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Panel on Economic Development
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**Background brief on the proposed legislative amendments to
the Competition Ordinance relating to the Competition Tribunal**

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 on the Tribunal.

Background

The Competition Ordinance

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

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).

Ordinance) as well as the institutional arrangements and penalty provisions for their enforcement.

3. 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.

The Competition Tribunal

4. The Tribunal is 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, on follow-on private actions, on alleged contravention of a conduct rule as a defence raised in proceedings before the Court of First Instance (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 (CE), 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.

Phased 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 will enable the public and the business sector to familiarize themselves with the new legal requirements during the transitional period and make necessary adjustments.

6. LegCo passed in January 2013 the Competition Ordinance (Commencement) Notice 2012. 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.

7. 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. The Commission will also carry out consultation as required under the Ordinance and conduct publicity programmes to promote public understanding of the Ordinance. Under 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.

8. For the implementation of the Ordinance, the CE appointed the Chairperson and members of the Commission in April 2013, while the Judiciary appointed the President and Deputy President of the Tribunal in July 2013, to take charge of the enforcement of the legislation.

Members' views and concerns on the Competition Tribunal

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

Role and functions of Tribunal

10. 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 who 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

11. 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).

12. 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

13. 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

14. 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

15. The Administration will brief the Panel at the meeting on 16 December 2013 regarding on the proposed legislative amendments to the Ordinance relating to the Tribunal.

References

16. 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

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>

Background brief on the proposed creation of two judicial posts for the establishment of the Competition Tribunal
<http://www.legco.gov.hk/yr12-13/english/panels/e/dev/papers/e/dev1211cb1-260-7-e.pdf>

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