which follow an administrative model) with that of the Bill (which follows a judicial model) is at **Appendix B**.

Exercise of concurrent jurisdiction

9. The Broadcasting Authority (BA) and the Telecommunications Authority (TA) will share the powers of the Commission in respect of enforcing the competition rules in the broadcasting and telecommunications sectors. In exercising their concurrent jurisdiction, the Commission, the BA and the TA will adopt the same regulatory guidelines which are likely to be authored jointly by the three competition authorities. The Memorandum of Understanding

(MOU) to be signed between the Commission, the BA and the TA will provide for these arrangements in greater detail.

10. Given a common set of competition rules and regulatory guidelines, as well as the judicial enforcement model under which the power to adjudicate a competition case will rest with the Tribunal, the concern over inconsistent application of the law or regulatory arbitrage should not arise. With a shared goal to enforce the law, the competition authorities will, through the signing of the MOU, agree on the allocation of responsibilities for competition matters, the manner in which the parties will resolve any dispute between themselves, as well as the provision of assistance to each other, including the secondment of personnel or pooling of experience in conducting cross-sector investigation. The proposed MOU would be sufficient to cater for most scenarios to which concurrent jurisdiction apply. Under clause 129 of the Bill, the Commission is tasked to investigate conduct that may contravene the competition rules and enforce the provisions of the competition law. For competition cases that straddle different sectors and require multi-disciplinary expertise and analyses or for other reasons not taken up by the BA or the TA, the Commission as the custodian of the competition law will be responsible. Hence, no cases should be left unattended under the concurrent jurisdiction regime.

11. The proposed concurrent jurisdiction intends to retain the specialist knowledge of the BA and the TA in competition regulation and for them to initially share some of the Commission's workload to enhance efficiency in implementing the competition law. Currently, there are four dedicated officers in the Competition Branch of the Television and Entertainment Licensing Authority (TELA) to assist BA in discharging its competition functions under the BO. On the other hand, there are 16 officers in the Competition Affairs Branch and the Legal Support Unit of the Office of the Telecommunications Authority responsible for the investigation of competition-related complaints, enforcement and associated legal matters under the TO. Compared to the proposal for the Commission to delegate its investigative function to the BA or the TA, the proposed concurrent jurisdiction has the merit of setting out more clearly the division of work among the competition authorities and provides a legal framework for the transparent and objective allocation and transfer of responsibilities among them. In the long run, our policy intent is to have one regulator for all competition matters.

12. On drafting, we will delete clause 157 and amend clause 160(2), adopting similar wordings in subsection (1) in order to describe more plainly the scope of concurrent jurisdiction. As for clause 159(1)(c), we will also amend the Chinese text to read as “廣管局已就該持牌人獲賦予職能” (amendments underlined) to bring it in line with the English version. We will also consider

replacing the term “competition regulator” with “competition authority” in Part 11, clause 2 and clause 125(1)(h) to better reflect the role of the Commission, the BA and the TA in relation to competition in the market.

Memorandum of Understanding

13. Schedule 6 to the Bill specifies some of the matters that may be provided for in the MOU. While these concern predominantly the internal administration and procedural arrangements of the competition authorities, they are important matters for the effective and transparent functioning of the concurrent jurisdiction regime. Hence, we will amend the term “may” in clause 161(2) of the Bill and the heading of Schedule 6 to “must” to mandate the inclusion of these matters in the MOU to be signed between the Commission, the BA and the TA. In response to Members’ suggestion, we will also amend clause 161(4) to require the competition authorities to make available the copy of the signed MOU at the offices of the competition authorities and in other manners. For enhanced accountability to the public, the competition authorities will consult the relevant panel of LegCo before signing the MOU.

Phased commencement of the law

14. Clause 1(2) of the Bill provides that the Competition Ordinance (the Ordinance) comes into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette. It is our policy intent to implement the Ordinance in phases, with a view to allowing sufficient time for the community, especially businesses, to familiarize with the new law and to make necessary adjustment. The phased approach would also enable the Commission and the Tribunal to prepare themselves more fully before actually enforcing the law. Such preparatory tasks include the institutional set-up (including recruitment and training of staff); consultation on/ formulation of the relevant guidelines or rules; carrying out public education campaign, etc.

