

**For discussion
on 25 October 2011**

**Bills Committee on Competition Bill
Responses to Concerns on the Competition Bill**

Purpose

This paper briefs Members on the proposed amendments to the Competition Bill (the Bill) to address concerns raised by Members of the Legislative Council (LegCo) and the business sector, particularly small and medium enterprises (SMEs).

Major Concerns over the Bill

2. Since the Bill was introduced into LegCo in July 2010, the Administration has consulted the business community (including chambers of commerce, trade associations and SMEs), District Councils, academics and professional bodies to gauge their views and concerns on the Bill. At the same time, the Bills Committee on Competition Bill (the Bills Committee) has met 21 times and received deputations at the Bills Committee meetings on 29 November 2010, 30 November 2010 and 20 July 2011. While there is broad consensus and wide support within the community that a cross-sector competition law should be introduced to tackle anti-competitive activities, a number of more basic concerns have been raised over some of the provisions in the Bill. These concerns centered around the following main areas –

- (a) the general prohibition against anti-competitive agreements is difficult for SMEs to understand and comply with;
- (b) the payment requirement of infringement notice may place a significant burden on SMEs;
- (c) the de minimis arrangements should be laid down in the law to give more certainty to SMEs;
- (d) the pecuniary penalty cap of 10% of global turnover for each year in which the contravention has occurred is too severe;
- (e) large companies may use stand-alone private action to harass SMEs; and
- (f) the application of the first and the second conduct rules to merger activities in the non-telecommunication sectors runs contrary to the

stated policy that these merger activities themselves will not be regulated under the Bill.

3. The Administration accepts that there is a need to address these issues raised by Members and the business community about the potential implications of the Bill, particularly on SMEs. Taking into account the concerns of the business community in general and those of SMEs, the general public aspiration for an effective cross-sector competition law and the actual circumstances of Hong Kong, we propose to introduce the following amendments to the Bill. Details of our proposals are set out in the ensuing paragraphs.

General prohibition against anti-competitive agreements

4. The Bill adopts a general prohibition against anti-competitive agreements and concerted practices between undertakings as well as decisions of an association of undertakings¹ which have the object or effect of preventing, restricting or distorting competition in Hong Kong. This general prohibition is known as “the first conduct rule” in the Bill². Some Members and many SMEs considered that SMEs might unwittingly breach the law because of the lack of certainty in this catch-all general prohibition. They argued that the indiscriminate treatment of more serious anti-competitive activities (the so-called “hardcore activities”) and less severe anti-competitive activities (the so-called “non-hardcore activities”) in the Bill would be a huge burden for SMEs as inadvertent breach of a less serious nature might still attract a heavy fine. As non-hardcore activities were usually less well-defined and SMEs which had limited experience in dealing with the requirements of competition law would need to incur additional costs to seek legal advice, some of them suggested that the law should completely exempt SMEs. Some advocated the so-called Canadian approach³ to apply less stringent sanctions to non-hardcore activities. They

¹ For convenience sake, the term “agreements” in the ensuing paragraphs collectively refers to agreements and concerted practices between undertakings and decisions by an association of undertakings which are all covered by the first conduct rule.

² Clause 6(1) of the Bill provides that an undertaking must not –
(a) make or give effect to an agreement;
(b) engage in a concerted practice; or
(c) as a member of an association of undertakings, make or give effect to a decision of the association,
if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

