For discussion

Bills Committee on
Competition Bill

Overview of Major Components of the Competition Bill

Purpose

This paper briefs Members on the major components of the Competition Bill (the Bill) to facilitate their scrutiny of the Bill.

Major components of the Bill

2. The Bill has the following major components -

(A) Institutional arrangement

Judicial enforcement model

3. Part 9 and Schedule 5 (Competition Commission), and Part 10 (Competition Tribunal) of the Bill provide for a judicial enforcement model through the establishment of the Competition Commission (the Commission) and the Competition Tribunal (the Tribunal).

4. Our policy objective is to establish a credible and impartial institutional framework which allows for effective and efficient enforcement of the competition law. The judicial enforcement model which we have adopted in the Bill through the creation of the Commission and the Tribunal has the advantages of separating the powers of investigation, prosecution and adjudication of alleged breaches of competition rules among different authorities, thereby enhancing fairness and addressing concerns over concentration of too much power in one body. Moreover, to ensure that there is effective deterrence of anti-competitive conduct, we consider that the Tribunal should be able to

apply a full range of remedies, including pecuniary penalties under the Bill. Given the significant power which will be provided to the adjudicative body, a judicial model is considered to be more appropriate.

Competition Commission

5. Part 9 of the Bill establishes the Commission as an independent statutory body tasked with the functions to investigate into competition-related complaints, and to bring public enforcement action before the Tribunal in respect of anti-competitive conduct either on receipt of complaints, on its own initiative, or on referral from the Government or a court. The Commission also performs other roles in granting exemptions from the application of the law to enhance legal certainty of the law, promoting public understanding of the Bill and the value of competition through public education work, as well as advising the Government on competition matters.

6. Schedule 5 of the Bill sets out the constitutional, administrative and financial provisions relating to the Commission. In terms of governance, the Bill provides that the Commission is not a servant or agent of the Government to ensure independence and credibility of its work. Similar to appointments of other independent regulatory authorities, the Chief Executive (CE) shall appoint members to the Commission, including the Chairperson. As competition law is a multi-disciplinary subject, in considering appointments to the Commission the CE needs to be able to select persons with expertise or experience in a diversity of sectors and background including industry, commerce, economics, law, small and medium enterprises (SMEs) or public policy. A good mix of expertise is essential to the Commission's effective discharge of its statutory duties. Through the appointment of members with business background, the Commission will be able to give due regard to the special needs and circumstances of SMEs when deciding whether it should start an investigation and in the exercise of its enforcement power. The Bill provides that the Commission is to consist of not less than five members to ensure that there could be one representative from each of the above areas of expertise. Members of the Commission are entitled to such terms (including remuneration and allowances) as the CE may determine.

7. Drawing reference from overseas jurisdictions, we propose the executive arm of the Commission to be headed by a Chief Executive Officer (CEO) appointed by the Commission on such terms as the Commission may determine with the approval of the CE. The CEO will lead a team of professional and executive staff including experts with legal, accounting and economics background. We expect that the CEO will work on a full-time basis to manage the administrative affairs of the Commission and to perform any functions that may be assigned or delegated to the CEO by the Commission as provided in Schedule 5 of the Bill.

8. The Commission will mainly be funded by the Government. To avoid abuse of the Commission's services, the Commission may also receive incomes from other sources such as services for fees e.g. applications for the Commission's decisions on exclusion (also see paragraph 22). However, the pecuniary penalties from issue of infringement notices (also see paragraphs 34 to 36) will go directly into the General Revenue to ensure the Commission's impartiality in discharging its investigative powers. Such fees will be prescribed by the CE by way of regulations which may provide for the payment of different fees by different persons or different classes or descriptions of persons so as to cater for those who are financially deprived. The Commission will be held accountable to the public, subject to regulation under the Prevention of Bribery Ordinance, the Ombudsman Ordinance and value-for-money audit by the Director of Audit. It also has to keep proper accounts and submit estimates to the Chief Executive every financial year. An Annual Report and audited accounts are to be tabled at the LegCo after the end of each financial year. To ensure transparency and good governance over the Commission's work, the Bill also contains provisions on the conduct of meetings, scope of delegation and powers to make house rules of the Commission, including those concerning conflict of interest.

