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Paper for the House Committee meeting on 4 January 2013

**Report of Subcommittee on
Competition Ordinance (Commencement) Notice 2012**

Purpose

This paper reports on the deliberations of the Subcommittee on Competition Ordinance (Commencement) Notice 2012 (L.N. 177) ("the Notice") made under the Competition Ordinance (14 of 2012) ("the Subcommittee").

Background

The Competition Ordinance

2. The Competition Ordinance ("the Ordinance") was passed by the Legislative Council ("the LegCo") on 14 June 2012 and published in the Gazette on 22 June 2012. The Ordinance seeks to prohibit undertakings from adopting conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. It provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule¹, the second conduct rule² and the merger rule³, which are collectively known as the "competition rules" in the Ordinance) as well as the institutional

¹ The first conduct rule, as described in section 6, 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.

² The second conduct rule under section 21 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.

³ The merger rule in Schedule 7 prohibits mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong. This rule only applies to carrier licences under the Telecommunications Ordinance (Cap. 106).

arrangements for the setting up of the Competition Commission ("the Commission") and the Competition Tribunal ("the Tribunal") and penalty provisions for their enforcement.

The Notice

3. By the Notice made under section 1(2) of the Ordinance, the Secretary for Commerce and Economic Development ("SCED") has appointed –

- (a) 18 January 2013 as the day on which the following provisions of the Ordinance come into operation:
 - (i) sections 1, 2, 35, 38, 40 and 59 (relating to short title, commencement, interpretation, and guidelines);
 - (ii) Parts 8 and 9 (relating to disclosure of information and the establishment, functions and powers of the Commission);
 - (iii) Divisions 1 and 2 of Part 12 (relating to miscellaneous general provisions and provisions on service of documents);
 - (iv) section 176 (relating to consequential and related amendments);
 - (v) Schedule 5 (relating to the Commission);
 - (vi) Part 6 of Schedule 7 (relating to guidelines on the merger rule);
 - (vii) Parts 5 and 7 and section 32 of Schedule 8 (relating to consequential and related amendments);
- (b) 1 August 2013 as the day on which the following provisions of the Ordinance come into operation:
 - (i) Part 10 (relating to the Tribunal);
 - (ii) Part 3 of Schedule 8 (relating to amendments to Judicial Officers Recommendation Commission Ordinance (Cap. 92)).

The provisions to be commenced by the Notice mainly relate to the setting up of the Commission and the Tribunal.

The Commission

4. Part 9 of and Schedule 5 to the Ordinance provide for the establishment of the Commission as a statutory body to investigate competition-related complaints and bring 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, the Court of First Instance ("CFI") or the Tribunal. Other functions of the Commission include promoting public understanding of the value of competition and how the Ordinance promotes competition, advising the Government on competition matters, and granting exemptions from the application of the Ordinance.

The Tribunal

5. Part 10 of the Ordinance provides for the setting up of the Tribunal within the Judiciary as a superior court of record that has primary jurisdiction to hear and adjudicate on competition cases brought by the Commission, on follow-on private actions, on alleged contravention of a conduct rule as a defence raised in proceedings before the CFI, as well as on applications for the review of certain determinations of the Commission, etc. CFI judges will, by virtue of their appointments as CFI Judges, be members of the Tribunal. The Chief Executive, acting in accordance with the recommendations of the Judicial Officers Recommendation Commission, is to 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 (but are eligible for re-appointment). The Ordinance also provides that, among others, every Registrar, senior deputy registrar and deputy registrar of the High Court, by virtue of that appointment, holds the corresponding office or position in the Tribunal.

The Subcommittee

6. At the House Committee meeting held on 30 November 2012, members agreed to form a subcommittee to study the Notice. Under the Chairmanship of Hon Andrew LEUNG Kwan-yuen, the Subcommittee has held one meeting with the Administration to examine the Notice. The membership list of the Subcommittee is in the **Appendix**.

7. To enable the Subcommittee to report to the House Committee and to allow sufficient time for giving notice of motion to amend the Notice, the scrutiny period of the Notice was extended to 16 January 2013 by a resolution of the LegCo passed on 19 December 2012.

Deliberations of the Subcommittee

Phased implementation of the Ordinance

8. The Administration has explained the phased implementation of the Ordinance to enable the public and the business sector to familiarize themselves with the new legal requirements and make necessary adjustments. According to the Administration, the commencement of the provisions as set out in paragraph 3 above is a necessary first step to allow sufficient time for setting up the Commission and the Tribunal and for the Commission to prepare the guidelines before the Ordinance comes into full operation.