³ Under sections 45 and 47 of the Canadian Competition Act (the Act), specifically defined categories of horizontal agreements, namely price fixing, market allocation, output control and bid-rigging are subject to strict “per se” criminal prohibitions (i.e. such conducts are prohibited regardless of whether they have the object or effect to affect competition) and infringements of which can attract a maximum 14 years of imprisonment or fines or both. Meanwhile, other forms of anti-competitive agreements between competitors may be subject to review by the Canadian Competition Tribunal, on application by the Commissioner of Competition, under a new non-criminal framework in section 90.1 of the Act. Where it is established that the agreements prevent or lessen, or are likely to prevent or lessen competition substantially in a market, the Canadian Competition Tribunal may make an order (i) prohibiting any person, whether or not a party to the agreement or arrangement, from doing anything under the agreement or arrangement; or (ii)

suggested that for non-hardcore activities, the prohibition should only take effect when the Competition Tribunal (the Tribunal) made a ruling against these activities. In other words, illegality and exposure to sanctions would only arise after the Tribunal had ruled against these activities and the companies concerned failed to comply with such ruling.

5. We consider the general prohibition approach, which is the mainstream international practice adopted by the EU, UK and Singapore, is more suitable for Hong Kong, when compared with the dual track approach under the Canadian model, i.e. strict liabilities for specified categories of horizontal agreements and minimal deterrent for other forms of anti-competitive agreements. Moreover, since the Canadian dual track approach only started implementation in 2010, it is untested in terms of its effectiveness in tackling non-hardcore activities⁴. Nevertheless, we recognise that a competition law is something new in Hong Kong. The business community, in particular SMEs, would need time to familiarise themselves with the new requirements. While the market needs a swift and effective response to hardcore anti-competitive activities because they almost always have an adverse impact on competition, we may consider a lighter enforcement approach in respect of non-hardcore activities.

6. We therefore propose to specify four types of hardcore activities in the Bill, namely price-fixing, bid-rigging, market allocation and output control. These activities are widely recognised in overseas jurisdictions as anti-competitive activities that will always have an adverse impact on competition. The Competition Commission (the Commission) will be provided with the full range of existing enforcement options in the Bill to deal with these hardcore activities. The Commission may exercise its discretion to accept commitments, issue infringement notices or institute proceedings in the Tribunal.

7. For other activities covered by the first conduct rule (that is the non-hardcore activities) such as restrictions on advertising, collective refusal to supply and the development of standardization agreements, there is no hard and fast rule as to whether they may or may not give rise to competition concerns. The Commission would need to conduct a competition analysis based on the circumstances and facts of each case. For these activities, we propose that -

- (a) a new instrument of warning notice should be introduced. If the Commission has reasonable cause to believe that an undertaking has contravened the first conduct rule and such contravening conduct does not meet the descriptions of the hardcore activities, the Commission will issue a warning notice to the concerned undertaking;

requiring any person, whether or not a party to the agreement or arrangement, with the consent of that person and the Commissioner, to take any other action.

⁴ Canada has a history of competition law for over a hundred years but the approach has been largely limited to criminal investigation and enforcement. The new provisions detailed in footnote (3), including the new non-criminal framework, were introduced to the Canadian Competition Act in 2009.

- (b) the concerned undertaking will be asked to cease the contravening conduct within a period to be determined by the Commission having regard to the amount of time likely to be required for the cessation. The period will be prescribed in the warning notice. During that prescribed period, the Commission will not take enforcement action against the undertaking. To avoid enforcement action by the Commission, during the prescribed period, the concerned undertaking may simply cease the contravening conduct or, if it wishes to resolve the matter in a formal manner, it may offer a commitment to address the Commission's concern⁵ ;
- (c) at any time after the expiry of the prescribed period, if the Commission has reasonable cause to believe that the contravening conduct is still ongoing or repeated, the Commission may institute proceedings in the Tribunal but only in respect of the alleged contravention against which a warning notice has been issued and of such alleged contravention that has occurred after the commencement of the prescribed period.

A1

A mark-up version showing the proposed amendments to the relevant clauses of the Bill is at **Annex A1**.

