

立法會
Legislative Council

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**Paper for the House Committee Meeting
on 8 October 2010**

**Legal Service Division Report on
Competition Bill**

I. SUMMARY

- 1. Objects of the Bill** 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 rule; to establish a Competition Commission and a Competition Tribunal; and to provide for incidental and connected matters.
- 2. Comments**

 - (a) The Bill prohibits undertakings in all sectors from adopting conduct which has the object of preventing, restricting and distorting competition in Hong Kong. However, the merger rule only applies to carrier licences under the Telecommunications Ordinance (Cap. 106).
 - (b) An independent Competition Commission will be established to investigate and bring proceedings before the Competition Tribunal, a superior court of record which may impose a range of civil penalties (including pecuniary penalties not exceeding 10% of the turnover of the undertaking).
 - (c) The proposed competition rules do not apply to statutory bodies except those specified in regulations made by the Chief Executive in Council.
- 3. Public Consultation** Two consultation exercises were conducted in 2006 and 2008. According to the Administration, an overwhelming majority expressed general support for the law but the business sector had some concerns on the effect of the new law.
- 4. Consultation with LegCo Panel** The former Panel on Economic Services and the Panel on Economic Development (the Panels) were consulted on 19 July 2006, 21 December 2006, 26 March 2007, 6 May 2008, 16 December 2008, 30 March 2009 and 28 June 2010. Various concerns were raised by the Panels' members.
- 5. Conclusion** The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the importance of the Bill and the concerns of the Panels, members may wish to study the policy aspects of the Bill in detail.

II. REPORT

Objects of the Bill

To prohibit conduct that prevents, restricts or distorts competition in Hong Kong; to prohibit mergers that substantially lessen competition in Hong Kong; to establish a Competition Commission and a Competition Tribunal; and to provide for incidental and connected matters.

LegCo Brief Reference

2. File Ref.: CITB CR 05/62/43 issued by the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau on 2 July 2010.

Date of First Reading

3. 14 July 2010.

Background

4. Between 1993 and 1996, the Administration commissioned the Consumer Council (CC) to undertake a series of studies on competition in Hong Kong. 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) 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".

5. 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 regulate restrictive practices in other sectors of the economy.

6. To make the competition policy keep pace with time 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. Two public consultations were conducted in 2006 and 2008 to gauge public views on the

competition law and according to the Administration, wide community support was received. The Competition Bill was subsequently introduced into the Legislative Council (LegCo) in July 2010.

Comments

7. The Bill seeks to prohibit and deter "undertakings"¹ 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. It 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 main proposals under the Bill are summarized in the following paragraphs.

The first and second conduct rules

8. The first conduct rule proposed in clause 6 of the Bill prohibits undertakings from making or giving effect to agreements or decisions or engaging in concerted practices that have as their object or effect the prevention, restriction or distortion of competition in Hong Kong. The second conduct rule under clause 21 of the Bill prohibits undertakings that have a substantial degree of market power in a market from engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. Under clauses 8 and 23, the first and second conduct rules apply even if the agreement, decision, concerted practice or conduct is made or engaged in outside Hong Kong. Clauses 6 and 21 provide for a non-exhaustive list of examples of the sort of agreements and conduct to which the first and second conduct rules respectively apply and makes it a statutory requirement under clause 35 of the Bill for the Competition Commission to draw up regulatory guidelines on the interpretation and implementation of the conduct rules in consultation with such persons as it considers appropriate.

The merger rule

9. The merger rule prohibits mergers that substantially lessen competition in Hong Kong. The Bill limits the scope of application of the merger rule to carrier licences issued under the Telecommunications Ordinance (Cap. 106) (TO). Clause 162 of and Schedule 7 to the Bill provide for prohibition against mergers in relation to such carrier licenses that have, or are likely to have, the effect of substantially lessening competition in Hong Kong. According to paragraph 6 of the LegCo Brief, whilst the provision will maintain the existing control over mergers and acquisitions available under the TO, the merger control will be modernized in light of development of merger rules in other competition jurisdictions 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. However, the Administration has not stated when such a review would be conducted.

¹ An "undertaking" is defined under clause 2 of the Bill to mean 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.

10. According to paragraph 10 of the Administration's paper discussed at the meeting of the Panel on Economic Development held on 16 December 2008 (LC Paper No. CB(1)372/08-09(03)), views were divided in the public consultation exercise on the issue of whether or not the law should include merger provisions. Given the recommendations of the CPRC and the lack of clear majority support for the inclusion of merger provisions, the Administration considered that the Commission should focus initially on anti-competitive conduct. The Administration stated that it would however reconsider whether there may be a need to add merger provisions after a review of the effect of the new law. Members may wish to consider the effectiveness of the proposed competition law without cross-sector merger provisions.

