

立法會 *Legislative Council*

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Bills Committee on Competition Bill

Background Brief

Purpose

This paper sets out the background of the Competition Bill and provides a summary of views and concerns expressed by Members on the development of competition policy in Hong Kong.

Background

Review on competition policy in Hong Kong

2. Between 1993 and 1996, the Government commissioned the Consumer Council (CC) to undertake a series of studies on competition in Hong Kong¹. In its final report, CC recommended the adoption of a comprehensive competition policy and enactment of a general competition law in Hong Kong. In December 1997, the Government established the Competition Policy Advisory Group (COMPAG)² to review competition-related matters. In May 1998, COMPAG promulgated a Statement on Competition Policy, articulating the objective of the Government's competition policy as being "to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare". The Statement also indicated that "the Government will take action only when market imperfections or distortions limit market accessibility or market contestability, and impair economic efficiency or free trade, to the detriment of the overall interest of Hong Kong".

¹ CC completed six sectoral studies on the banking, supermarkets, gas supply, broadcasting, telecommunications and private residential property markets.

² COMPAG was established under the chairmanship of the Financial Secretary to provide a high-level and dedicated forum to review competition-related issues which had substantial policy or systemic implications, and examine the extent to which more competition should be introduced in the public and private sectors.

3. In 2000 and 2001, legislation was enacted to specifically prohibit certain types of anti-competitive conduct and the abuse of a dominant position in the telecommunications and the broadcasting markets respectively. Apart from these two pieces of legislation, there are no statutory procedures that the Government can take to reign in businesses that are engaged in restrictive practices in other sectors of the economy.

4. In September 2003, the COMPAG published guidelines aimed at advising businesses as to the types of practice that might constitute anti-competitive conduct. However, this approach of voluntary compliance by the business community with administrative guidelines has not been very effective in addressing continued public concerns about possible cases of anti-competitive conduct in Hong Kong. To ensure the competition policy would keep pace with time and continue both to serve the public interest and to facilitate a business-friendly environment, COMPAG appointed a Competition Policy Review Committee (CPRC) in June 2005 to, inter alia, make recommendations on the future direction for competition policy in Hong Kong. In June 2006, CPRC submitted its report to COMPAG, recommending that a new law with a clearly defined scope be introduced in Hong Kong to tackle anti-competitive conduct across all sectors.

Public consultations on competition policy in Hong Kong

5. On 6 November 2006, the Government published the document "Promoting Competition – Maintaining our Economic Drive" for a three-month public consultation to gauge views on the need for Hong Kong to introduce a cross-sector competition law. The result of the consultation revealed that the majority of respondents supported the introduction of a cross-sector competition law in Hong Kong and there was a high level of support for a stronger regulatory environment for competition. Nonetheless, there were some concerns in the business sector, in particular from the small and medium-sized enterprises (SMEs), about the possible adverse effect that the new law might have on business operations.

6. To allay the concerns of the business sector, the Administration issued on 6 May 2008 a further public consultation paper entitled "Detailed Proposals for a Competition Law" for a three-month consultation. A report on views collected during the public consultation was released by the Administration on 30 September 2008. According to the consultation findings, there was still broad support in the community for the introduction of a competition law. However, respondents raised concerns regarding certain specific proposals. While the Government originally indicated its intention to introduce the Competition Bill into the Legislative Council (LegCo) in the 2008-2009 legislative session, it subsequently announced on 30 March 2009 that in the light of the feedback received from the public consultation, more time was required to work out details of the Bill.

Members' views and concerns

7. Members have been monitoring the development of competition policy in Hong Kong through raising questions and conducting motion debates at Council meetings in previous years, covering areas such as promotion of fair competition, enactment of a fair competition law, exemptions and exclusion under the proposed competition law, types of anti-competitive conduct to be covered in the competition law, promoting competition in the auto-fuel market and subjecting those public organizations with a profit-making objective to the regulation of competition law.

8. CPRC and the Administration briefed the former Panel on Economic Services³ (ES Panel) on 19 July 2006 on major findings and recommendations in CPRC's review report, including the structure and powers of the Competition Commission (the Commission) and Competition Tribunal (the Tribunal). Concern was raised on the types of conduct to be regulated, such as bundling of services across sectors. Panel members noted the Administration's view that the scope of exemptions under the competition law should not be too wide, and CPRC's opinion that civil sanctions, which might include heavy fines and disqualification from being a company director, should have sufficiently powerful deterrent effect. There was a suggestion to link the level of fines to the annual business turnover of the companies found in breach of the competition legislation.