8. The proposed warning notice would enable the Commission to take swift action to halt non-hardcore activities while at the same time address the concern that businesses, particularly SMEs, might unknowingly engage in non-hardcore activities. The notice provides undertakings a chance to correct their malpractices before enforcement action is taken and limits their exposure to sanctions to the period starting from the commencement of the period prescribed in the warning notice. Enforcement against hardcore activities would not be compromised since all existing enforcement options in the Bill would continue to be available. We will review this differential treatment of hardcore and non-hardcore activities as we gain more experience in enforcing the new competition law in Hong Kong.

⁵ Clause 59(1) provides that the Commission may accept from a person a commitment to (a) take any action; or (b) refrain from taking any action, that the Commission considers appropriate to address its concerns about a possible contravention of a competition rule.

Clause 59(2) provides that if the Commission accepts a commitment under this section, it may agree (a) not to commence an investigation or, if it has commenced an investigation, to terminate it; and (b) not to bring proceedings in the Tribunal or, if it has brought proceedings, to terminate them.

Clause 59(3) provides that if the Commission accepts a commitment under this section, it may not (a) commence or continue an investigation; or (b) bring or continue proceedings in the Tribunal in relation to any alleged contravention of a competition rule in so far as that investigation or those proceedings relate to matters that are addressed by the commitment.

Payment requirement of infringement notice

9. Some Members and many in the business sector considered the Commission's power to ask an undertaking to pay a sum not exceeding HKD 10 million to the Government under the infringement notice⁶ an unreasonable burden on SMEs and suggested the removal of this power from the Bill. Moreover, they argued that the amount would be too low to act as a real deterrent for big undertakings. While acceptance of the notice is not compulsory, SMEs would be 'forced' to accept the notice and settle with the Commission as they would not have the resources to fight for themselves in the Tribunal. They considered that if a contravention did not have a significant effect on the market, a payment should not be demanded. On the other hand, if a serious contravention was involved, they preferred the Commission bringing proceedings in the Tribunal.

10. The infringement notice was introduced to enable the Commission to resolve cases and apply a minimum "punishment" on infringing parties without resorting to the Tribunal. This is to take into account that hardcore activities can have a different degree of effect on competition and infringement notices could be used to address those that constitute less severe contravention of the first conduct rule.

11. If the power to impose a payment requirement under an infringement notice is removed, it would reduce the options available to the Commission but the infringement notice could still serve the purposes of halting anti-competitive activities. In the absence of a payment requirement, undertakings, in particular SMEs, might be more willing to settle with the Commission through the acceptance of the infringement notice. In cases involving hardcore activities that constitute more severe contravention, the option of applying more stringent measures (such as legal proceedings) will still be available at the discretion of the Commission. In light of SMEs' concerns and the above considerations, we propose to remove the payment requirement of a sum not exceeding HKD 10 million. The proposed amendments in mark-up version are at **Annex A2**.

A2

De minimis arrangements

12. It is a common practice in other jurisdictions with competition law to provide de minimis arrangements so that agreements below certain thresholds, usually expressed in combined market share or turnover of the parties involved in

⁶ Clauses 65 to 77 of the Bill provide for the infringement notice procedure under which the Commission may issue an infringement notice to an undertaking whom the Commission has reasonable cause to believe has contravened a conduct rule. The notice will contain an offer, which the concerned undertaking is not obliged to accept, not to bring legal proceedings if the undertaking makes a commitment to comply with the requirements in the notice. Such requirements may include taking certain action, refraining from taking certain action, paying a sum of up to HKD 10 million to the Government, and admission to a contravention of the relevant conduct rule.

the agreements, are generally not considered to have an appreciable impact on competition and not subject to enforcement action by the competition authorities. At present, the Bill does not provide any details on the de minimis arrangements. Our original intention was for the Commission to draw up guidelines on the de minimis arrangements so that they can be adapted quickly to changes in market circumstances. Nonetheless, Members of the Bills Committee have asked the Administration to set out details of the de minimis arrangements in the Bill to provide greater certainty to SMEs.

