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

Background brief

Purpose

This paper provides background information on the Competition Ordinance (Commencement) Notice 2012 (L.N. 177) ("the Notice") and summarizes previous discussions on the subject.

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 arrangements and penalty provisions for their enforcement.

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).

3. The Ordinance provides for a judicial enforcement model through the establishment of the Competition Commission ("the Commission") and the Competition Tribunal ("the Tribunal"). The Commission will be established as an independent statutory body to investigate competition-related complaints and 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 Ordinance and the value of competition through public education work, as well as advising the Government on competition matters.

4. The Tribunal will be set up within the Judiciary as a superior court of record that has primary jurisdiction to hear and adjudicate on competition cases brought by the Commission, follow-on private actions, alleged contravention of a conduct rule as a defence raised in proceedings before the Court of First Instance ("CFI"), as well as reviews of certain determinations of the Commission. Every CFI judge will, by virtue of his or her appointment as CFI Judge, be a member of the Tribunal. The Chief Executive of the HKSAR Government ("CE") shall, 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 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.

Implementation of the Ordinance

5. It has been the Administration's intent to implement the Ordinance in phases after its enactment to allow sufficient time for setting up the Commission and the Tribunal and preparing the guidelines before the competition rules come into force. According to the Administration, this would enable the public and the business sector to familiarize themselves with the new legal requirements during the transitional period and make necessary adjustments. The Commission will conduct publicity campaigns and public education activities, and prepare guidelines regarding the competition rules, handling of complaints and investigations. The competition rules in the Ordinance will only come into force upon completion of all relevant preparatory work. It is expected that the whole preparatory process will take at least one year.

The Notice

6. By the Notice made under section 1(2) of the Ordinance, the Secretary for Commerce and Economic Development 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 Competition 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 Competition 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 Competition Tribunal);
 - (ii) Part 3 of Schedule 8 (relating to amendments to Judicial Officers Recommendation Commission Ordinance (Cap. 92)).

7. In gist, the provisions to be commenced by the Notice mainly relate to the setting up of the Competition Commission and the Competition Tribunal. The competition rules and the relevant penalty provisions will not be brought into operation by the Notice.

Views and concerns of Members

8. The Notice has not been discussed at a Panel of the LegCo. However, during the deliberation of the Competition Bill ("the Bill") at the Bills Committee, members raised views and concerns in relation to the Commission and the Tribunal which are summarised in the ensuing paragraphs.

The Competition Commission

Powers of the Commission

9. Some members expressed concern about the concentration of too much power in the Commission, which would be playing the roles of drawing up guidelines on interpretation of contravention of conduct rules, investigation and prosecution. The Administration advised that the Bill proposed a judicial enforcement model by setting up the Tribunal to take up the adjudication function to avoid concentration of too much power in the Commission. Before exercising its investigative powers, the Commission must have reasonable cause to suspect that there was a contravention of the competition rules. The Administration also pointed out that at present, there was difficulty in mounting effective investigations into complaints against alleged anti-competitive conduct. The Bill would establish a credible and impartial institutional framework which allows for effective and efficient enforcement of the competition law.

Expertise and experience of Commission members

10. Some members expressed concern about the lack of competition expertise in the Commission, while some other members opined that Commission should include representatives from the business sector, small and medium sized enterprises ("SMEs") and consumers. The Administration responded that in considering the appointment of a person as a member of the Commission, the CE might have regard to that person's expertise or experience in industry, commerce, economics, law, SMEs or public policy. It was therefore possible that a person possessing expertise or experience in any of the above areas would be considered for appointment to the Commission. The present formulation struck a good balance between reflecting the policy intention as well as the need for sufficient flexibility under the appointment mechanism.

Size of the Commission membership

11. Members suggested that a cap on the number of Commission members should be spelt out in the Bill to enhance certainty of the likely scale of operation of the Commission. Some expressed concern that the CE might, at

his discretion, appoint additional members to the Commission if the existing members do not share the same opinion with him. In response to such views, and drawing reference from overseas jurisdictions and the ceilings for other statutory bodies in Hong Kong with varying size and functions, the Administration proposed that the total number of Commission members should be capped at 16.

Guidelines issued by the Commission

12. The Bills Committee deliberated on the sample Guidelines on the First Conduct Rule, the Second Conduct Rule and Market Definition drawn up by the Administration. Some members considered that the Guidelines are general in nature and are not clear enough to address the concerns of SMEs in specific trades. The Administration assured members that the Commission would consult relevant stakeholders and prepare the actual guidelines with more details and illustrative examples. In response to the request of some members to make the guidelines on the proposed conduct rules subsidiary legislation subject to scrutiny of the LegCo, the Administration expressed disagreement emphasizing the importance to allow flexibility for the Commission to issue and amend the guidelines as and when necessary in order to respond swiftly to the rapid changes in the market, and that it is in line with practices in overseas jurisdictions.