9. Panel members were briefed on the public consultation on competition policy and its outcome on 21 December 2006 and 26 March 2007. While some members indicated full support for introducing a cross-sector competition law in Hong Kong, other members were concerned that SMEs might easily fall foul of the new legislation. The Panel called on the Administration to ensure that the new law would balance the interests of relevant stakeholders and would not impede Hong Kong's status as a free market.

10. On 6 May 2008, the Administration briefed the Panel on Economic Development (EDEV Panel) on the detailed proposals of the Competition Bill. On the proposal that the Competition Commission would not pursue an agreement if the aggregate market share of the parties to the agreement did not exceed a certain level (i.e. the "de minimis" approach) except where "hard core" conduct was involved, Panel members raised concern that in the absence of a clear definition of "hard core" anti-competitive conduct, the safeguard for SMEs under this proposal was rather limited. There was concern as to how the new law could tackle the problem of abusing substantial market power by large companies as they could easily escape from the market share test, if any, through manipulating their shareholdings. Some members suggested that exemptions and exclusions should be approved by LegCo.

³ The Panel on Economic Services was renamed as the Panel on Economic Development with effect from the 2007-2008 session.

11. The Administration reported to the EDEV Panel on 16 December 2008 the consultation findings on the "Detailed Proposals for a Competition Law". Some Panel members considered that the clarity of the proposed legislation should be improved and there should be clear guidelines to dispel uncertainties in the business sector. Some members queried why a clear majority support would be required for the inclusion of merger provisions⁴, as the absence of such might undermine the objective of the law in promoting sustainable competition. Panel members also raised concerns on the provision for private action against anti-competitive conduct, the need to impose criminal penalty to enhance the deterrent effect of the competition law, and the type of statutory bodies that would be subject to the application of the law or otherwise.

12. At the EDEV Panel meeting on 30 March 2009, some members expressed concern about the Administration's proposal to change the original civil administration model to a judicial model for the enforcement of the Bill, the need to recruit competition economists to assist in the enforcement of the Bill and the need to review all non-government public bodies, be they statutory or otherwise, to assess whether they should be subject to application of the Bill.

The Bill

13. The Competition Bill was gazetted on 2 July 2010 and introduced into LegCo on 14 July 2010. The objects of the Bill are to prohibit conduct that prevents, restricts or distorts competition in Hong Kong; to prohibit mergers that substantially lessen competition in Hong Kong by the merger rule⁵; to establish an independent Competition Commission to investigate and bring proceedings before the Competition Tribunal; and to provide for incidental and connected matters. Specifically, the Bill contains the following key elements in 12 parts and 9 schedules:

- (a) **Part 1 - Preliminary** - provides for the application of the Ordinance to statutory bodies, to specified persons and to person engaged in specified activities;
- (b) **Part 2 - Conduct rules** - sets out the conduct rules applicable to agreements, decisions and concerted practices, and the abuse of a substantial degree of market power in a market and the territorial applications of the conduct rules, as well as establishes a framework

⁴ According to the information provided by the Administration (CB(1)494/08-09(01)), among those who touched on merger regulation in the public consultation exercise, 21 preferred option A (i.e. to include in the competition law "user-friendly" merger provisions similar to those found in the Telecommunications Ordinance, two chose option B (i.e. to include such provisions in the law but to delay their coming into effect pending a review of the effect of the implementation of the law) and 13 selected option C (i.e. not to include merger provisions in the law initially, but to reconsider the need for them only after a review of the effect of the implementation of the law).

⁵ The merger rule only applies to carrier licences under the Telecommunications Ordinance (Cap. 106).

for exemptions and exclusions from the application of the conduct rules;