13. Some Members and some sectors of the business community went further to suggest a complete exemption for SMEs from the Bill, arguing that because of their small size SMEs would have limited influence on the market. As we have explained to the Bills Committee, a blanket exemption for all SMEs is not acceptable because SMEs acting collectively could cause significant impact on competition. Small companies may also engage in hardcore activities (such as price-fixing and bid-rigging) which are harmful to end consumers and should be prohibited by law.

14. In response to Members' concerns about the de minimis arrangements and the preference for such arrangements to be provided in the Bill, we have drawn reference from overseas practices and propose to provide the following de minimis framework in Schedule 1 to the Bill in the form of an exclusion from the first conduct rule -

- (a) all agreements between undertakings with a combined turnover not exceeding HKD 100 million in the preceding financial year (or the preceding calendar year if the undertakings do not have a financial year) will be excluded from the application of the first conduct rule. We propose to adopt turnover as the threshold because it is more easily determined than market share which requires a definition of the relevant market for each and every agreement. According to the statistics of the Census and Statistics Department (C&SD)⁷, the average annual business turnover of SMEs has been steady throughout 2005 to 2009 at about HKD 11 million. The threshold of HKD 100 million would exclude all agreements between some eight to nine SMEs with that average annual turnover from the application of the first conduct rule. Technical details of the turnover calculation will be specified in the form of subsidiary legislation subject to negative vetting by LegCo⁸. Providing the de minimis arrangements as an exclusion in Schedule 1 will facilitate undertakings to self-assess their agreements. The threshold of HKD 100 million can be amended through subsidiary legislation when circumstances change. Clause 36 of the Bill provides that the Chief Executive in Council may by order amend Schedule 1 subject to the

⁷ Figures have been compiled based on data collected by C&SD's Annual Survey of Economic Activities.

⁸ Both UK and Singapore set out the technical details of turnover calculation by way of subsidiary legislation.

approval of LegCo;

- (b) the exclusion does not apply to agreements involving the four types of hardcore anti-competitive activities mentioned in paragraph 6 above (i.e. price-fixing, bid-rigging, market allocation and output control) since these activities almost always have an appreciable adverse effect on competition. Similar carve-outs of hardcore activities from the de minimis arrangements have been adopted in other jurisdictions; and
- (c) insofar as a decision of an association of undertakings is concerned, the de minimis arrangements apply if the aggregate turnover of the undertakings that are members of the association does not exceed HKD 100 million. For the purpose of the de minimis arrangements, we define the turnover of an association as the aggregate turnover of its members because the impact on competition by the decision of an association would depend on the market influence of its members which in turn would be reflected by the size of these members. If we only consider the turnover of the association (such as membership fee), most if not all associations and their decisions will be excluded from the first conduct rule under the de minimis arrangements and that would defeat, in particular, the purpose of the first conduct rule to prohibit members of an association to make or give effect to anti-competitive decisions of the association.

A3

The proposed amendments in mark-up version are at **Annex A3**.

A4

15. As regards the abuse of a substantial degree of market power prohibited by the second conduct rule of the Bill⁹, we propose to adopt similar de minimis arrangements, using the average SME business turnover of HKD 11 million as the threshold. The proposed amendments are shown in mark-up version at **Annex A4**. Conduct of an undertaking the turnover of which does not exceed HKD 11 million will be excluded from the application of the second conduct rule. The rationale is that a smaller-than-average-sized SME is unlikely to have a substantial degree of market power in a market and its conduct would unlikely constitute an abuse of market power causing an appreciable effect on competition. Although it is possible that a smaller-than-average-sized SME possesses substantial market power in a narrow market and abuses such power against other smaller companies in the same market, such cases would be rare and their impact on Hong Kong's economy limited.