Competition Tribunal

9. Part 10 of the Bill provides for the establishment of the Tribunal. The Tribunal will be set up within the Judiciary as a superior court of record to hear and adjudicate on competition cases brought by the

Commission, private actions as well as reviews of determination of the Commission[(1)]. The Tribunal will be empowered to apply a full range of remedies. Decisions of the Tribunal are, subject to leave of the Court of Appeal (CA), reviewable in appeals to the CA.

10. Given that competition law is a new and difficult area of law and has to be applied in the circumstances of Hong Kong, we consider that it is best dealt with by a specialized Tribunal to allow this dedicated adjudicative body to accumulate experience and expertise in this specific area of law. This specialized Tribunal will be set up within the Judiciary at the level of a superior court of record to task this onerous and difficult responsibility to judicial officers of considerable experiences in dealing with complex commercial cases.

11. As for the constitution, 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 two of the members of the Tribunal to be the President and Deputy President of the Tribunal respectively for a term of at least three years, but not more than five years. The President and the Deputy President are eligible for re-appointment. In respect of practices and procedures 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 specialized experts to act as assessors to assist in proceedings and tap relevant expertise. The policy intention is that the Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice to enable it to handle cases in a timely manner and at comparatively lower cost to all parties involved. It may also decide its

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(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.

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.

12. The Tribunal is to be supported by the Judiciary with additional resources to meet the establishment and training needs. The Bill provides that every Registrar, senior deputy registrar, deputy registrar and any other officer such as Bailiff of the High Court, by virtue of that appointment, holds the corresponding office or position in the Tribunal. To start off the Tribunal, at least one CFI judge, one Deputy Registrar of the High Court and some support staff to the Judge and registry staff would need to be added to the establishment of the Judiciary.

Concurrent jurisdiction

13. To reconcile the new law with the existing competition regulatory framework in the broadcasting and telecommunications sectors, the Bill provides that the Broadcasting Authority (BA) and the Telecommunications Authority (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.

14. The proposed concurrent jurisdiction mechanism is intended to retain the specialist knowledge of the TA and BA in competition regulation and for them to initially share some of the Commission's workload to promote efficiency. In the longer term, we do not preclude the possibility of having one regulator for all competition matters. 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. Schedule 6 of the Bill specifies some of the matters that may be provided for in the MOU.

(B) Major prohibitions, exclusion and exemption

Major prohibitions

15. The scope of the Bill is to prohibit and deter 'undertakings' in all sectors from adopting abusive or other anti-competitive practices which have the object or effect of preventing, restricting or distorting competition in Hong Kong. Part 2 of the Bill provides for general prohibitions in two major areas of anti-competitive conduct, namely agreements, decisions or concerted practices (the first conduct rule) and the abuse of a substantial degree of market power in a market (the second conduct rule). In addition to the conduct rules, Schedule 7 of the Bill provides for regulation of mergers or acquisitions which have, or are likely to have the effect of substantially lessening competition in Hong Kong (the merger rule), but the merger control is confined to carrier licenses granted by the TA. These three prohibitions are collectively known as the 'competition rules' in the Bill, which will also apply to anti-competitive conduct and mergers engaged or carried out in places outside Hong Kong as long as the conduct and mergers concerned are harmful to, or have the potential to harm, competition in Hong Kong.

16. An 'undertaking' is defined as 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. This is also a definition held by the European Court of Justice. 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. Pursuant to European Union competition law jurisprudence, entities engaging in activities which amount to "tasks in the public interest which form the essential functions of the state" are generally not considered as undertakings. In other words, a function or activity which is an expected or necessary part of the Government is not an economic activity. However, the term "economic activity" is not defined in the competition law of any of the major jurisdictions. Case laws in Europe have developed some guiding principles to elaborate on "economic activity", which includes offering goods or services in a given market. There is no need for a profit-making motive or economic purpose, whilst the legal status of the entity and the way it is financed are irrelevant.