Institutional framework

11. The Bill provides for a judicial enforcement model, instead of a civil administration model as originally proposed in the public consultation paper published in 2008. Under the proposed model, an independent statutory Competition Commission (the Commission) and a Competition Tribunal (the Tribunal) will be established under clauses 128 and 133 of the Bill respectively. The Commission will investigate and bring proceedings 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. Other functions of the Commission include promoting public understanding of the competition law, advising the Government on competition matters, etc. The Commission, led by a Chairperson, will consist of not less than five members (including the Chairperson) appointed by the Chief Executive (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 (Cap. 201), the Ombudsman Ordinance (Cap. 397) and value-for-money audits conducted by the Director of Audit.

12. It is proposed that the Tribunal is a superior court of record² which will hear and adjudicate competition cases brought by the Commission, private actions as well as reviews of determination of the Commission. Decisions of the Tribunal are, subject to leave of the Court of Appeal (CA), reviewable on appeals to the CA. Every judge of the Court of First Instance (CFI) appointed in accordance with section 6 of the High Court Ordinance (Cap. 4) will, by virtue of his or her appointment as CFI Judge, be a member of the Tribunal. The CE will, on the recommendation 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 one or more specially qualified assessors to assist in proceedings. Under clause 143(3) of the Bill, the Tribunal is to conduct its proceedings with as much informality as

² The chief distinction between superior and inferior courts is found in their jurisdiction. Prima facie no matter is deemed beyond the jurisdiction of the superior courts unless it is expressly shown to be so, while nothing is within the jurisdiction of the inferior courts unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court (*Halsbury's Laws of Hong Kong, Vol. 8, 2008 Reissue, LexisNexis, paragraph 125.010*). In Hong Kong, the Court of First Instance, the Court of Appeal, and the Hong Kong Court of Final Appeal are superior courts of record by virtue of sections 12(1) and 13(1) of the High Court Ordinance (Cap. 4), and section 3 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) respectively.

is consistent with attaining justice. Members may note that the proceedings of some tribunals in Hong Kong (e.g. the Lands Tribunal, the Labour Tribunal, and the Small Claims Tribunal³ which are courts of record) are conducted in an informal manner. However, it appears to be uncommon for a superior court of record to conduct its proceedings with informality. The Legal Service Division will be seeking clarification from the Administration on the rationale for clause 143(3) and what procedures are to be adopted to achieve the purpose of the clause.

13. To reconcile the new law with the existing competition regulatory framework in the broadcasting and telecommunications sectors, Part 11 of the Bill provides that the Broadcasting Authority and the Telecommunications Authority will have concurrent jurisdiction with the Commission in respect of the investigation and bringing of enforcement proceedings of competition cases in their sectors, while their existing adjudicative function will be transferred to the Tribunal.

Enforcement by the Competition Commission

14. Under Part 3 of the Bill, the Commission is 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 a competition rule has taken place, is taking place or is about to take place before exercising these investigative powers. Non-compliance with the Commission's investigative power in the absence of reasonable excuse will be subject to criminal penalties (the maximum penalty is a fine of \$1,000,000 and imprisonment for 2 years).

15. Divisions 1 and 2 of Part 4 of the Bill provide for a two-tier commitment mechanism under which the Commission will be empowered to -

- (a) 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
- (b) after its investigation and before bringing proceedings to the Tribunal, issue an infringement notice bearing a sum of payment of up to HK\$10,000,000 to a person allegedly contravening or having contravened a 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.

16. Division 3 of Part 4 of the Bill seeks to empower the Commission to enter into agreements (called leniency agreements in the Bill) with persons who have allegedly

³ Section 10(5)(a) of the Lands Tribunal Ordinance (Cap. 17), section 20(1) of the Labour Tribunal Ordinance (Cap. 25), and section 16(1) of the Small Claims Tribunal Ordinance (Cap. 338).

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 bring or continue with proceedings for a pecuniary penalty in respect of an alleged contravention of a conduct rule against those with which it has reached leniency agreements. This type of leniency programme is quite common in the context of competition law of other jurisdictions, e.g. the United Kingdom, the United States and Singapore.

Enforcement before the Competition Tribunal

17. Part 6 of the Bill provides for civil remedies which may be granted by the Tribunal for contravention of a competition rule. These include 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 orders during investigations or proceedings; termination or variation of an agreement or merger; and disqualification orders against directors and others who had contributed to the contravention of the competition rule, or had reasonable grounds to suspect that the conduct of the company constituted the contravention and took no steps to prevent it, or did not know but ought to have known that the conduct of the company constituted the contravention.