⁹ The second conduct rule of the Bill (clause 21) provides that an undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

Pecuniary penalty

16. Some Members and the business community criticised the proposed cap on pecuniary penalty in clause 91¹⁰, i.e. 10 % of the global turnover for each year in which the contravention has continued, as being disproportionately severe when compared with that in the EU, UK and Singapore. They advocated a cap at 10% of one year's turnover of the concerned products or services (i.e. products or services to which a contravention relates) in Hong Kong. Some Members were concerned that the heavy-handed approach might drive foreign investment away from Hong Kong.

17. The 10% cap in the Bill was introduced to provide certainty on the maximum pecuniary penalty and at the same time adequate sanctions to deter undertakings from engaging in prohibited anti-competitive activities. We agree that our proposed cap is higher than those of other jurisdictions as it has no fixed time limit – the 10% cap is applied to the global turnover of every year of contravention. In order to strike a balance between maintaining a sufficient level of deterrence and keeping our competitive edge against competing economies in the region, we propose to introduce the amendments in mark-up version at A5 **Annex A5** to provide a pecuniary cap of 10% of the local turnover for each year of infringement, up to a maximum of three year. If the infringement lasts for more than three years, the three years of infringement with the highest turnover would be chosen.

18. As regard the proposal by the business community of limiting the turnover to relevant products or services to which a contravention relates, we consider it not acceptable. In other competition jurisdictions, the turnover of relevant products or services is usually taken as the “starting point”, in a way similar to a minimum level, for penalty determination and would be adjusted to take account of the duration and seriousness of the infringement, subject to a prescribed cap on maximum penalty. Setting our cap on penalty at the lowest end of the spectrum will significantly reduce the deterrent effect.

Stand-alone right of private action

19. Part 7 of the Bill provides for private actions to be brought by persons who have suffered loss or damage as a result of a contravention of a conduct rule. Such private actions could either follow on from a determination of a contravention by the court, or could be “stand-alone” actions seeking a judgment on particular conduct and remedies. SMEs were concerned that large companies could make use of the stand-alone right of private action to harass SMEs. They

¹⁰ Clause 91(3) provides that the amount of a pecuniary penalty imposed under clause 91(1) in relation to conduct that constitutes a single contravention may not exceed in total (a) 10% of the turnover of the undertaking concerned, for the year in which the contravention occurred; or (b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in which the contravention has continued.

were worried that larger companies, which have more resources, could resort to or threaten litigation as a means to drive out or affect the business of smaller competitors. Even if the court moves quickly to dismiss the claim as baseless, SMEs would still have to deploy resources in responding to the litigation and face significant costs. Despite our original intention of providing the stand-alone right as an alternative “self-help” option for aggrieved parties, SMEs considered that in practice, the legal costs involved would discourage them from invoking such rights.

20. Experience in other jurisdictions does not substantiate the worries of SMEs. Overseas experience shows that large companies were usually the defendants in privately instigated competition litigation. Nevertheless, to reduce the anxiety and concerns of SMEs, we consider that a gradual approach may be adopted under the circumstances. At the initial stage, enforcement will be carried out by the Commission, supplemented by the follow-on right of action for determined contraventions. As the business community acquires more experience with the new competition regime, a stand-alone right of action might be introduced. We propose to introduce the proposed amendments at **Annex A6** to take out the relevant provisions on the stand-alone right of private action. We will review the need to introduce the stand-alone right of private action in a few years' time.

A6

Merger rule

21. It is our policy intention that the Bill will not regulate merger activities per se, except for carrier licences granted by the Telecommunications Authority which is already subject to such regulation (c.f. section 7P of the Telecommunications Ordinance (Cap. 106)). As we build up more experience and expertise under the new competition regime, we would be in a better position to review the effectiveness of the law and assess whether cross-sector merger provisions are suitable for and needed in Hong Kong.

22. Some Members and the business community are concerned that while the application of the merger rule in Schedule 7 to the Bill had been limited to carrier licences, the first and the second conduct rules of the Bill as currently drafted could potentially catch merger activities. This would be contrary to the Government's stated position. They urged the Government to clarify its stance and carve out merger activities from the application of the two conduct rules.

