

**For discussion
on 16 December 2013**

Legislative Council Panel on Economic Development

**Proposed Legislative Amendments to the Competition Ordinance
relating to the Competition Tribunal**

PURPOSE

The paper briefs Members on the proposed legislative amendments to the Competition Ordinance (“CO”) (Cap. 619) relating to the Competition Tribunal (“the Tribunal”).

BACKGROUND

2. The CO, which was enacted in June 2012, provides a legal framework to tackle anti-competitive conduct across different sectors. The CO prohibits anti-competitive agreements and abuse of market power that have the object or effect to prevent, restrict or distort competition in Hong Kong. The CO also has a merger control regime which applies only to carrier licences granted under the Telecommunications Ordinance (Cap. 106).

3. Since the enactment of the CO, the Administration and the Judiciary have been working closely to prepare for the phased implementation of the CO. The first phase involves commencement of provisions relating to the establishment of the Competition Commission (“Commission”) and the Tribunal. The provisions relating to the Commission came into operation on 18 January 2013, while the provisions relating to the Tribunal came into operation on 1 August 2013.

4. One of the major tasks leading to the full implementation of the CO is to prepare for the full operation of the Tribunal, which is a superior court of record established under the CO having primary jurisdiction to hear and adjudicate

competition-related cases. In this connection, the Judiciary is formulating the rules for the operation and proceedings of the Tribunal and making other necessary administrative arrangements to prepare for the full operation of the Tribunal.

5. During the preparatory process, the Administration and the Judiciary have identified certain amendments to the CO and consequential amendments to other pieces of legislation, which are considered essential to the proper functioning of the Tribunal. These amendments mainly seek to confer on the Tribunal as well as its judges and judicial officers specific powers similar to those for the judges and judicial officers of the Court of First Instance (“CFI”) in respect of civil proceedings. To ensure the operational readiness of the Tribunal in discharging its functions, we consider it essential to introduce these amendments before the full implementation of the CO.

PROPOSALS AND JUSTIFICATIONS

6. We seek to introduce the abovementioned amendments by way of a Competition (Amendment) Bill (“Amendment Bill”). The major legislative proposals and their justifications are set out in the following paragraphs.

(A) Proposed General Powers for the Functioning of the Tribunal

7. The CO has adopted a general approach (c.f. sections 142, 143, 144 and 158 of the CO) such that the Tribunal may generally follow the practice and procedure of the CFI; has the power to enforce its orders in the same way as a superior court of record (including the CFI); and has the power to grant orders that the CFI is empowered to make, unless specifically provided otherwise by the Tribunal Rules or the CO. Generally speaking, the Tribunal would have the jurisdiction of the CFI as provided under the High Court Ordinance (“HCO”) (Cap. 4) and the Rules of the High Court (Cap. 4A) (“RHC”) as well as the CFI’s inherent jurisdiction insofar as they relate to the practice and procedure of the CFI in exercising its civil jurisdiction.

8. This notwithstanding, we have identified the following proposed amendments to the CO which are considered necessary to confer specific powers on the Tribunal with a view to providing greater clarity and certainty that is required given the particular circumstances.

Enforcement powers

9. Section 143(1)(c) of the CO confers all the powers, rights and privileges of a superior court of record on the Tribunal with respect to, among others, its enforcement of orders. However, in common law, there is no clear and comprehensive statement of the powers of enforcement of a superior court of record. For clarity and avoidance of any doubt, we propose amending the CO to make it clearer that the Tribunal will have in respect of the enforcement of its orders the same powers, rights and privileges of the CFI.

Levying interest on damages and judgment debts

10. The CO provides that the Tribunal may make various orders relating to damages or otherwise. For example, section 1(k) of Schedule 3 to the CO stipulates that the Tribunal may order a person to pay damages to any person who has suffered loss or damage as a result of any contravention of the competition rules. Section 1(p) of the same Schedule states that the Tribunal may order any person to pay to the Government or any other person an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention.

