

Islands District Council
Paper IDC 14/2011

COMPETITION BILL

INTRODUCTION

At the meeting of the Executive Council on 29 June 2010, the Council ADVISED and the Chief Executive ORDERED that the Competition Bill (the Bill), should be introduced into the Legislative Council (LegCo).

JUSTIFICATIONS

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. The existing approach of discouraging anti-competitive conduct through voluntary compliance by the business community with administrative guidelines has not been very effective in addressing continued public concerns about possible cases of anti-competitive conduct in Hong Kong. Due to the difficulty in mounting effective investigations into the complaints made to the Competition Policy Advisory Group (COMPAG)⁽¹⁾, the Government has been unable to determine whether certain anti-competitive conduct has taken place. Moreover, we could not impose appropriate sanctions for such conduct and deterrence of its recurrence, nor is there any mechanism for parties aggrieved by anti-competitive conduct to seek damages when a complaint is substantiated.

⁽¹⁾ The COMPAG chaired by the Financial Secretary was established in 1997 for examining, reviewing and advising on competition-related issues. In May 1998, the COMPAG promulgated the Statement on Competition Policy, which sets out the Government's approach to competition regulation and lays the basis for the existing regulatory regime. In September 2003, the COMPAG published guidelines aimed at advising businesses as to the types of practice that might constitute anti-competitive conduct.

KEY ELEMENTS OF THE BILL

3. The Bill has the following key elements.

(A) Scope

4. The objective of the Bill 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. 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. Each conduct of an entity has to be considered on its own merits, to decide whether it amounts to an ‘economic activity’ and thus falls within the scope of the Bill. As activities of the public sector are almost invariably non-economic in nature falling outside the scope of the Bill, the Bill will not bind the Government. Certain parts of the Bill (i.e. Part 2 (Conduct Rules), Part 4 (Enforcement powers of the Commission), Part 6 (Enforcement before Tribunal) and Schedule 7 (Mergers) (hereafter referred to as ‘non-applicable parts’ of the Bill’) will not apply to statutory bodies or their specified activities. For details, please refer to paragraph 14 below.

(B) General prohibitions of the new law

5. The Bill provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule, the second conduct rule and the merger rule which are collectively known as the ‘competition rules’ in the Bill). The first conduct rule covers agreements, decisions and concerted practices. The second conduct rule covers the abuse of a substantial degree of market power in a market. The Bill regulates business conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong, including those conduct engaged in places outside Hong Kong. In other words, the conduct itself, or ‘*per se*’, would not be a contravention of the Bill, without such object or effect. To enhance the certainty and clarity of the law, the Bill will include a non-exhaustive list of examples of

anti-competitive conduct to supplement the conduct rules, and will make it a statutory requirement for the Competition Commission (see paragraph 7 below) to draw up regulatory guidelines on the interpretation and implementation of the conduct rules in consultation with such persons as it considers appropriate.

6. In addition to the first and second conduct rules in paragraph 5 above, there would be a prohibition against mergers or acquisitions (described as the merger rule) applying only to carrier licenses granted by the Telecommunications Authority (TA) that have, or are likely to have the effect of substantially lessening competition in Hong Kong. Whilst the provision will maintain the existing control over mergers and acquisitions available under the Telecommunications Ordinance (TO), the merger control will be modernized in light of development of merger rule in other competition jurisdiction and adjusted to cater for possible extension to a cross-sector regulation after a review of the effect of the Bill to be conducted in a few years.

(C) Institutional framework

7. The Bill provides for a judicial enforcement model. First, an independent statutory Competition Commission (the Commission) will be established to investigate and bring proceedings before the Competition Tribunal (see paragraph 8 below) in respect of anti-competitive conduct either on receipt of complaints, on its own initiative, or on referral from the Government or a court. Details of the Commission's investigatory powers are given in paragraphs 10 and 11 below. Other functions of the Commission include promoting public understanding of the competition law, advising the Government on competition matters and deciding upon the application for exemptions from the application of the competition law, etc. The Commission, led by a Chairperson, will consist of not less than five members (including the Chairperson) appointed by the Chief Executive (CE). The executive arm of the Commission will be headed by a Chief Executive Officer appointed by the Commission with the approval of the CE. The Commission will be subject to regulation under the Prevention of Bribery Ordinance, the Ombudsman Ordinance and value-for-money audit by the Director of Audit. The Bill also contains provisions on the governance

of the Commission, including its meeting procedures and financial management.

8. Further, a Competition Tribunal (the Tribunal) will be established 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⁽²⁾. The Tribunal will be empowered to apply a full range of remedies (details given in paragraph 12 below). Decisions of the Tribunal are, subject to leave of the Court of Appeal (CA), reviewable in appeals to the CA. Every judge of the Court of First Instance (CFI) will, by virtue of his or her appointment as CFI Judge, be a member of the Tribunal. The CE will, on the recommendations of the Judicial Officers Recommendation Commission, appoint one of the members of the Tribunal to be the President of the Tribunal. The President may appoint one or more members of the Tribunal to hear and determine an application made to the Tribunal. 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 the CFI in the exercise of its civil jurisdiction.