17. We have adopted a 'general prohibitions' approach in the Bill instead of a 'per se infringement' approach. We consider this approach appropriate for a cross-sector competition law as it would offer the greatest flexibility to cater for the circumstances of different sectors and the changing business practices and has been widely adopted in overseas competition jurisdictions from which Hong Kong can draw reference from their abundant case law and long history of experiences. To enhance clarity of the law and to facilitate compliance by the business sector, particularly SMEs which have expressed concerns on the adverse impact of the law on their operation, the Bill has included a non-exhaustive list of examples of anti-competitive conduct to supplement the general prohibition provisions, and made it a statutory requirement for the future Commission to draw up regulatory guidelines on interpretation and implementation of the law in consultation with any persons it considers appropriate. We have also built in the Bill provisions and mechanisms to ensure appropriate and sufficient promotion and educational work. Besides, clause 1 of the Bill has provided for the flexibility of staggered commencement of different parts of the Ordinance so as to allow a transitional period between the enactment of the law and the coming into force of the major prohibitions to allow the business community to get familiar with the new law and to make any necessary adjustments. The Bill also covers mechanisms under which undertakings may seek the future Commission's decision on whether their business practices or activities are excluded from the new law subject to certain conditions.

18. We recognize the importance of market definition which is essential to competition analysis for enforcement and adjudication. Since market definition may vary from case to case and has to be dealt with specifically on a case-by-case basis, we have not proposed to include in the Bill provisions to define market in order to provide greater flexibility for the future Commission to cater for changes in market circumstances over time. In fact, the Commission will look into the useful experience of overseas competition regulatory authorities in this respect. It will follow their experience to set out the considerations and procedures in coming up with a market definition in the guidelines. Before issue of the guidelines, the Commission must consult any persons it considers appropriate.

19. As regards merger regulation on a cross-sector basis, noting the Competition Policy Review Committee's view that the focus of competition law in Hong Kong should be on prohibiting conduct, rather than targeting market structure through the regulation of monopolies and mergers, and that mergers may be an efficient way to achieve economies of scale in a small economy like Hong Kong, we consider it pragmatic and sensible not to regulate merger activities under the Bill at its infancy stage, except for carrier licenses granted by the TA which is already subject to such regulation (c.f. section 7P of the Telecommunications Ordinance (Cap. 106). We have, however, taken the opportunities to modernize merger control under the Bill in the light of recent developments in the merger rule of other competition jurisdictions. We have also adjusted the provisions to cater for possible extension to a cross-sector regulation. As experience and expertise about the competition law regime build up, we would be in a better position to review the effectiveness of the law and assess whether cross-sector merger provisions are suitable and needed in Hong Kong.

Exclusion and exemption mechanism under the Bill

20. Part 2 and Schedule 1 of the Bill provide that the first conduct rule and/ or the second conduct rule will not apply to any agreement that enhances or would likely enhance overall economic efficiency (where the gain from economic efficiency is greater than the anti-competitive harm), or any agreement to the extent that it is made to comply with a legal requirement (where an anti-competitive agreement is required by law), or any undertaking entrusted by the Government with the operation of services of general economic interest, i.e. services that the authorities consider should be provided in all cases, whether or not there is incentive for the private sector to do so. Such services must be widely available and not restricted to a class, or classes of customers, e.g., public transport, water supply, power supply or postal services. The underlying principle of the exclusion mechanism is that certain agreement or conduct that yields efficiency gains which outweigh any anti-competitive harm, or achieve other important social or public policy objectives, should be exempted from the law. This mechanism follows practices in other overseas competition jurisdictions.

21. The competition laws in other jurisdictions do not explicitly define these exclusions. There are however abundant sources of case laws and guidelines in these jurisdictions clarifying the scope of application of these exclusions.

