

For Information on
28 June 2010

**LEGISLATIVE COUNCIL
PANEL ON ECONOMIC DEVELOPMENT**

COMPETITION BILL

PURPOSE

This paper briefs Members on the key elements to be provided for in the Competition Bill (the Bill).

BACKGROUND

2. The introduction of a new cross-sector competition law was first recommended by the Competition Policy Review Committee (CPRC) in its report published in June 2006. The CPRC noted that whilst Hong Kong had a free and open economy with few market barriers, the small size of the local market had resulted in some sectors being dominated by a small number of big companies and concerns were frequently expressed about possible anti-competitive conduct. The CPRC considered that, to enable the authorities to investigate such cases more effectively and to impose sanctions, legislative backing is necessary. We conducted two rounds of public consultations in 2006 and 2008 respectively to gauge public views on the legislative proposal and wide community support was received. We reported the outcome of the second round of the public consultations which contain our detailed proposal for the Competition Law, to this Panel on 16 December 2008 and again on 30 March 2009 with the Administration's proposals including some major changes to the proposed enforcement model.

KEY ELEMENTS OF THE BILL

(A) Scope

3. The objective of the Bill is to prohibit and deter 'undertakings' in all sectors from adopting abusive or other

anti-competitive conduct which has the object or effect of preventing, restricting and distorting competition in Hong Kong. An ‘undertaking’ will be defined in the Bill as an 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. Each conduct of an entity has to be considered on its own merits, to decide whether it amounts to an ‘economic activity’ and thus falls within the scope of the Bill.

(B) Government and statutory bodies

4. The Bill will not apply to the Government and statutory bodies except for those statutory bodies or their activities specified by way of a regulation to be made by the CE-in-Council. The regulation making power will be provided for in the Bill. There are some 500 statutory bodies with very diverse functions set up in Hong Kong. We are examining these statutory bodies in conjunction with Bureaux and Departments to determine which, if any of these bodies should be made subject to the application of the Bill. Given the large number involved and close examination is required, we anticipate that more time will be needed to complete the work. However, this should not affect the drafting of the Bill.

(C) General prohibitions

5. The Bill provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule, the second conduct rule and the merger rule which are collectively known as the ‘competition rules’ in the Bill). The first conduct rule covers agreements, decisions and concerted practices. The second conduct rule covers the abuse of a substantial degree of market power in a market. The Bill regulates business conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong, including those conduct engaged in places outside Hong Kong. In other words, the conduct itself, or ‘*per se*’, would not be a contravention of the Bill,

without such object or effect. To enhance the certainty and clarity of the law, the Bill will include a non-exhaustive list of examples of anti-competitive conduct to supplement the conduct rules, and will make it a statutory requirement for the Competition Commission (paragraph 7 below) to draw up regulatory guidelines on the interpretation and implementation of the conduct rules in consultation with such persons as it considers appropriate.

6. As regards mergers, there would be a prohibition against mergers or acquisitions (described as the merger rule) applying only to carrier licenses granted by the Telecommunications Authority (TA) that have, or are likely to have the effect of substantially lessening competition in Hong Kong. Whilst the provision will maintain the existing control over mergers and acquisitions available under the Telecommunications Ordinance (TO), the merger control will be modernized in light of development of merger rule in other competition jurisdiction and adjusted to cater for possible extension to a cross-sector regulation after a review of the effect of the Bill to be conducted in a few years.

(D) Institutional framework

7. The Bill provides for a judicial enforcement model. First, an independent statutory Competition Commission (the Commission) will be established to investigate and bring proceedings before the Competition Tribunal (paragraph 8 below) in respect of anti-competitive conduct either on receipt of complaints, on its own initiative, or on referral from the Government or a court. Details of the Commission's investigatory powers are given in paragraphs 10 and 11 below. Other functions of the Commission include promoting public understanding of the competition law, advising the Government on competition matters and deciding upon the application for exemptions from the application of the competition law etc. The Commission, led by a Chairperson, will consist of not less than five members (including the Chairperson) appointed by the CE. The executive arm of the Commission will be headed by a Chief Executive Officer appointed by the Commission with

the approval of the CE. The Commission will be subject to regulation under the Prevention of Bribery Ordinance, the Ombudsman Ordinance and value-for-money audit by the Director of Audit. The Bill also contains provisions on the governance of the Commission, including its meeting procedures and financial management.

8. Further, a Competition Tribunal (the Tribunal) will be established within the Judiciary as a superior court of record to hear and adjudicate competition cases brought by the Commission, private actions as well as reviews of determination of the Commission¹. The Tribunal will be empowered to apply a full range of remedies (details given in paragraph 12 below). Decisions of the Tribunal are, subject to leave of the Court of Appeal (CA), reviewable in appeals to the CA. Every judge of the Court of First Instance (CFI) will, by virtue of his or her appointment as CFI Judge, be a member of the Tribunal. The CE will, on the recommendations of the Judicial Officers Recommendation Commission, appoint one of the members of the Tribunal to be the President of the Tribunal. The President may appoint one or more members of the Tribunal to hear and determine an application made to the Tribunal. The Tribunal may appoint assessors to assist in proceedings. The Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice. It may also decide its own procedures and may, so far as it thinks fit, follow the practice and procedure of the CFI in the exercise of its civil jurisdiction.

