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Subcommittee to Study the Proposed Subsidiary Legislation on the Procedures to be Adopted by the Competition Tribunal

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper gives an account of the deliberations of the Panel on Administration of Justice and Legal Services ("the AJLS Panel") on the proposed subsidiary legislation on the procedures to be adopted by the Competition Tribunal ("the Tribunal") ("the Draft Rules").

Background

2. The Competition Ordinance (Cap. 619) ("the CO"), which was enacted in June 2012 and amended in November 2014, provides a legal framework for tackling anti-competitive conduct across different sectors. The CO prohibits anti-competitive agreements and abuse of market power the object or effect of which is to prevent, restrict or distort competition in Hong Kong. The CO also has a merger control regime which applies only to the telecommunications sector.

3. Since the enactment of the CO, the Administration and the Judiciary have been working on its phased implementation. One of the key tasks for the Judiciary is to set up the Tribunal, which is a superior court of record established under the CO having primary jurisdiction to hear and adjudicate on enforcement cases brought by the Competition Commission ("the Commission"), follow-on private actions, alleged contravention of a conduct rule as a defence raised in proceedings before the Court of First Instance ("the CFI"), as well as reviews of certain determinations of the Commission/Communications Authority. Provisions relating to the Tribunal commenced on 1 August 2013. The President and Deputy President of the Tribunal were also appointed.

4. The Tribunal has a broad-range of sanctions available to levy against a contravening party. These include imposing a pecuniary penalty, director disqualification orders, award of damages in follow-on actions and various other orders set out in Schedule 3 to the CO. The Tribunal may award a pecuniary penalty up to 10% of the turnover of the undertakings involved for up to three years in which the contravention occurred.

The Draft Rules

5. At the meeting of the AJLS Panel held on 16 February 2015, Members' views were sought on the following Draft Rules to be adopted by the Tribunal:

- (a) the Competition Tribunal Rules ("CTR") which set out the procedural rules for the Tribunal to cater for different types of proceedings that the Tribunal may need to deal with;
- (b) proposed amendments to the Rules of the High Court ("RHC") (Cap. 4 sub. leg. A) which provide for (i) the procedures for proceedings transferred between the Tribunal and the CFI; and (ii) the procedures for applications to the Court of Appeal for leave to appeal from the interlocutory decisions of the Tribunal;
- (c) the Competition Tribunal Fees Rules which set out the fees to be paid by users of the Tribunal for various purposes; and
- (d) the Competition Tribunal Suitors' Funds Rules which govern the administration of suitors' funds for the Tribunal in a way similar to that of the High Court, including how suitors' funds are lodged in and paid out of the Tribunal, investment of the funds, provision of interest for individual suitors' accounts and preparation of annual audited financial statements for the funds.

Deliberations of the AJLS Panel

6. The Judiciary Administration ("JA") consulted the views of the AJLS Panel at its meeting held on 16 February 2015 on the Draft Rules.

7. Members noted that the CTR, which were procedural rules for the Tribunal, were largely modelled on the practice and procedure of the CFI of the HC provided under the RHC. Responding to members' enquiry about the key differences in the procedures to be adopted by the Tribunal and those adopted

by the CFI, JA advised as follows:

- (a) pursuant to section 144(3) of the CO, the Tribunal was to conduct its proceedings with as much informality as was consistent with attaining justice;
- (b) section 147 provided that other than in certain proceedings, the Tribunal was not bound by the rules of evidence and might receive and take into account any relevant evidence or information;
- (c) as confidential commercial and sensitive information (including that relating to leniency agreements) might be involved in Tribunal cases, dedicated rules were proposed to deal with compulsory disclosure of documents by one party to another (rule 24 of the CTR); and tackle information which a party sought to disclose to the Tribunal in full but not to some or all of the other parties or the public (rule 37 of the CTR); and
- (d) a more specific and elaborate procedure was proposed to facilitate early intervention by interested parties in the Tribunal. For example, under rule 19 of the CTR, the Registrar must publish a notice after the filing of an application under the CO; the granting of leave to apply for a review of a reviewable determination of the Commission; the receipt of a follow-on claim brought under the CO; the transfer of any proceedings from the CFI to the Tribunal; or in any other proceedings, the Tribunal had given a direction to do so. Further, under rule 20 of the CTR, a person who had a sufficient interest in the matters to which the proceedings of the Tribunal related might apply for leave to intervene in the proceedings.