15. Our intention is that the first phase would commence soon after the enactment of the Bill, covering those parts relating to the establishment of the Commission and the Tribunal, the preparation of the MOU by competition authorities, and the drafting of guidelines by the Commission. The next phase concerns mainly the coming into force of the competition rules and the related enforcement provisions. Based on overseas experience^{Note (3)}, we expect that it

^{Note (3)} In the UK, the Competition Act 1998 received the Royal Assent on 9 November 1998 and the main provisions (including the prohibitions) entered into force on 1 March 2000. In Singapore, the Competition Act 2004 was passed on 19 October 2004; the main provisions came into effect on

would take at least 12 months to complete the first phase. When specifying the date of commencement for the second phase, we will take into account the readiness of the enforcement authorities and the various segments of the community for a full implementation of the law. The commencement notice is subsidiary legislation and will be subject to vetting by LegCo.

Independent review on the impact of competition law enforcement

16. At Members' further requests, we are looking into various reviews studying the impact of competition law enforcement by overseas non-governmental organizations, independent bodies or chambers of commerce. We will provide a summary of these reviews in due course.

Advice sought

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

**Commerce and Economic Development Bureau
May 2011**

**Comparison between the Competition Tribunal and
the Securities and Futures Appeals Tribunal**

| | Competition Tribunal | Securities and Futures Appeals Tribunal |
|------------------------------|--|--|
| Governing legislation | Competition Bill | Securities and Futures Ordinance (SFO) |
| Nature | <ul style="list-style-type: none">● Adjudicative and review body under a judicial enforcement model● A superior court of record | <ul style="list-style-type: none">● A review body to review specified decisions¹ of the Securities and Futures Commission (SFC), Monetary Authority or a recognized investor compensation company in accordance with Part XI and Schedule 8 to SFO. |
| Constitution | <ul style="list-style-type: none">● All judges of the Court of First Instance appointed in accordance with section 6 of the High Court Ordinance are members of the Tribunal by virtue of their appointments as such judges. | <ul style="list-style-type: none">● The Chairman of Tribunal shall be a judge² and the two other members of the Tribunal shall not be public officers. (s216(3) of SFO).● The Chairman shall be appointed by the Chief |

¹ According to s215 of SFO, “specified decision” means –

a) a decision of SFC which-

(i) is made under or pursuant to any of the provisions set out in column 2 of Division 1 of Part 2 of Schedule 8; and

(ii) is within the description set out, opposite such provisions, in column 3 of Division 1 of Part 2 of Schedule 8;

b) a decision of the Monetary Authority which –

(i) is made under or pursuant to any of the provisions set out in column 2 of Division 2 of Part 2 of Schedule 8; and

(ii) is within the description set out, opposite such provisions, in column 3 of Division 2 of Part 2 of Schedule 8;

c) a decision of SFC or a recognized investor compensation company which –

(i) is made under or pursuant to any of the provisions set out in column 2 of Division 3 of Part 2 of Schedule 8; and

(ii) is within the description set out, opposite such provisions, in column 3 of Division 3 of Part 2 of Schedule 8.

² According to section 215 of SFO, judge means –

a) a judge or a deputy judge of the Court of First Instance;

b) a former Justice of Appeal of the Court of Appeal;

c) a former judge or a former deputy judge of the Court of First Instance.

| | Competition Tribunal | Securities and Futures Appeals Tribunal |
|----------------------------------|---|--|
| | <ul style="list-style-type: none"> ● The President and the Deputy President shall be appointed by the Chief Executive from among the members of the Tribunal on the recommendation of the Judicial Officers Recommendation Commission. ● The term of office of the President and the Deputy President is at least 3 years and not more than 5 years. Reappointment permitted. | <p>Executive (CE) on the recommendation of the Chief Justice. (s7 of Schedule 8 to SFO)</p> <ul style="list-style-type: none"> ● The CE shall appoint persons to a panel comprising members which are not public officers. (s2 of Schedule 8 to SFO) ● For the purpose of determining a review, the Secretary for Financial Service and the Treasury on the recommendation of the Chairman shall appoint two panel members as ordinary members to the Tribunal for the review. (s12 of Schedule 8 to SFO) ● The Chairman shall be appointed for a term of three years or appointed to act in relation to any specified review. A panel member shall be appointed for such period as the CE considers appropriate. An ordinary member can be appointed to act in relation to any specified review. Reappointment permitted. (s8, s3 and s13 of Schedule 8 to SFO). |
| Core functions and powers | <ul style="list-style-type: none"> ● To hear and adjudicate on competition cases brought by the Commission as well as private actions ● To review determination of the Commission³ | <ul style="list-style-type: none"> ● To review specified decisions¹ and to hear and determine any question or issue arising out of or in connection with any review, in accordance with Part |