11. While sections 48 and 49 of the HCO empower the CFI to make orders to impose simple interest on any damages for which judgment is given and any judgment debt respectively, there is no explicit provision in the CO providing such power to the Tribunal. Although section 142(2) of the CO currently provides that the Tribunal, in exercising its jurisdiction, has the jurisdiction to grant remedies and reliefs as the CFI, it is not entirely clear whether section 142(2) of the CO would cover the imposition of interest and if so, how such interest might be determined and ordered.

12. For the sake of consistency and clarity, we propose adding to the CO a specific empowering provision on the order of payment of interest on damages and judgment debts by the Tribunal similar to that applicable to the CFI in the HCO.

Enforcement of pecuniary penalties and financial penalties

13. There are certain provisions in the CO governing the payment of penalties or costs by means of orders of the Tribunal. These include sections 93 and 169 of the CO, which prescribe that the Tribunal may impose a pecuniary penalty for any contravention of the competition rules, and a financial penalty for contravention of section 168 of the CO concerning the indemnification for any person who is liable for payment of a pecuniary penalty or costs respectively. Moreover, section 63(2)(b) of the CO provides that the Tribunal may order payment of costs as a result of failure to comply with a commitment, and section 96 of the CO states that the Tribunal may order payment of costs relating to investigation incurred by the Commission in connection with proceedings for the contravention of a competition rule.

14. Unlike some other legislation, the CO does not currently provide for any legal consequences in the event that a party fails to pay or delays the payment of the penalties or costs as decided by the Tribunal. For example, under section 21E of the HCO, if the payment of fines etc. fails to be made, the CFI or the Court of Appeal may certify to the Registrar of the High Court the sum payable, and the payment of that sum could then be enforced by the Registrar as a “judgment debt” due to him and simple interest might be imposed.

15. With a view to incentivising prompt payment of penalties or costs and making reference to the existing arrangements under the HCO, we propose adding provisions to the CO empowering the Tribunal to impose interest in respect of non-payment or late payment of pecuniary and financial penalties under sections 93 and 169 of the CO as well as costs under sections 63(2)(b) and 96 of the CO.

Prohibition of debtors from leaving Hong Kong

16. At present, under section 21B of the HCO, the CFI has power to make an order prohibiting a person from leaving Hong Kong (“prohibition order”) to facilitate the enforcement, securing or pursuance of a judgment against that person for the payment of a specified sum of money, or a judgment or order against that person for the payment of an amount to be assessed or requiring him to deliver any property or perform any other act. Such a prohibition order could also be made to facilitate the pursuance of a civil claim (other than a judgment) for the

payment of money or damages, or for the delivery of any property or the performance of any other act.

17. To ensure that the Tribunal can effectively enforce its judgment or order against payment of pecuniary or financial penalties, damages, costs or other amounts of money and to enable the Tribunal to make pre-judgment prohibition orders in a like manner as the CFI, we propose amending the CO to incorporate a provision similar to section 21B of the HCO to provide the Tribunal with such order-making power.

18. Similar to the CFI, the same procedural protections would be afforded to the person affected by a prohibition order under the CO as those available under the HCO. For instance, there must be sufficient proof that the person is about to leave Hong Kong and satisfaction of the Tribunal's judgment or order is likely to be obstructed or delayed.

Expenses of witnesses

19. A witness in proceedings might incur expenses in order to perform his/her duty (e.g. expenses on travelling to the court), and such expenses should generally be reimbursed. Section 52 of the HCO, for example, provides that a High Court judge may order the reimbursement of a witness in respect of any expenses reasonably and properly incurred by that witness. We propose adding a similar provision in the CO.

Rule-making powers for suitors' funds rules

20. Suitors are parties to suits in a court of law. They may need to pay or transfer funds into court (including tribunals) or deposit funds in court for various purposes, for example, as security against possible default on legal costs, or in satisfaction of claims or judgment debts etc.. Depending on the outcome of the lawsuits, the funds may have to be paid out of court to the persons entitled to such payment as the court orders. In general, suitors' funds may be accepted in the form of money, securities and/or movable properties.