23. We agree that the first and the second conduct rules can apply to merger activities since a merger is essentially an agreement between undertakings and an undertaking having a substantial degree of market power may also engage in a merger. In jurisdictions where there are separate merger rule, merger activities are excluded from their equivalent conduct rules. To give effect to our stated intention of not introducing a cross-sector merger regulation at this stage, we propose to introduce the amendments at **Annex A7** to exclude merger activities as defined in Schedule 7 to the Bill from the application of the first and the second

A7

conduct rules. However, it should be emphasized that the exclusion does not extend to the activities of the merged undertaking. The merged undertaking would still be subject to the application of both the first and the second conduct rules.

Advice Sought

24. Members are invited to note the contents of the paper and provide their views.

Commerce and Economic Development Bureau
October 2011

2. Interpretation

(1) In this Ordinance –

“agreement” (協議) includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings;

“Broadcasting Authority” (廣管局) means the Broadcasting Authority established by section 3 of the Broadcasting Authority Ordinance (Cap. 391);

“Commission” (競委會) means the Competition Commission established by section 128;

“company” (公司), in addition to the meaning given by section 2(1) of the Companies Ordinance (Cap. 32), includes a “non-Hong Kong company” within the meaning of that Ordinance and a company registered under Part IX of that Ordinance;

“competition matter” (競爭事宜) means any matter involving or having a connection with –

- (a) a contravention or alleged contravention of a competition rule; or
- (b) any decision relating to a competition rule, that has been made or is to be made under this Ordinance;

“competition regulator” (競爭規管者) means any one of the following –

- (a) the Commission;
- (b) the Telecommunications Authority; or
- (c) the Broadcasting Authority;

“competition rule” (競爭守則) means –

- (a) the first conduct rule;

(b) the second conduct rule; or

(c) the merger rule;

“conduct” (行為) means any conduct, whether by act or omission;

“conduct rule” (行為守則) means –

(a) the first conduct rule; or

(b) the second conduct rule;

“confidential information” (機密資料) has the meaning given by section 122;

“contract of employment” (僱傭合約) means any agreement, whether in writing or oral, express or implied, under which one person (an “employer”) agrees to employ another and that other agrees to serve the employer as an employee, and also includes a contract of apprenticeship;

“director” (董事) includes any person occupying the position of director or involved in the management of a company, by whatever name called, and includes a shadow director;

“document” (文件) includes information recorded in any form;

“first conduct rule” (第一行為守則) has the meaning given by section 6;

“functions” (職能), except in section 129, includes powers and duties;

“funds of the Commission” (競委會資金) means the funds of the Commission, as specified in section 21 of Schedule 5;

“Government” (特區政府) does not include a company that is wholly or partly owned by the Government;

“information” (資料) includes information contained in a document;

“infringement notice” (違章通知書) means an infringement notice issued under section 66(2);

“investigation” (調查) means an investigation conducted under Part 3;

“leniency agreement” (寬待協議) means a leniency agreement made under section 79;

“member” (委員), in relation to the Commission, means a member of the Commission appointed under section 2 of Schedule 5;

“merger” (合併) has the meaning given by section 3 of Schedule 7 read together with section 5 of that Schedule;

“merger rule” (合併守則) has the meaning given by section 3 of Schedule 7;

“person” (人), in addition to the meaning given by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), includes an undertaking;

“President” (主任法官) means the President of the Tribunal appointed under section 135;

“reviewable determination” (可覆核裁定) has the meaning given by section 81;

“second conduct rule” (第二行為守則) has the meaning given by section 21;

“serious anti-competitive conduct” (嚴重反競爭行為) means any conduct that consists of any of the following or any combination of the following –

(a) fixing, maintaining, increasing or controlling the price for the supply of goods or services;

(b) allocating sales, territories, customers or markets for the production or supply of goods or services;

(c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services;

(d) bid-rigging;

Note –

See also subsection (2).