22. Undertakings can self-assess their agreements or conduct in accordance with the general exclusions from conduct rules provided in Schedule 1 of the Bill. The rationale of this "self-assessment" is that undertakings are better placed to assess their actions as they possess the facts and could access the relevant sources of information which allow them to make an informed decision on whether to proceed with an agreement or conduct. That said, to enhance legal certainty to undertaking who may be faced with a case of sufficient novelty for which no existing case laws or rulings of the authorities may answer, the Commission may consider an application from undertakings under Part 2 of the Bill to decide whether or not an agreement or conduct is excluded from the conduct rules in accordance with those criteria in Schedule 1. If the Commission decides that the agreement or conduct is excluded from the conduct rules, such agreement or conduct will be immune from both public enforcement actions and private actions. We note from overseas experience, especially the European Community, that in the early stages of the implementation of a competition law, there would be great demand for an opinion or determination by the competition authorities that might drain the resources of the authorities. To minimize the risk of opening up a floodgate of applications for decisions, we have provided some conditions in the Bill which must be satisfied before the Commission is required to consider an application. These conditions are formulated to ensure that the case in an application poses sufficient novelty and importance in the wider interest in the community where no existing case law or literature can answer. The Commission is required by law to issue guidelines on how it will receive applications for and exercise its power to make a decision.

23. Part 2 of the Bill also empowers the Chief Executive in Council (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. These orders will be subject to vetting by the Legislative Council. This mechanism is in line with international best practices.

24. As for the exclusion and exemption mechanism for mergers of licensees whose licenses are granted by the TA, the Bill provides that the merger rule will not apply to any merger that enhances or would likely enhance overall economic efficiency. The CE in Council may also make orders to exempt a merger from the merger rule on public policy ground. According to international experience, it is rare that a merger would be compelled by other laws or international obligations. Moreover, a merger involving general economic interest is usually entrusted by the Government and will usually fall under the public policy test according to which a merger is allowed to apply for exemptions through CE in Council. Both the UK and Singapore adopt the same arrangement under their competition regulatory regimes.

(C) Exemption for statutory bodies and non-statutory bodies by regulations

25. Activities of many statutory bodies are non-economic and regulatory in nature or involve provision of essential public services. Having regard to cases in other jurisdictions, such activities would effectively be excluded from the application of the competition law. However, to provide certainty, we propose that exemption should be given to these statutory bodies and their activities to ensure that the efficient implementation of public policies as well as measures which are required to react quickly to problems in the community would not be affected. Thus, under clause 3(1) of the Bill, we propose not to apply those parts of the Bill relating to competition rules (Parts 2 and Schedule 7) and enforcement (Parts 4 and 6) (referred to as “non-applicable parts of the Bill” below) to statutory bodies.

26. Specifically, the Bill will provide that the non-applicable parts of the Bill will not apply to statutory bodies or their activities except those statutory bodies or their activities specified in regulations to be made by the CE in Council under clause 5(1)(a). Such regulations may be made by the CE in Council only after the commencement of the relevant empowering provisions in the Bill. The CE in Council will have to satisfy that the following four criteria under clause 5(2) are met before making the regulation –

(a) the statutory body is engaging in an economic activity in direct competition with another undertaking;

(b) the economic activity of the statutory body is affecting the economic efficiency of a specific market;

(c) the economic activity of the statutory body is not directly related to the provision of an essential public service or the implementation of public policy; and

(d) there are no other exceptional and compelling reasons of public policy against making such a regulation.

27. These criteria reflect the prevailing doctrines and case laws in overseas jurisdictions on the essential qualities of an entity which should be made subject to the regulation of competition law. Entities not satisfying one or all of these criteria are likely to fall outside the scope of competition law, as they are either not an "undertaking", or that they would likely satisfy the tests for exclusions or exemptions on economic or public policy grounds.