9. The Subcommittee notes that the rest of the Ordinance relating to the prohibitions and the relevant penalty provisions will come into force only when all relevant preparatory work is completed, which is expected to take at least a year. During this period, the Commission will prepare guidelines regarding the competition rules, block exemption orders, lodging of complaints, as well as investigations and the merger rule. The Commission will also carry out consultation as required under the Ordinance and conduct publicity programmes to promote public understanding of the Ordinance. Under sections 35(4) and 59(3) of and section 17(4) of Schedule 7 to the Ordinance, the Commission must consult LegCo and any persons it considers appropriate before issuing any guidelines or amendments to them. As for the Judiciary, the Chief Judge of the High Court would, after consulting the President of the Tribunal, make rules regulating and prescribing the practice and procedure to be followed in the Tribunal. The Judiciary would also make other necessary arrangements to pave way for the full operation of the Tribunal.

10. Regarding some members' enquiry about the commencement of the complaint and investigation mechanism in respect of anti-competitive conduct, the Administration has advised that only after the preparatory work on relevant guidelines and procedures was completed would the Ordinance come into full operation to enable the Commission to consider and investigate competition-related complaints. The Subcommittee has raised no objection to the phased implementation of the Ordinance.

Guidelines on the merger rule

11. On some members' concern about the commencement of Part 6 of Schedule 7 to the Ordinance relating to guidelines on the merger rule, the Administration has explained that although the merger control is confined to carrier licences in the telecommunications sector under the Telecommunications Ordinance (Cap. 106), the commencement of the

relevant provisions is necessary to enable the preparation of guidelines for the regulation of mergers which have, or are likely to have, the effect of substantially lessening competition in Hong Kong.

Recruitment of the Chief Executive Officer (CEO) of the Commission

12. Some members have expressed concern about the progress of preparation for the establishment of the Commission, in particular, the recruitment of the CEO of the Commission and its executive team. In view of the CEO's pivotal role in managing the affairs of the Commission, members are generally of the view that a global recruitment exercise might be conducive to identifying the best qualified candidate with the most relevant expertise and experience for the post. According to the Administration, following the appointment of a Chairperson and members of the Commission by the CE, the Commission would proceed with the recruitment of its CEO and other staff as provided for under Part 3 of Schedule 5 to the Ordinance. The Commission could decide on whether to conduct a global search to fill the post of the CEO with regard to the relevant job requirements.

Determination of turnover of undertaking

13. The Subcommittee has noted that under section 163 (in Division 1 of Part 12) of the Ordinance, SCED may, by regulations published in the Gazette, provide for the determination of the "turnover" of an undertaking. As an undertaking's turnover would be adopted as the threshold for exclusion from the first⁴ and second conduct⁵ rules for agreements and conduct of lesser significance, and would also form the basis for determining the pecuniary penalty⁶ for contravention of a competition rule, members consider it important that the Commission and the relevant stakeholders be consulted when determining the calculation of turnover of an undertaking. The Administration has taken note of the Subcommittee's concern.

⁴ Under section 5(1) of Schedule 1, the first conduct rule does not apply to an agreement, a concerted practice or a decision of an association of undertakings in any calendar year if the combined turnover of the undertakings or the turnover of the association for the turnover period does not exceed HK\$200 million.

⁵ Under section 6(1) of Schedule 1, the second conduct rule does not apply to conduct engaged in by an undertaking the turnover of which does not exceed HK\$40 million for the turnover period.

⁶ Section 93(3) provides a pecuniary cap of 10% of the local turnover for each year of contravention, up to a maximum of three years. If the contravention occurred in more than three years, the three years of contravention with the highest, second highest and the third highest turnover would be chosen.

Recommendation

14. The Subcommittee supports the Notice and has not proposed any amendment to it.

Advice sought

15. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 1
Legislative Council Secretariat
3 January 2013

Subcommittee on Competition Ordinance (Commencement) Notice 2012

Membership List

Chairman Hon Andrew LEUNG Kwan-yuen, GBS, JP

Members Hon Albert HO Chun-yan
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon Ronny TONG Ka-wah, SC
Dr Hon LAM Tai-fai, SBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon WU Chi-wai, MH
Hon YIU Si-wing
Hon MA Fung-kwok, SBS, JP
Hon Charles Peter MOK
Hon Dennis KWOK
Hon Christopher CHEUNG Wah-fung, JP
Hon SIN Chung-kai, SBS, JP
Hon CHUNG Kwok-pan

(Total : 15 members)

Clerk Ms Annette LAM

Legal Adviser Mr Timothy TSO