“shadow director” (幕後董事), in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act, but a person is not to be regarded as a shadow director by reason only that the directors act on advice given by that person in a professional capacity;

“statutory body” (法定團體) means a body of persons, corporate or unincorporate, established or constituted by or under an Ordinance or appointed under an Ordinance, but does not include –

- (a) a company;
- (b) a corporation of trustees incorporated under the Registered Trustees Incorporation Ordinance (Cap. 306);
- (c) a society registered under the Societies Ordinance (Cap. 151);
- (d) a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33); or
- (e) a trade union registered under the Trade Unions Ordinance (Cap. 332);

“Telecommunications Authority” (電管局局長) means the Telecommunications Authority appointed under section 5 of the Telecommunications Ordinance (Cap. 106);

“Tribunal” (審裁處) means the Competition Tribunal established by section 133;

“undertaking” (業務實體) means 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.

(2) For the purposes of the definition of “serious anti-competitive conduct” –

“bid-rigging” (圍標) means –

- (a) an agreement –
 - (i) that is made between or among 2 or more undertakings whereby one or more of those undertakings agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to

withdraw a bid or tender submitted in response to such a call or request; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement;

or

(b) a submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by an agreement –

(i) that is made between or among 2 or more undertakings; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement;

“goods” (貨品) includes real property;

“price” (價格) includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of goods or services;

“supply” (供應) –

(a) in relation to goods, means sell, rent, lease or otherwise dispose of the goods, an interest in the goods or a right to the goods, or offer so to dispose of the goods or of such an interest or right; and

(b) in relation to services, means sell, rent or otherwise provide the services or offer so to provide the services.

80A. Commission may issue warning notice

- (1) If the Commission has reasonable cause to believe that –
- (a) a contravention of the first conduct rule has occurred; and
 - (b) the contravention does not involve serious anti-competitive conduct,

the Commission must, before bringing proceedings in the Tribunal against the undertaking whose conduct is alleged to constitute the contravention, issue a notice (a “warning notice”) to the undertaking.

- (2) A warning notice must –
- (a) describe the conduct (the “contravening conduct”) that is alleged to constitute the contravention;
 - (b) identify the undertaking (the “contravening undertaking”) that has engaged in the contravening conduct;
 - (c) identify the evidence or other materials that the Commission relies on in support of its allegations;
 - (d) state –
 - (i) that the Commission requires the contravening undertaking to cease the contravening conduct within the period (the “warning period”) specified in the notice, and not to repeat that conduct after the warning period;
 - (ii) that, if the contravening conduct continues after the expiry of the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and
 - (iii) that, if the contravening undertaking repeats the contravening conduct after the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in

respect of the contravening conduct and the repeated conduct; and

(e) indicate the manner in which the contravening undertaking may cease the contravening conduct.

(3) In determining the warning period, the Commission must have regard to the amount of time that the contravening undertaking is likely to require to cease the contravening conduct.

(4) After the expiry of the warning period –

(a) if the Commission has reasonable cause to believe that the contravening conduct continues after the expiry, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and

(b) if the Commission has reasonable cause to believe that the contravening undertaking repeats the contravening conduct after the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct and the repeated conduct.

(5) To avoid doubt, proceedings under subsection (4) may not be brought in respect of any period that precedes the warning period.

66. Commission may issue infringement notice

~~(1) Subsection (2) applies where the Commission has reasonable cause to believe that a contravention of a conduct rule has occurred, but has not yet brought proceedings in the Tribunal in respect of that contravention.~~

(1) Subsection (2) applies where –

(a) the Commission has reasonable cause to believe that –

(i) a contravention of the first conduct rule has occurred and the contravention involves serious anti-competitive conduct; or

(ii) a contravention of the second conduct rule has occurred; and

(b) the Commission has not yet brought proceedings in the Tribunal in respect of the contravention.