8. On the question as to whether the Tribunal would have concurrent jurisdiction with the CFI on follow-on claims, JA replied that the CO provided that the Tribunal had a primary jurisdiction on competition matters. However, the Tribunal might transfer certain proceedings to the CFI under suitable circumstances, e.g. if the Tribunal considered that it was in the interests of justice to do so. The criteria and mechanism for the transfer of proceedings from the CFI to the Tribunal and vice versa were provided under sections 113 to 116 of the CO. As regards how the legal costs of the Tribunal cases would be determined and borne by suitors, JA pointed out that the determination of legal costs and the bearing of legal costs by the losing party were not specified in the CTR. However, rule 4 of the CTR provided that where there was no provision in the CO and the CTR for a matter, the RHC applied to all proceedings before the Tribunal, so far as they might be applicable to that

matter.

9. As to whether the taking of evidence from witnesses outside Hong Kong by way of a live television link for the purposes of proceedings in Hong Kong would be permitted by the Tribunal, JA replied in the positive although witnesses would be encouraged to fly to Hong Kong to appear before the proceedings.

10. Responding to members' concern that not all litigants to the proceedings of the Tribunal could afford the legal costs which could be high, JA advised that rule 30 of the CTR provided, amongst others, that (a) parties might choose to act in person; (b) with leave granted by the Tribunal, a company might be represented by its director; (c) the Tribunal be given a reserve power to allow any other person to appear on a party's behalf. One of the objectives of rule 30 was to help reduce the legal costs of the parties under suitable circumstances, particularly those who brought follow-on actions under Part 5 of the CTR. To further help reduce legal costs to the litigants, similar to the CFI, it was also proposed in the CTR that the Tribunal would be empowered to allow consolidation of cases if, for instance, the cases arose from a common set of facts/laws, the reliefs sought were similar, or the reliefs were sought against the same defendant/respondent.

11. On the question as to what acts would constitute contravention of the First Conduct Rule and the Second Conduct Rule under the CO, the Administration explained that the First Conduct Rule prohibited agreements, concerted practices and decisions of trade associations if the object or effect was to prevent, restrict or distort competition in Hong Kong. The term "agreement" was widely defined and potentially included non binding "gentlemen's agreements". Conduct that might infringe the First Conduct Rule included collusive behaviour amongst competitors (i.e. a horizontal agreement) to, for example, fix prices, allocate sales, territories, customers or markets for the production or supply of goods or services which had the object or effect of preventing, distorting or restriction competition in Hong Kong. On the other hand, retail price maintenance was an example of a vertical agreement setting a fixed or minimum resale price to be observed when a product was to be marketed/resold. Retail price maintenance was generally regarded as having the object of harming competition but in some cases might satisfy the terms of the general exclusion for agreements enhancing overall economic efficiency in section 1 of Schedule 1 to the CO.

12. As regards the Second Conduct Rule, the Administration explained that it prohibited undertakings that had a substantial degree of market power in a market from abusing that power by engaging in conduct that had as its object or effect the prevention, restriction or distortion of competition in Hong Kong. An example of such misconduct was predatory pricing which involved an

undertaking with a substantial degree of market power in a market pricing the supply of its goods below cost so as to force its competitors out of the market or otherwise discipline them and/or prevent potential competitors from entering the market. Whilst losses might be incurred in the beginning, the expectation was that prices would be raised in the longer term. The Administration pointed out that the Second Conduct Rule was concerned with unilateral conduct not collusion. An undertaking with a substantial degree of market power might be able to engage in predatory pricing without any element of collusion (although the two might co-exist). The fact that an undertaking took advantage of its market power to set prices did not necessarily mean it was engaging in abusive conduct in contravention of the Second Conduct Rule.

13. On the question as to how small businesses and members of the general public could commence legal actions against anti-competitive conduct by big businesses, the Administration advised that they must approach the Commission which was tasked to, amongst others, investigate conduct that might contravene the competition rules of the CO and enforce the provisions of the CO.

14. Given the volume of the Draft Rules, the AJLS Panel agreed to the JA's request for the appointment of a subcommittee under the House Committee ("HC") to study the Draft Rules in order to allow sufficient time for Members to scrutinize them before they were gazetted and laid on the table of the Legislative Council under the negative vetting procedures. At its meeting held on 27 February 2015, HC agreed to form a subcommittee to study the Draft Rules.

15. To facilitate Members' consideration of the Draft Rules, the JA and the Administration were requested to provide the following additional information for the consideration of the Subcommittee:

- (a) relationship between the contravention of the First Conduct Rule under section 6 of the CO and the Second Conduct Rule under section 21 of the CO;
- (b) comparison of the key procedures adopted by the Small Claims Tribunal and the Lands Tribunal and to be adopted by the Tribunal;
- (c) comparison of the key differences in the procedures to be adopted by the Tribunal and those adopted by the CFI;
- (d) rules and practice applicable to the competition-related courts in other common law jurisdictions; and

- (e) procedures for members of the public to seek remedies due to contravention of the requirements in the CO.

Advice sought

16. Members are invited to note the above deliberations of the AJLS Panel.

Council Business Division 4
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