³ Determinations of the Competition Commission which are reviewable by the Competition Tribunal are decisions made by the Commission in respect of :

- (i) exemptions or exclusions for agreement(s), conduct or merger(s);
- (ii) rescission of a decision regarding exemptions or exclusions for agreement(s), conduct(s) or merger(s);
- (iii) variation of a commitment made by undertaking(s) to take or refrain from taking certain action to address the Commission's concerns about a possible contravention of a competition rule;
- (iv) release of undertaking(s) from a commitment to take or refrain from taking certain action to address the Commission's concerns about a possible contravention of a competition rule; and
- (v) termination of a leniency agreement.

| | Competition Tribunal | Securities and Futures Appeals Tribunal |
|-------------------------------|--|---|
| | <ul style="list-style-type: none"> ● To apply a full range of remedies with regard to contraventions of the competition rules, including pecuniary penalty; a declaration about the contravention of a competition rule; an order restricting a person from engaging in any conduct that constitutes a contravention; an order requiring a person who has contravened a competition rule to do any act or thing; an order concerning the disposal of property; disqualification order, etc. ● To hear application for the enforcement of commitments ● To have all the powers, rights and privileges of a superior court of record with respect to the attendance, swearing and examination of witnesses; the production and inspection of documents; the enforcement of its orders; and all other matters necessary for the exercise of its jurisdiction | <p>XI and Schedule 8 of SFO. (s216(1) of SFO)</p> <ul style="list-style-type: none"> ● The Tribunal may- <ul style="list-style-type: none"> (a) confirm, vary or set aside the decision, and, where the decision is set aside, substitute for the decision any other decision which the Tribunal considers appropriate, (b) remit the matter in question to the relevant authority with the directions it considers appropriate, which may include a direction to the relevant authority to make a decision afresh in respect of any matter specified by the Tribunal. (s218(2) of SFO) ● To have a full range of powers with respect to attendance of person to give evidence on oath, production and inspection of documents, determination of the procedures to be followed in the review and enforcement of orders for the conduct of its review or functions. (s219 of SFO) |
| Hearing and Procedures | <ul style="list-style-type: none"> ● To decide its own procedures and may insofar as it thinks fit follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction ● The Chief Judge may, after consulting the President, make rules regulating and prescribing the practice and procedure to be followed in the Tribunal. ● The Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice. | <ul style="list-style-type: none"> ● The Tribunal can determine the procedures to be followed in the review. (s219(1)(j) of SFO) ● The Tribunal shall not determine a review without first giving the parties to the review a reasonable opportunity of being heard. (s218(5) of SFO) ● The standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law. (s218(7) of SFO) |

| | Competition Tribunal | Securities and Futures Appeals Tribunal |
|----------------|--|---|
| | <ul style="list-style-type: none"> ● In proceedings other than proceedings in which the Commission applies for an order for a pecuniary penalty under clause 91 or a financial penalty under clause 168 of the Bill, the Tribunal is not bound by the rules of evidence. ● An application to the Tribunal may be heard and determined by a Tribunal constituted by the President, the President and one or more other members appointed by the President, or one or more members appointed by the President. ● The President or the member appointed by the President (presiding member) shall preside over the sitting. ● Any difference between the members exercising the jurisdiction of the Tribunal is to be decided by majority vote, and in the event of an equality of votes, the member presiding is to have a second or casting vote. | <ul style="list-style-type: none"> ● The Chairman shall convene such sittings of the Tribunal as are necessary to determine a review. (s16 of Schedule 8 to SFO) ● Before convening a sitting in respect of a review, the Tribunal may give directions to the parties to the review concerning procedural matters to be complied with by the parties and the time within which the parties are required to comply with such matters. (s17 of Schedule 8 to SFO) ● At any sitting of the Tribunal, the Chairman and two ordinary members shall be present; the Chairman shall preside; and every question before the Tribunal shall be determined by the opinion of the majority of the members except a question of law which shall be determined by the Chairman alone. (s18 of Schedule 8 to SFO) ● At any sitting of the Tribunal held in respect of any matter which is determined by the Chairman alone as the sole member of the Tribunal, the Chairman only shall be present, and every question before the Tribunal shall be determined by him. (s19 of Schedule 8 to SFO) ● Every sitting of the Tribunal shall be held in public unless the Tribunal determines otherwise (s20 of Schedule 8 to SFO) |
| Appeals | Court of Appeal | Court of Appeal (s229 of SFO) |