28. For the purpose of the Bill, 'statutory body' means a body of persons, corporate or unincorporate, established or constituted by or under an Ordinance or appointed under the Ordinance, but does not include a company, a corporation of trustees incorporated under the Registered Trustees Incorporation Ordinance (Cap. 306), a society registered under the Societies Ordinance (Cap. 151), a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33), or a trade union registered under the Trade Unions Ordinance (Cap. 332). These ordinances concern mainly vehicles of incorporation of private

entities which if not excluded, may fall under the definition of "statutory body". Hence, we have included these exceptions to reflect better our policy intention in respect of statutory bodies.

29. Clause 4(1) of the Bill further provides that the non-applicable parts of the Bill do not apply to a person or a person to the extent that the person is engaged in an activity specified in a regulation to be made by the CE in Council under clause 5(1)(b). In considering making the application to exempt certain persons or specified activities, the CE in Council may take into account the relevant considerations, including but not limited to exceptional and compelling reasons of public policy in doing so. The flexibility is considered necessary to cater for unforeseen circumstances which may require exemption under this clause. The regulation will be subject to vetting by the Legislative Council.

30. The Administration is working on its proposals on which statutory bodies or their activities will be brought under the purview of competition law. As there are a large number of statutory bodies with very diverse functions set up in Hong Kong, we are carefully examining the operation of and activities engaged in by these entities within the legal framework set out above, and will brief the Bills Committee on the proposals in early 2011.

(D) Complaints and investigations, disclosure of information

31. Part 3 of the Bill 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. 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. Non-compliance with the Commission's investigative power in the absence of reasonable excuse will be subject to criminal penalties.

32. The Bill also provides for safeguards in relation to the Commission's investigative power to address concerns from the business

sector, particularly SMEs on the impact of the Bill to their business operations. For instance, 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. The power to enter and search premises as well as power to seize and retain evidence and property could only be exercised upon obtaining a warrant issued by a judge of the CFI. In fact, when preparing Part 3 of the Bill, we have made reference to the relevant provisions in the competition laws of other major jurisdictions as well as Hong Kong's existing legislation, in order to ensure that the future Commission will be able to effectively enforce the new law while necessary control is in place on its exercise of investigative power. Moreover, the Commission is required by law to issue guidelines on how it will exercise its investigative powers, including the de minimis approach under which it would not pursue a case where the aggregate market share of the undertakings involved do not exceed a certain level.

33. Part 8 of the Bill requires the Commission (including the TA and the BA) to establish and maintain safeguards to prevent the unauthorized disclosure of confidential information provided to it by complainants or persons under investigation, or acquired using its statutory evidence gathering powers. The Bill also imposes a duty on 'specified persons' as defined in clause 121 not to unlawfully disclose confidential information; and sets out how confidential information may be lawfully disclosed.

(E) Enforcement

Enforcement powers of Commission

34. Part 4 of the Bill provides for a two-tier commitment mechanism under which the Commission will be empowered to accept commitments from, or issue an infringement notice bearing a sum of payment up to HK$10 million to require, a person to take or refrain from taking certain actions to address the Commission's concerns about a possible contravention of the competition rules in exchange for cessation of investigation and/or proceedings against the person.

35. The commitment mechanism set out in the Bill is borrowed from the UK legislation, which provides for a statutory framework to empower the future Commission to reach settlements during the process of investigation and before the institution of trial in the Tribunal. Commitments are mainly focused on future conduct of the undertakings in question, i.e. agree to take or refrain from taking certain action, such that the Commission's concerns about a possible contravention of a competition rule can be addressed.

36. On the other hand, the infringement notice procedure should be viewed as an alternative to bringing proceedings in the Tribunal for a contravention of a conduct rule of lesser scale and severity, so as to facilitate mediation and hence to reduce overall litigation cost in the community. Under this procedure, the Commission may issue an infringement notice to a person whom it has reasonable cause to believe has contravened a conduct rule. The notice will contain an offer not to bring proceedings in the Tribunal against that person in return for the person making a commitment to comply with certain specified requirements. These requirements may include paying a sum of up to HK$10 million, refraining from certain conduct, taking certain actions, and admitting to a contravention of the conduct rule in question. A person is not obliged to make a commitment to comply with the requirements of an infringement notice but if a commitment is made, the Commission may not bring proceedings in the Tribunal against the person, in relation to the alleged contravention.