13. As regards the guidelines on making complaints, while some members opined that the above guidelines could facilitate complaint-handling, some other members considered it undesirable to issue such guidelines, lest complaints not made in the specified format would not be handled. The Administration explained that the guidelines were not meant to be mandatory requirements for compliance, but were aimed at indicating, for the complainants' reference, the types and details of information that the Commission could base on in considering whether an investigation should be initiated on receipt of a complaint.

The Competition Tribunal

Role and functions of the Tribunal

14. On the enquiry as to whether a member of the Tribunal, in performing any of his functions under the Bill, would be regarded as a member of a court, the Administration advised that since the Bill provided that the Tribunal should consist of the judges of the CFI by virtue of their appointments as such judges, members of the Tribunal were members of the court when performing their functions under the Bill. As for the President and the Deputy President of the Tribunal whom should be appointed by the CE from among members of the

Tribunal, they were carrying out a judicial function under the Bill.

Conduct of proceedings with informality

15. Some members expressed concern that under the Bill, the Tribunal was allowed to receive evidence that would not be admissible in court proceedings, including hearsay evidence. The Administration responded that in attaining justice, the Tribunal should be allowed to consider evidence collected from diverse sources. Provisions were made in the Bill regarding the rules of evidence and evidence that might tend to incriminate. Similar arrangement was provided in the Securities and Futures Ordinance (Cap. 571).

16. Some members expressed concern whether the Tribunal should conduct its proceeding with informality as stipulated in the Bill since it would be a superior court of record and it might impose pecuniary penalty. The Administration reiterated its policy objective for the Tribunal to conduct its proceedings with as much informality as possible was consistent with attaining justice, with a view to providing a less formal framework and expeditious proceedings, thereby easing the burden on smaller enterprises involved in competition cases. The Chief Judge of the High Court might make rules, in consultation with the President of the Tribunal, to regulate and prescribe the practice and procedures to be followed in the Tribunal having regard to the Administration's policy intent for informality.

Term of the President and Deputy President

17. Some members queried whether the independence of the President and Deputy President of the Tribunal would be undermined if they were appointed by the CE to hold office for a fixed term of at least three years and not more than five years. The Administration advised that providing a specific term of appointment for the President and the Deputy President of the Tribunal would facilitate the appointment (or re-appointment) of suitable members of the Tribunal to be the President or the Deputy President on a regular basis. The fixed-term appointment would be made by the CE on the recommendation of the Judicial Officers Recommendation Commission and would automatically lapse upon expiration of the term.

Casting/second vote of the President/ presiding member

18. Members expressed concern about the exercise of the second or casting vote by a presiding member in the case of an equality of votes at a hearing. They also questioned why the President of the Tribunal could appoint any number of members to hear an application which might lead to the need for the member presiding to exercise a second or casting vote. The Administration

advised that the proposal to give the President or the presiding member of the Tribunal a casting or second vote aimed to ease any deadlock in a decision upon an equality of votes and helped ensure the efficient operation of the Tribunal. A similar arrangement was adopted in a number of tribunals in Hong Kong such as the Lands Tribunal, the Unsolicited Electronic Messages (Enforcement Notice) Appeal Board, the Appeal Tribunal (Buildings), and the Buildings Energy Efficiency Appeal Board. Compared to the proposal to introduce a requirement on the number of members of the Tribunal hearing a case (e.g. an uneven number), the proposed casting vote ensured that there would always be a decision while providing operational flexibility for the Tribunal to decide on the number of members sitting having regard to the nature of each case.

Relevant papers

19. The links to the relevant papers are as follows –

The Legislative Council Brief on the Competition Bill issued on 2 July 2010
http://www.legco.gov.hk/yr09-10/english/bills/brief/b35_brf.pdf

The Legal Service Division Report on the Competition bill
<http://www.legco.gov.hk/yr09-10/english/hc/papers/hc1008ls-93-e.pdf>

Background Brief for Bills Committee on Competition Bill
<http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121109cb1-320-5-e.pdf>

Report of the Bills Committee on Competition Bill
<http://www.legco.gov.hk/yr09-10/english/bc/bc12/reports/bc120530cb1-1919-e.pdf>

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