- (c) **Part 3 - Complaints and investigations** - sets out the powers and procedures of the Commission in relation to the investigation of alleged contravention of the competition rules and creates offences in relation to investigations;
- (d) **Part 4 - Enforcement powers of Commission** - authorizes the Commission to accept, vary, substitute and release commitments with persons and to issue infringement notice to persons in exchange for the Commission ceasing its investigation and/or not to institute or continue with proceedings against the persons; and provides a leniency procedure with regard to contraventions of the conduct rules;
- (e) **Part 5 - Review by Tribunal** - sets out the conditions for review of the determinations of the Commission by the Tribunal and the operation of the review mechanism;
- (f) **Part 6 - Enforcement before Tribunal** - sets out the remedies which the Tribunal can grant in respect of breach of the competition rules;
- (g) **Part 7 - Private actions** - provides for the private enforcement of the conduct rules and sets out the related procedures;
- (h) **Part 8 - Disclosure of Information** - requires the Commission to establish and maintain safeguards to prevent the unauthorized disclosure of confidential information in its possession; imposes a duty on 'specified persons' not to unlawfully disclose confidential information; and sets out how confidential information may be lawfully disclosed;
- (i) **Part 9 - Competition Commission** – establishes the Commission and sets out its functions and powers and its status in relation to the Government; and provides personal immunity from civil liability for acts done or omitted to be done in good faith by members of the Commission and others in the performance of functions under the Bill;
- (j) **Part 10 - Competition Tribunal** – establishes the Tribunal as a superior court of record, and sets out its jurisdiction and powers; makes provisions for the procedures of the Tribunal and appeal against decisions of the Tribunal; provides for the appointment of the President and Deputy President of the Tribunal and the making available of a Registrar and other staff to the Tribunal; and authorizes the Chief Judge of the High Court to make rules of the Tribunal;

- (k) **Part 11 - Concurrent jurisdiction relating to telecommunications and broadcasting** - provides that the Telecommunications Authority (TA) and Broadcasting Authority (BA)⁶ may exercise the powers of the Commission with respect to telecommunications licensees and broadcasting licensees respectively, and requires the TA, BA and the Commission to sign an Memorandum of Understanding (MOU) to coordinate the performance of their concurrent functions;
- (l) **Part 12 - Miscellaneous** - provides for miscellaneous provisions; empowers the Commission to charge fees and the Chief Executive to prescribe such fees; provides personal immunity from civil liability for acts done or omitted to be done in good faith by public officers in the performance of functions under the Bill; sets out the details on service of documents on the Commission and others for the purpose of the Ordinance; prohibits provision of certain indemnities to officers, agents or employees; protects employees from abuse and punishment by their employers for assisting the Commission in the performance of its functions or giving evidence; provides for offences for obstruction of performance of functions under the Bill; and provides for offence committed by a body corporate or partner in a partnership; and
- (m) **9 Schedules**
- Schedule 1** – provides the general exclusions from the conduct rules;
- Schedule 2** – sets out the procedural requirements relating to acceptance, variation, withdrawal and release of commitments;
- Schedule 3** – sets out the orders that may be made by the Tribunal in relation to contraventions of the competition rule;
- Schedule 4** – sets out the provisions that may be contained in orders made by the Tribunal in relation to anticipated mergers and mergers;
- Schedule 5** – contains constitutional, administrative and financial provisions relating to the Commission;
- Schedule 6** – lists matters that may be included in the MOU to be signed by the Commission, TA and BA in relation to the exercise of their concurrent functions;
- Schedule 7** – sets out the merger rule which is confined to carrier

⁶ Under the Communications Authority (CA) Bill which is being scrutinized by LegCo, the functions of the BA and the TA will be transferred to the CA.

licences under the Telecommunications Ordinance; details on investigation into a merger; and provides exclusions and exemptions from the merger rule; and provides for decisions to be made by the Commission in relation to mergers and anticipated mergers;

Schedule 8 – makes consequential and related amendments to other enactments; and

Schedule 9 – contains transitional and saving provisions.

Views and concerns of the Panel on the Bill

14. During the EDEV Panel discussion on 28 June 2010, the Administration briefed members on the key elements of the Competition Bill, including the scope of the new legislation, general prohibitions, institutional framework, enforcement by the Commission, remedies for contravention of a competition rule, rights of private actions, exemptions and exclusions etc. Members were very concerned about how the Administration would determine which statutory bodies should be subject to the application of the Bill and the mechanism by which the list could be reviewed. Some members also called on the Administration to publicize the criteria for appointing members to the Commission, to ensure the Bill would not create additional compliance burden for SMEs, and to extend the merger rule to more sectors.

Latest development

15. At the House Committee meeting on 8 October 2010, a Bills Committee was formed to scrutinize the Bill.

Relevant papers

16. A list of relevant papers with their hyperlinks can be found at:
http://www.legco.gov.hk/database/english/data_es/es-competition-policy.htm