**Comparison of the competition regulatory regimes under the Competition Bill,
the Broadcasting Ordinance and the Telecommunications Ordinance**

| | Competition Bill | Broadcasting Ordinance (Cap. 562) | Telecommunications Ordinance (Cap. 106) |
|--|---|--|--|
| Prohibitions against anti-competitive conduct | <p><u>First conduct rule (clause 6):</u> prohibits agreements, concerted practices or decisions by undertakings which have the object or effect of preventing, restricting or distorting competition in Hong Kong.</p> <p><u>Second conduct rule (clause 21):</u> prohibits the abuse of a substantial degree of market power by an undertaking that has the object or effect of preventing, restricting or distorting competition in Hong Kong.</p> <p><u>Merger rule (clause 3 of Schedule 7):</u> prohibits a merger involving an undertaking holding a carrier license that has, or is likely to have, the effect of substantially lessening competition in Hong Kong.</p> | <p><u>Section 13:</u> a licensee is prohibited from engaging in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.</p> <p><u>Section 14:</u> a licensee in a dominant position in a television programme service market shall not abuse its position; a licensee is deemed to have abused its position if the licensee has engaged in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.</p> | <p><u>Section 7K:</u> a licensee shall not engage in conduct which has the purpose or effect of preventing or substantially restricting competition in a telecommunications market.</p> <p><u>Section 7L:</u> Section 7L(1): a licensee in a dominant position in a telecommunications market shall not abuse its position; Section 7L(4): a licensee is deemed to have abused its position if engaging in conduct which has the purpose or effect of preventing or substantially restricting competition in a telecommunications market.</p> <p><u>Section 7N:</u> a licensee in a dominant position shall not discriminate, with the purpose or effect of preventing or substantially lessening competition in a telecommunications market, between persons who acquire the</p> |

| | Competition Bill | Broadcasting Ordinance (Cap. 562) | Telecommunications Ordinance (Cap. 106) |
|---------------------------|--|---|---|
| | | | <p>services in the market on charges or the conditions of supply, or an exclusive licensee or a carrier licensee shall not do so between a person who lawfully acquires and uses telecommunications networks, systems, installations, customer equipment or services to provide services to the public and any other person who is not providing a service to the public.</p> <p>Section 7P: regulates the merger or acquisition of a carrier licensee that has, or is likely to have, the effect of substantially lessening competition in a telecommunications market.</p> |
| Investigation Body | Competition Commission/ Telecommunications Authority (in relation to the conduct of telecommunications licensees)/ Broadcasting Authority (in relation to the conduct of broadcasting licensees) | Broadcasting Authority | Telecommunications Authority |
| Adjudicative Body | Competition Tribunal (a superior court of record) | Broadcasting Authority, for deciding on whether a breach is established, and if so, the appropriate sanctions | Telecommunications Authority, for deciding on whether a breach is established, and if so, the appropriate |

| | Competition Bill | Broadcasting Ordinance (Cap. 562) | Telecommunications Ordinance (Cap. 106) |
|----------------------------|--|--|---|
| | | (including financial penalty); and Court of First Instance, for deciding the financial penalty only (on application from the Broadcasting Authority for a financial penalty exceeding the limits set by section 28(3)). | sanctions (including financial penalty); and Court of First Instance, for deciding the financial penalty only (on application from the Telecommunications Authority for a financial penalty exceeding the limits set by section 36C(3)). |
| Appeal/ Review Body | Competition Tribunal (for review of determinations of the Commission) Court of Appeal (for decisions of the Competition Tribunal) | Chief Executive in Council | Telecommunications (Competition Provisions) Appeal Board |