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**Bills Committee on Competition (Amendment) Bill 2014**

**Background brief**  
**prepared by the Legislative Council Secretariat**

**Purpose**

This paper provides background information on the proposed legislative amendments to the Competition Ordinance (Cap. 619) ("the Ordinance") relating to the Competition Tribunal ("the Tribunal"), and summarizes the views and concerns expressed by members of the Panel on Economic Development on the Administration's proposed amendments to the Ordinance.

**Background**

Competition Policy and the Competition Ordinance

2. The Government's competition policy is to enhance economic efficiency and the free flow of trade through promoting sustainable competition to bring benefits to both the business sector and consumers. On 2 July 2010, the Administration introduced the Competition Bill to the Legislative Council ("LegCo").

3. The objective of the Ordinance is to prohibit and deter "undertakings" 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. In this context, 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. The Ordinance does not bind the Government, and certain parts of the Ordinance do not apply to statutory bodies or their specified activities. The Administration has explained that the activities of the public sector are almost invariably non-economic in nature falling outside the scope of the Ordinance.

4. The Ordinance was passed by the LegCo on 14 June 2012 and published in the Gazette on 22 June 2012. The Ordinance provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule<sup>1</sup>, the second conduct rule<sup>2</sup> and the merger rule<sup>3</sup>, which are collectively known as the "competition rules" in the Ordinance) as well as the institutional arrangements and penalty provisions for their enforcement.

### Competition Commission

5. The Ordinance provides for a judicial enforcement model. An independent statutory Competition Commission ("the Commission") is established to investigate into competition-related complaints and to bring proceedings before the Tribunal in respect of anti-competition conduct either on receipt of complaints, on its own initiative, or on referral from the Government or a court. The Commission is also tasked to promote public understanding of the Ordinance and the value of competition through public education work, to advise the Government on competition matters and to grant exemptions from the application of the competition law, etc.

### Competition Tribunal

6. The Tribunal is established within the Judiciary as a superior court of record to hear and adjudicate on competition cases brought by the Commission, follow-on private actions (brought by persons who have suffered loss or damage as a result of a contravention of a conduct rule), as well as applications for the review of certain determinations of the Commission, etc. Decisions of the Tribunal are, subject to leave of the Court of Appeal ("CA"), reviewable in appeals to CA. Judges of the Court of First Instance ("CFI") will, by virtue of their appointments as CFI Judges, be members of the Tribunal.

7. On the recommendations of the Judicial Officers Recommendation Commission, CE would appoint one member of the Tribunal to be the President of the Tribunal, and one other member to be Deputy President.

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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).

Their tenure would be between three years to five years, and they are eligible for re-appointment. The President of the Tribunal may appoint one or more members to hear and determine an application made to it.

8. 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.

9. The Tribunal may appoint assessors to assist in proceedings. The Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice. It may also decide its own procedures and may, so far as it thinks fit, follow the practice and procedure of CFI in the exercise of its civil jurisdiction.

10. The Tribunal is 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 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. The Tribunal can only impose pecuniary penalty on application by the Commission.

#### Phased implementation of the Ordinance

11. It has been the Administration's intention 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. This arrangement will enable the public and the business sector to familiarize themselves with the new legal requirements during the transitional period and make necessary adjustments.

12. LegCo passed the Competition Ordinance (Commencement) Notice 2012 in January 2013. The provisions of the Ordinance relating to the establishment of the Commission, the short title and commencement, interpretation, and the issue of guidelines by the Commission came into operation on 18 January 2013. The provisions relating to establishment of the Tribunal and part of the provisions relating to its operation commenced on 1 August 2013.

13. 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. The preparatory work by the Commission includes its

preparation of guidelines regarding the competition rules, block exemption orders, lodging of complaints, as well as investigations and the merger rule. 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.

14. The Chairperson and members of the Commission were appointed with effect on 1 May 2013. With the support of a seconded government team, the Commission has undertaken initial work to establish the Commission office, its internal procedures and financial and administrative systems, and set direction of work leading to full function of the Commission and the prospective full commencement of the Ordinance. With the first batch of staff in place now, the Commission has moved from the initial establishment work to the preparation of various documents foreseen under the Ordinance.

15. The Judiciary appointed the President and Deputy President of the Tribunal in July 2013, to take charge of the enforcement of the legislation.

### **Proposed amendments to the Competition Ordinance**

16. According to the Administration, since the enactment of the Ordinance, the Administration and the Judiciary have been working closely to prepare for the phased implementation of the Ordinance. One of the major tasks leading to the full implementation of the Ordinance is to prepare for the full operation of the Tribunal. During the preparatory process, the Administration and the Judiciary have identified certain amendments to the Ordinance and consequential amendments to other pieces of legislation, which are considered essential to the proper functioning of the Tribunal.

17. Against these considerations, the Administration introduced the Competition (Amendment) Bill 2014 ("the Bill") to LegCo on 14 May 2014. The Bill seeks to amend the Ordinance to give the Tribunal certain specific powers, and provides for certain operational matters, that are considered by the Administration and the Judiciary to be necessary to ensure the proper functioning of the Tribunal; and to make miscellaneous amendments to other Ordinances.

#### Provisions of the Bill

18. The major proposed amendments in the Bill can be grouped into three categories which are summarized in the ensuing paragraphs.

*(A) Proposed powers for the functioning of the Tribunal*

19. The Ordinance has adopted a general approach in providing for the powers, and the practice and procedure of the Tribunal with reference to those of CFI. Administration has identified several areas in the Ordinance where it is considered not entirely clear as to whether the Tribunal would have the specific powers of CFI to grant remedies and relief in discharging its functions. The Administration therefore proposes to amend the Ordinance to confer more specific powers on the Tribunal with a view to providing greater clarity and certainty that are required. These powers include the power to enforce the orders of the Tribunal, the power to award interest on debts and damages and judgment debts, the power to prohibit debtors from leaving Hong Kong, and the power to reimburse a witness for expenses reasonably and properly incurred. The Administration also proposes to empower the Chief Judge to make rules, after consulting the President of the Tribunal, on the administration of suitors' funds.

