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Panel on Economic Development
Meeting on 11 December 2012

**Background brief on the proposed creation of two judicial posts
for the establishment of the Competition Tribunal**

Purpose

This paper sets out the background on the proposed creation of two judicial posts in the Judiciary for the establishment of the Competition Tribunal ("the Tribunal"), and summarises the views and concerns expressed by Members on relevant matters in the Competition Bill ("the Bill").

Background

The Competition Ordinance

2. The Competition Ordinance ("the Ordinance") was passed by the Legislative Council 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

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).

as the "competition rules" in the Ordinance) as well as the institutional arrangements and penalty provisions for their enforcement.

Implementation of the Ordinance

3. It has been the Administration's intent to implement the Bill 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. It is expected that the transitional period would take at least a year.

The Competition Tribunal

4. The Ordinance provides for a judicial enforcement model through the establishment of the Competition Commission ("Commission") and the Tribunal. The Commission is an independent statutory body to investigate into competition-related complaints and to bring public enforcement action before the Tribunal in respect of anti-competition conduct.

5. The Tribunal will be set up 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 Commission. 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 local turnover of the undertaking(s) in breach of the competition rule for each year of infringement up to a maximum of three years; 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 who had contributed to the contravention of the competition rule. Decisions of the Tribunal are reviewable on appeals to the Court of Appeal. Every judge of the Court of First Instance ("CFI") will, by virtue of his or her appointment as a CFI Judge, be a member of the Tribunal. The Chief Executive of the HKSAR Government ("CE") will, on the recommendation 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 may appoint one or more members of the Tribunal to hear and determine an application made to the Tribunal. The Tribunal may also appoint assessors to assist in proceedings.

Members' views and concerns on the Competition Tribunal

6. The views and concerns raised by Bills Committee members during the deliberation of the Competition Bill ("the Bill") in relation to the Tribunal are summarised in the ensuing paragraphs.

Role and functions of Tribunal

7. 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

8. 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).

9. 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

10. 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

11. 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.

Latest development

12. The Administration will consult the Panel at its meeting on 11 December 2012 on the proposed creation of a permanent post of Judge in the Court of First Instance and a permanent post of Deputy Registrar, High Court for the purpose of establishing the Tribunal.

Relevant papers

13. 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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