18. Members may wish to note that unlike the situation in some overseas jurisdictions (e.g. the United Kingdom and the United States), contravention of a competition rule is not proposed to be a criminal offence under the Bill. According to paragraph 26 of Chapter III of the public consultation paper published in 2008, the institutional arrangements adopted in other jurisdictions give the competition authorities the option of seeking either civil or criminal judgments in cases of anti-competitive conduct. Whilst penalties need to be sufficiently serious to have a deterrent effect, the Administration considers that as the introduction of competition laws is a new step for Hong Kong, it may be appropriate to limit sanctions to civil penalties, on the assumption that fines set at an appropriate level would remove economic incentives to engage in anti-competitive conduct. Members may wish to consider whether civil penalties would be effective as far as enforcement of the competition rules is concerned.

Rights 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 decision of the Tribunal, the CA or the Court of Final Appeal that the act is a contravention of a conduct rule, or could be stand-alone actions seeking a judgment on particular conduct and remedies.

Non-application of the Bill to statutory bodies

20. The Bill provides that the conduct rules and the merger rule will not apply to statutory bodies or their activities except those statutory bodies or their activities specified in regulations to be made by the Chief Executive in Council (CE in Council) under clause 5(1) of the Bill. The following criteria as set out in clause 5(2) of the Bill serve as the basis for determining which statutory body or its specified activities should be caught by the Bill -

- (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.

Exclusions and exemptions

21. Exclusions and exemptions are set out in Division 3 of Part 2 of and Schedule 1 to the Bill. It is provided that the first conduct rule and/or the second conduct rule do not apply to any agreement that enhances or would be likely to enhance overall economic efficiency, or any agreement or conduct to the extent that it is made or engaged in for the purpose of complying with a legal requirement, or any undertaking entrusted by the Government with the operation of services of general economic interest. Schedule 1 may be amended by an order of the CE in Council under clause 36 of the Bill which is subject to the approval of the LegCo, i.e. the positive vetting procedure under section 35 of the Interpretation and General Clauses Ordinance (Cap. 1).

22. Further, clause 31 of the Bill seeks to 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 for doing so. Clause 32 of the Bill also seeks to 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 that directly or indirectly relate to Hong Kong.

23. Part 4 of Schedule 7 to the Bill sets out the exclusions and exemptions in relation to mergers. It is provided that the merger rule does not apply to a merger if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong. The CE in Council may also make orders to exempt a merger from the application of the merger rule on public policy grounds.

24. The above-mentioned orders that may be made by the CE in Council under the Bill are subject to scrutiny by the LegCo under a procedure provided in clause 33 and section 10 of Schedule 7. The proposed procedure is in substance the same as the negative vetting procedure under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). Under the proposed procedure, LegCo may by resolution amend the order in any manner consistent with the power of the CE in Council to make the order in question.

Immunities for public officers and Commission

25. Clause 164 of the Bill seeks to 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 are also provided for Commission members and employees by clause 132 of the Bill. This kind of protection is quite common for statutory bodies that carry out investigative functions, e.g. the Equal Opportunities Commission and the Securities and Futures Commission.

Commencement

26. The Bill, if enacted, will come into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

Public Consultation

27. In 2006, the Administration conducted a consultation exercise to gauge public views on the introduction of a cross-sector competition law to be enforced by an independent Competition Commission. According to paragraph 22 of the LegCo Brief, feedback from the public indicated a high level of support but the business sector had some concerns on the effect that a new competition law might have on business, especially the small and medium sized enterprises (SMEs). In 2008, the Administration launched another public consultation on the proposed key elements that will form the basis of the competition law, including: the regulatory structure; conduct to be prohibited; penalties that would apply for infringing the law; the right to take private legal action; and criteria and mechanisms for granting exemptions and exclusions from the application of the competition law. Over 170 submissions were received. According to the Administration, an overwhelming majority expressed general support for the law and proposed detailed proposals.

Consultation with LegCo Panel

28. The former Panel on Economic Services (ES Panel) was briefed on CPRC's review report at the meeting on 19 July 2006. At the ES Panel meetings on 21 December 2006 and 26 March 2007, members were briefed on the public consultation on competition policy and its outcome. 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. Panel members also 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.

29. When the detailed provisions of the Competition Bill were discussed by the Panel on Economic Development (ED Panel) at its meetings held on 6 May 2008, 16 December 2008, 30 March 2009 and 28 June 2010, members raised concerns on

various matters including whether merger provisions should be included, the right of private action against anti-competitive conduct, the need to impose criminal penalty to enhance the deterrent effect of the competition law, the type of statutory bodies that would be subject to the application of the law or otherwise, the judicial model for the enforcement of the Competition 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. Panel members also called on the Administration to publicize the criteria for appointing members to the Competition Commission, to ensure that the Bill would not create additional compliance burden for SMEs, and to extend the merger rule to more sectors.

Conclusion

30. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the importance of the Bill and the concerns of the Panels concerned, members may wish to study the policy aspects of the Bill in detail.

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