37. Recognising that leniency programme is increasingly regarded as an effective tool in detecting and prosecuting collusive behaviour in recent years and in order to provide greater certainty for leniency arrangement under the Bill, Part 4 of the Bill also empowers 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. In other major competition jurisdictions, the details of their leniency

programmes are often stipulated in the regulatory guidelines or policy documents. We therefore consider it appropriate to defer the detailed design of the leniency regime to the future Commission.

Enforcement before Tribunal

38. As mentioned in paragraph 9 above, the Tribunal as a superior court of record will have the power to review certain determinations of the Commission, including but not limited to those relating to exclusion/exemption of specific conduct/agreement, variation of a commitment and termination of a leniency agreement etc. With reference to the competition laws of some major jurisdictions, Part 6 of the Bill also empowers the Tribunal to apply a full range of remedies, as set out in Schedules 3 and 4, for contravention of a competition rule. These remedies include in particular pecuniary penalties not exceeding 10% of the turnover (including global 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.

39. Some stakeholders in the business sector consider the 10% global turnover cap for pecuniary penalty as too high and opine that the benchmark turnover should be confined to the portion generated by business activity in Hong Kong only. We consider that our proposed cap is consistent with the approach adopted in some of the comparable overseas competition jurisdictions. With the prevailing trend of globalized business operation, it is also difficult to delineate the portion of business turnover in Hong Kong for calculation of pecuniary penalty. What is stipulated in the Bill is a maximum penalty that can be imposed by the Tribunal. We are of the view that the Tribunal will exercise its due diligence and reasonableness when applying this particular remedy.

(F) Private actions

40. In addition to public enforcement through the Commission, Part 7 of 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.

41. We note some stakeholders' concern that by allowing stand-alone private rights of action, large businesses may abuse the system and use it to harass small business operators. Such concern, however, are not substantiated by international experience. There are in fact limited number of private cases related to competition with the exception of the US conceivably reflecting the special characteristics of its legal system such as contingency fees and award of treble damages. Moreover, the future Tribunal or CFI will be able to strike out vexatious and frivolous lawsuits at the early stage of litigation.

42. Access to justice by way of private action is a fundamental right which should not be easily denied without convincing justification. Experience from overseas regulators indicates that having a stand-alone private action regime actually alleviates some of the pressure and resources in respect of public enforcement. Most competition regimes provide a standalone private right of action as the option of a "self help" remedy to business and customers who consider themselves the victims of anti-competitive conduct. Indeed, the European Commission and the UK's Office of Fair Trading are exploring how to remove roadblocks to greater use of private rights of action.

(G) Consequential amendments, transitional and saving provisions

43. Schedule 8 of the Bill makes consequential and related amendments to other enactments, whilst Schedule 9 contains transitional and saving provisions to reconcile the existing sector-specific competition regulation in the broadcasting and telecommunications sectors. As the conduct rules of the Bill will apply to all sectors, competition-related provisions under the Broadcasting Ordinance (BO) (Cap. 562) and the

Telecommunications Ordinance (TO) (Cap. 106) will be repealed. To this end, the Bill includes some "transitional provisions" to make sure that there is a smooth transition from the application of the competition provisions of the TO & BO to the application of the future Competition Ordinance (CO) in the telecommunications and broadcasting industries. Since the CO will not have retrospective effect, as a guiding principle, conduct or agreements which occur prior to the commencement of the CO which are actionable under the BO or TO repealed provisions but in respect of which no investigation has commenced will still be addressed post commencement of the CO under the repealed TO or BO provisions.

Advice sought

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

Commerce and Economic Development Bureau
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