21. Suitors' funds rules are now provided in various pieces of legislation (e.g. the High Court Suitors' Funds Rules (Cap. 4B)) to govern the administration of such funds, including how suitors' funds are lodged in and paid out of court,

investment of the funds, provision of interest for individual suitors' accounts and preparation of annual audited financial statements for the funds.

22. Following the establishment of the Tribunal, we propose that its suitors' funds be administered in a manner similar to that in the High Court and on the basis of a similar set of suitors' funds rules. We propose adding in the CO a provision similar to section 57 of the HCO to provide for the rule-making powers for the suitors' funds rules.

(B) Proposed Amendments relating to Registrars

23. Sections 144, 156 and 158 of the CO currently provide for a framework on the automatic appointment of the Tribunal's Registrar and other registrar-related positions (collectively referred to as "registrars" hereinafter), as well as the practice and procedure of the Tribunal that should be followed by registrars. The CO nonetheless does not confer powers on the Tribunal's registrars to perform judicial duties as with their counterparts in the High Court under the HCO.

24. To ease the workload of members of the Tribunal and in line with the arrangements for the High Court, the Judiciary considers it necessary to empower the Tribunal's registrars to perform judicial work under the CO similar to that performed by their counterparts in the High Court. Details are set out below.

Power of Registrars

25. Provisions modeling on section 38 of the HCO (mainly regarding jurisdiction, powers and duties of the Registrar of the High Court) are proposed to be added to the CO to empower the Tribunal's registrars to perform judicial work.

Tribunal rules in relation to Registrars

26. To provide technical details on the exercise of the powers and jurisdiction of the Tribunal's registrars, the Judiciary intends to make Tribunal rules under section 158 of the CO. While section 158 of the CO currently provides that rules of the Tribunal could be made to regulate and prescribe the practice and procedure to be followed in the Tribunal in all matters with respect to which the Tribunal has jurisdiction, it is not entirely clear whether rules

prescribing the jurisdiction of the Tribunal which may be exercised by the Tribunal's registrars are covered under section 158 of the CO.

27. For the sake of clarity and certainty, we propose amending section 158 of the CO to make it clear that rules in relation to the jurisdiction of the Tribunal which may be exercised by the Tribunal's registrars could be made under the section. This proposed amendment follows the formulation adopted in section 54(2)(b) of the HCO which stipulates that rules prescribing the jurisdiction of the High Court which may be exercised by the Registrar or a Master of the High Court could be made thereunder.

Protection of registrars

28. At present, section 39 of the HCO offers certain protection to the Registrar of the High Court so that he/she would be immune from legal actions brought against him/her for any act done or omitted to be done by any bailiff without directions from the Registrar, or for any direction given to any bailiff with regard to the execution/non-execution process in accordance with an order for direction and guidance of the CFI where no material fact is wilfully misrepresented or suppressed by the Registrar.

29. For the sake of consistency, we propose adding to the CO new provisions to extend similar protection to the Tribunal's registrars.

Temporary registrars

30. Section 156 of the CO currently states that "Every Registrar, senior deputy registrar, deputy registrar and any other officer such as a Bailiff of the High Court, by virtue of that appointment, holds the corresponding office or position in the Tribunal". As the HCO provides for the possible appointment of temporary registrars, we propose amending section 156 of the CO to the effect that the "temporary registrar", "temporary senior deputy registrar" and "temporary deputy registrar" of the High Court will also automatically hold the corresponding positions in the Tribunal. Provisions modeling on section 40A of the HCO on certain powers of the temporary registrars are also suggested to be added to the CO.

(C) Proposed Consequential Amendments

Transfer of proceedings

31. Section 113 of the CO states that the CFI should generally transfer to the Tribunal so much of the proceedings that are within the jurisdiction of the Tribunal. It is necessary to provide detailed rules in the RHC for the exercise of such power by the CFI (e.g. to specify the manner in which and/or the circumstances under which the CFI should invoke the power). The relevant rules will govern the transfer of the whole or part of the proceedings when the proceedings are still with the CFI.