*(B) Proposed amendments relating to Registrars*

20. The Ordinance currently provides for a framework on the automatic appointment of the Tribunal's Registrar and other registrar-related positions (collectively referred to as "the Tribunal's registrars" hereinafter). The Ordinance does not confer powers on the Tribunal's registrars to perform judicial duties. To ease the workload of members of the Tribunal and in line with the arrangements for the High Court, the Administration proposes to amend the Ordinance to empower the Tribunal's registrars to perform judicial work under the Ordinance similar to that performed by their counterparts in the High Court, and also to afford the Tribunal's registrars the privileges and immunities currently enjoyed by the registrars in the High Court. The Administration also proposed to amend section 156 of the Ordinance to provide expressly that, temporary registrars, temporary senior deputy registrars, and temporary deputy registrars of the High Court would automatically hold the corresponding positions in the Tribunal and be given similar powers and duties of their permanent counterparts in the Tribunal.

*(C) Proposed amendments to other Ordinances*

21. Amendments are proposed to a number of Ordinances with the aim to facilitate the future operation of the Tribunal (e.g. enabling the making of rules of court for prescribing the procedure in connection with the transfer of proceedings between CFI and the Tribunal), and to ensure consistency with the arrangements currently applicable to CFI and/or other courts/tribunals in general under these Ordinances. They include the High Court Ordinance (Cap. 4), the Evidence Ordinance (Cap. 8), the Legal Practitioners Ordinance

(Cap. 159), the Higher Rights of Audience Rules (Cap. 159AK), the Electronic Transactions Ordinance (Cap. 553) and the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591).

### Commencement

22. There is no commencement provision in the Bill. By virtue of section 20(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the Bill, if passed, would come into operation on the day it is published in the Gazette as an ordinance.

### **Panel members' views and concerns on the proposed amendments to Competition Ordinance**

23. The Panel on Economic Development was consulted on the proposed amendments to the Ordinance on 16 December 2013. Relevant views and concerns raised by members are set out below.

#### *Registrar of the Competition Tribunal*

24. A member considered that the workload of the High Court registrars was already very heavy and that the Administration should create new posts to relieve their work pressure if they have to take up the duties as the Tribunal's registrars. The Administration explained that a Deputy Registrar post had been created in 2013, and there were ten registrar-related posts in the Judiciary. This level of staff was considered adequate to cope with the additional work of the Tribunal. Besides, the Judiciary considered it not cost-effective to require the Deputy Registrar to work full-time for the Tribunal.

#### *Penalty to be imposed by the Competition Tribunal*

25. Some Panel members had queried about whether the penalty levels under the Ordinance had sufficient deterrent effect against contraventions. The Administration explained that the pecuniary penalty imposed in relation to conduct that constituted a contravention of a competition rule could be as high as 10% of the local turnover of the undertaking concerned for each year in which contravention occurred. If the contravention occurred in more than three years, the maximum pecuniary penalty would be 10% of the local turnover of the concerned undertaking for the three years in which the contravention occurred that saw the highest, second highest and third highest turnover. The Administration also explained that the Ordinance also allowed the Tribunal to declare, amongst others, that any agreement (the making or giving effect to which constituted the contravention of the competition rules)

to be void or voidable, or to require any person to pay to the Government or to any other specified person an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention.

### *Appeal mechanisms*

26. A member queried about the appeal mechanisms under the Ordinance, and when the provision would take effect. The Administration explained that section 154 of the Ordinance provided that an appeal lied as of right to CA against any decision, determination or order of the Tribunal made under the Ordinance. However, the lodging of an appeal to CA did not necessarily suspend the effect of the decision, determination or order of the Tribunal to which the appeal related.

### **Latest development**

27. At the House Committee meeting on 16 May 2014, a Bills Committee was formed to scrutinize the Bill.

### **References**

28. The relevant papers are available at the following links –

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](http://www.legco.gov.hk/yr09-10/english/bills/brief/b35_brf.pdf)

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

Establishment of the Competition Commission and the Engagement Plan for the Guidelines Required under the Competition Ordinance  
<http://www.legco.gov.hk/yr13-14/english/panels/edev/papers/edev0526cb1-1436-5-e.pdf>

Proposed Legislative Amendments to the Competition Ordinance relating to the Competition Tribunal  
<http://www.legco.gov.hk/yr13-14/english/panels/edev/papers/edev1216cb1-501-4-e.pdf>

The Legislative Council Brief on the Competition (Amendment) Bill 2014  
issued on 7 May 2014

[http://www.legco.gov.hk/yr13-14/english/bills/brief/b201405091\\_brf.pdf](http://www.legco.gov.hk/yr13-14/english/bills/brief/b201405091_brf.pdf)

Legal Service Division Report on Competition (Amendment) Bill 2014

<http://www.legco.gov.hk/yr13-14/english/hc/papers/hc0516ls-54-e.pdf>

Background brief on the proposed legislative amendments to the Competition  
Ordinance relating to the Competition Tribunal

<http://www.legco.gov.hk/yr13-14/english/panels/eDEV/papers/eDEV1216cb1-501-5-e.pdf>

Minutes of special meeting of the Panel on Economic Development held on  
Monday, 16 December 2013

<http://www.legco.gov.hk/yr13-14/english/panels/eDEV/minutes/eDEV20131216.pdf>

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