9. To reconcile the new law with the existing competition regulatory framework in the broadcasting and telecommunications sectors,

¹ Determinations of the Commission which are reviewable by the Tribunal are decisions made by the Commission in respect of :

- (i) exemptions or exclusions for agreement(s), conduct(s) 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.

the Bill provides that the Broadcasting Authority (BA) and the TA will have concurrent jurisdiction with the Commission in respect of the investigation and bringing of enforcement proceedings of competition cases in the broadcasting and telecommunications sectors, while their existing adjudicative function will be transferred to the Tribunal. To ensure co-ordination and clarity in the exercise of the concurrent jurisdiction, the Bill provides that the Commission, the BA and the TA will enter into a Memorandum of Understanding (MOU) which will be published.

(E) Enforcement by the Commission

10. The Commission will be vested with investigatory powers including the power to require production of documents and information and attendance before the Commission to give evidence, power to enter and search premises as well as power to seize and retain evidence and property under a court warrant etc. The Commission must have reasonable cause to suspect that a contravention of any of the competition rules has taken place, is taking place or is about to take place before exercising its investigative powers. Non-compliance with the Commission's investigative power in the absence of reasonable excuse will be subject to criminal penalties.

11. The Bill will provide for a two-tier commitment mechanism under which the Commission will be empowered to –

- (i) accept commitments from a person to take or refrain from taking certain action to address the Commission's concerns about a possible contravention of a competition rule; and
- (ii) after its investigation and before bringing proceedings to the Tribunal, issue an infringement notice bearing a sum of payment to a person allegedly contravening or having contravened the conduct rule. The notice may also require the person to take or refrain from taking certain action to address the Commission's concerns about a possible

contravention of a conduct rule,

in exchange for the Commission's commitment to cease its investigation and / or not to institute or continue with proceedings against the person. Infringement notice and the sum of payment imposed by the Commission are consensual. The Bill will also empower the Commission to enter into leniency agreements with persons who have allegedly contravened the conduct rules in exchange for their cooperation in the Commission's investigation and bringing enforcement proceedings before the Tribunal in respect of other parties involved in the same contravention. The Commission will not institute or continue with proceedings for a pecuniary penalty in respect of a contravention of a conduct rule against those with which it has reached leniency agreements.

(F) Remedies

12. The Tribunal will be empowered to apply a full range of remedies for contravention of a competition rule. These include pecuniary penalties not exceeding 10% of the turnover of the undertaking(s) in breach of the competition rule for the year in which the contravention occurs; award of damages to aggrieved parties; interim injunction during investigations or proceedings; termination or variation of an agreement or merger; and disqualification orders against directors and others who have contributed to the contravention of the competition rule. The Tribunal can only impose pecuniary penalty on application by the Commission.

(G) Allowing rights of private action

13. In addition to public enforcement through the Commission, the Bill also 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 the Tribunal, the CA or the Court of Final Appeal that the conduct is a contravention of a conduct rule, or could be 'stand-alone' actions seeking

a judgment on particular conduct and remedies. The CFI will be empowered to make determinations on alleged contravention of the conduct rules in cases involving composite claims made under the Bill and those claims which are not made under the Bill.

(H) Exemptions and exclusions

14. Following practices in other overseas competition jurisdiction, the Bill will provide that the first conduct rule and / or the second conduct rule will not apply to any agreement that enhances or would be likely to enhance overall economic efficiency, or any agreement to the extent that it is made to comply with a legal requirement, or any undertaking entrusted by the Government with the operation of services of general economic interest. Undertakings can assess their agreements or conduct in accordance with these general exclusions from conduct rules. The Commission will be empowered to decide, in response to an application, as to whether or not an agreement or conduct is excluded or exempt from the conduct rules in accordance with these criteria. If the Commission decides that the agreement or conduct is excluded or exempt from the conduct rules, such agreement or conduct will be immune from both public enforcement actions and private actions. Further, the Bill will empower the CE in Council to make orders to exempt agreements or conducts from the conduct rules if the CE in Council is satisfied that there are exceptional and compelling reasons of public policy that the conduct rules ought not to apply. The Bill will also empower the CE in Council to make orders to exempt agreements or conducts from the application of the conduct rules if the agreements or conducts are required to avoid a conflict with international obligations.

15. As for the exclusion and exemption mechanism for mergers of licensees whose licenses are granted by the TA, the Bill will provide that the merger rule will not apply to any merger that enhances or would be likely to enhance overall economic efficiency. The CE in Council may also make orders to exempt a merger from the merger rule on public policy ground.

(I) Immunities for public officers and Commission and other issues

16. The Bill will provide protection from civil liabilities to public officers for anything done or omitted to be done by the public officers in good faith in the performance of a function or purported performance of a function under the Bill. Similar immunities will be provided for Commission members and employees. The Bill will also require the Commission (including the TA and the BA) to follow strict conditions on the disclosure of confidential information provided to it by complainants or persons under investigation. The Bill will also protect employees from abuse and punishment by their employers for assisting the Commission in the performance of its functions or giving evidence.

ADVICE SOUGHT

17. Members are invited to note the key elements of the Bill.

**Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
June 2010**