32. To enable the making of such rules, we propose introducing consequential amendments to the HCO to more specifically empower the Rules Committee constituted under section 55 of the HCO to make rules of court for prescribing the procedures in respect of the transfer of proceedings between the CFI and the Tribunal.

Higher rights of audience

33. At present, solicitors who satisfy the eligibility criteria under the Legal Practitioners Ordinance (“LPO”) (Cap. 159) may apply to the Higher Rights Assessment Board established under the LPO for higher rights of audience, i.e. rights of audience before the High Court and the Court of Final Appeal in civil proceedings, criminal proceedings or both.

34. Given the status of the Tribunal as a superior court of record and the possible transfer of cases (in part or in whole) between the CFI and the Tribunal, and to enable a case be handled by the same team of solicitors/barristers even after the transfer, we propose introducing consequential amendments to section 39H(3) of the LPO so that solicitor advocates granted with the higher rights of audience before the High Court and the Court of Final Appeal in civil proceedings should also be granted similar rights before the Tribunal.

Power to bring up persons in custody to give evidence

35. Judges and judicial officers at various courts and tribunals are empowered under section 81 of the Evidence Ordinance (“EO”) (Cap. 8) to bring

up any person in lawful custody to prosecute, pursue, defend, or to be examined as a witness before those courts/tribunals.

36. To cater for the possibility that the Tribunal may require persons in lawful custody to give evidence, we propose introducing consequential amendments to the EO so that such powers are also given to the relevant judges and judicial officers of the Tribunal.

Extension of Tribunal's jurisdiction to Hong Kong Port Area

37. The Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591) seeks, among others, to apply the laws of Hong Kong in the Hong Kong Port Area in Shenzhen Bay (a Mainland territory) and to provide for the jurisdiction of courts/tribunals in this connection. The term "court" is defined in section 2 of this Ordinance as "a court or tribunal specified in Part 1 of Schedule 4", which sets out a full list of the courts/tribunals currently under the Judiciary, except the Tribunal.

38. For the sake of completeness, we propose introducing consequential amendments to the Shenzhen Bay Port Hong Kong Port Area Ordinance to the effect that the Tribunal's jurisdiction will be extended to the Hong Kong Port Area and the territorial limit of the Tribunal's orders would be construed as including the Hong Kong Port Area.

Electronic Transactions Ordinance

39. The Electronic Transactions Ordinance ("ETO") (Cap. 553) establishes a legal framework for the conduct of electronic transactions by giving electronic records and electronic/digital signatures the same legal status as that of their paper-based counterparts as well as a framework for the operation of certification authorities.

40. While it is the Administration's objective to promote wider adoption of electronic transactions in Hong Kong, it is recognised that some parties, including Government Bureaux / Departments and the Judiciary, are not able to accept electronic information because of operational, technological or other reasons. The ETO therefore provides for exemptions to all existing courts/ tribunals under the Judiciary so that they will not be required to accept electronic submissions. But the Tribunal has not yet been included.

41. The Judiciary is undergoing a major computer upgrading exercise called the Information Technology Strategy Plan which will take time to be implemented. As the Judiciary will not be able to offer electronic services for the Tribunal in the near future, for the sake of consistency with the other existing courts/tribunals, we propose to introduce consequential amendments to the ETO to extend the exemption to the Tribunal.

CONSULTATION

42. The Administration and the Judiciary Administration have briefed the Commission on the proposed legislative amendments to the CO. The Judiciary Administration has also consulted the Hong Kong Bar Association and the Law Society of Hong Kong. They are generally supportive of the proposed legislative amendments. We have also provided them with clarifications on a few points which they have raised. We will take account of these comments in the drafting of the Amendment Bill and the procedural rules for the Tribunal.

WAY FORWARD

43. The Administration and the Judiciary are preparing the Amendment Bill and plan to introduce it into LegCo in the second half of the 2013-14 legislative year.

44. Members are invited to note the proposed legislative amendments to the CO outlined in this paper.

Commerce and Economic Development Bureau
Judiciary Administration
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