(2) The Commission may, instead of bringing proceedings in the Tribunal in the first instance, issue a notice (an “infringement notice”) to the person against whom it proposes to bring proceedings, offering not to bring those proceedings on condition that the person makes a commitment to comply with requirements of the notice.

(3) The requirements of an infringement notice may include, but are not limited to, the following requirements –

~~(a) to pay a sum not exceeding \$10,000,000 to the Government;~~

(b) to refrain from any specified conduct, or to take any specified action, that the Commission considers appropriate; and

(c) to admit to a contravention of the relevant conduct rule.

(4) The action that may be specified by the Commission under subsection (3)(b) does not include making a payment to the Government.

SCHEDULE 1

[ss. 9, 15, 24, 30
& 36]

GENERAL EXCLUSIONS FROM CONDUCT RULES

5. **Agreements of minor significance**

- (1) The first conduct rule does not apply to –
- (a) an agreement between undertakings in any calendar year if the combined turnover of the undertakings in the year preceding that calendar year does not exceed \$100,000,000;
 - (b) a concerted practice engaged in by undertakings in any calendar year if the combined turnover of the undertakings in the year preceding that calendar year does not exceed \$100,000,000; or
 - (c) a decision of an association of undertakings in any calendar year if the turnover of the association in the year preceding that calendar year does not exceed \$100,000,000.

(2) Subsection (1) does not apply to an agreement, a concerted practice or a decision of an association of undertakings that involves serious anti-competitive conduct.

(3) In this section –
“turnover” () –

- (a) in relation to an undertaking that is not an association of undertakings, means the total gross revenues of the undertaking whether obtained in Hong Kong or outside Hong Kong; and

(b) in relation to an association of undertakings, means the total gross revenues of all the members of the association whether obtained in Hong Kong or outside Hong Kong;

“year” () means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.

SCHEDULE 1

[ss. 9, 15, 24, 30
& 36]

GENERAL EXCLUSIONS FROM CONDUCT RULES

6. Conduct of minor significance

(1) The second conduct rule does not apply to conduct engaged in by an undertaking the turnover of which does not exceed \$11,000,000 for the year preceding the calendar year in which the conduct is engaged in.

(2) In this section –

“turnover” () means the total gross revenues of an undertaking whether obtained in Hong Kong or outside Hong Kong;

“year” () means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.

91. Tribunal may impose pecuniary penalty

(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate.

(2) Without limiting the matters that the Tribunal may have regard to, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters –

- (a) the nature and extent of the conduct that constitutes the contravention;
- (b) the loss or damage, if any, caused by the conduct;
- (c) the circumstance in which the conduct took place; and
- (d) whether the person has previously been found by the Tribunal to have contravened this Ordinance.

(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed –

- (a) 10% of the turnover of the undertaking concerned for the year in which the contravention occurred;
- (b) if the contravention has continued for a period of more than one year but not more than 3 years, 10% of the turnover of the undertaking concerned for each year in that period; or
- (c) if the contravention has continued for a period of more than 3 years, 10% of the turnover of the undertaking concerned for the 3 years in that period that saw the highest, second highest and third highest turnover.

(4) In this section –

~~“turnover” (營業額) means the total gross revenues of an undertaking whether obtained in Hong Kong or outside Hong Kong;~~

“turnover” (營業額) means the total gross revenues of an undertaking obtained in Hong Kong;

“year” (年) means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.

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).

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.

SCHEDULE 1

[ss. 9, 15, 24, 30
& 36]

GENERAL EXCLUSIONS FROM CONDUCT RULES

4. Mergers

(1) To the extent to which an agreement (either on its own or when taken together with another agreement) results in, or if carried out would result in, a merger, the first conduct rule does not apply to the agreement.

(2) To the extent to which conduct (either on its own or when taken together with other conduct) results in, or if engaged in would result in, a merger, the second conduct rule does not apply to the conduct.