9. To reconcile the new law with the existing competition regulatory framework in the broadcasting and telecommunications sectors, the Bill provides that the Broadcasting Authority (BA) and the TA will have concurrent jurisdiction with the Commission in respect of the investigation and bringing of enforcement proceedings of competition cases in the broadcasting and telecommunications sectors, while their

⁽²⁾ Determinations of the Commission which are reviewable by the Tribunal are decisions made by the Commission in respect of :

- (i) exemptions or exclusions for agreement(s), conduct(s) or merger(s);
- (ii) rescission of a decision regarding exemptions or exclusions for agreement(s), conduct(s) or merger(s);
- (iii) variation of a commitment made by undertaking(s) to take or refrain from taking certain action to address the Commission's concerns about a possible contravention of a competition rule;
- (iv) release of undertaking(s) from a commitment to take or refrain from taking certain action to address the Commission's concerns about a possible contravention of a competition rule; and
- (v) termination of a leniency agreement.

existing adjudicative function will be transferred to the Tribunal. To ensure co-ordination and clarity in the exercise of the concurrent jurisdiction, the Bill provides that the Commission, the BA and the TA will enter into a Memorandum of Understanding (MOU) which will be published.

(D) Enforcement by the Commission

10. The Commission will be vested with investigatory powers including the power to require production of documents and information and attendance before the Commission to give evidence, power to enter and search premises as well as power to seize and retain evidence and property under a court warrant, etc. The Commission must have reasonable cause to suspect that a contravention of any of the competition rules has taken place, is taking place or is about to take place before exercising its investigative powers. Non-compliance with the Commission's investigative power in the absence of reasonable excuse will be subject to criminal penalties.

11. The Bill will provide for a two-tier commitment mechanism under which the Commission will be empowered to –

- (i) accept commitments from a person to take or refrain from taking certain action to address the Commission's concerns about a possible contravention of a competition rule; and
- (ii) after its investigation and before bringing proceedings to the Tribunal, issue an infringement notice bearing a sum of payment of up to HK\$10 million to a person allegedly contravening or having contravened the conduct rule. The notice may also require the person to take or refrain from taking certain action to address the Commission's concerns about a possible contravention of a conduct rule,

in exchange for the Commission's commitment to cease its investigation and / or not to institute or continue with proceedings against the person. Infringement notice and the sum of payment imposed by the Commission are consensual. The Bill will also empower the Commission to enter

into leniency agreements with persons who have allegedly contravened the conduct rules in exchange for their cooperation in the Commission's investigation and bringing enforcement proceedings before the Tribunal in respect of other parties involved in the same contravention. The Commission will not institute or continue with proceedings for a pecuniary penalty in respect of a contravention of a conduct rule against those with which it has reached leniency agreements.

(E) Remedies

12. 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 turnover (including global turnover) of the undertaking(s) in breach of the competition rule for the year in which the contravention occurs; 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.

(F) Allowing rights of private action

13. In addition to public enforcement through the Commission, the Bill also provides for private actions to be brought by persons who have suffered loss or damage as a result of a contravention of a conduct rule. Such private actions could either follow on from a determination of the Tribunal, the CA or the Court of Final Appeal that the conduct is a contravention of a conduct rule, or could be 'stand-alone' actions seeking a judgment on particular conduct and remedies. The CFI will be empowered to make determinations on alleged contravention of the conduct rules in cases involving composite claims made under the Bill and those claims which are not made under the Bill.

(G) Exemptions and exclusions

Non-application of the Bill to statutory bodies

14. It is our policy decision not to apply the competition rules of the Bill to statutory bodies as the activities of the public sector are almost invariably non-economic in nature falling outside the scope of the Bill. Specifically, the Bill will provide that the non-applicable parts of the Bill will not apply to them or their activities except those statutory bodies or their activities specified in regulations to be made by the Chief Executive in Council (CE in Council). These regulations will be made by the CE in Council only after the commencement of the relevant empowering provisions in the Bill. The following criteria will be provided in the Bill to serve as the basis for determining which statutory body or its specified activities should be caught by the Bill –

- (a) the statutory body is engaging in an economic activity in direct competition with another undertaking;
- (b) the economic activity of the statutory body is affecting the economic efficiency of a specific market;
- (c) the economic activity of the statutory body is not directly related to the provision of an essential public service or the implementation of public policy; and
- (d) there are no other exceptional and compelling reasons of public policy against making such a regulation.

Exclusion and exemption mechanism under the Bill

15. Following practices in other overseas competition jurisdiction, the Bill will provide that the first conduct rule and/ or the second conduct rule will not apply to any agreement that enhances or would be likely to enhance overall economic efficiency, or any agreement to the extent that it is made to comply with a legal requirement, or any undertaking entrusted by the Government with the operation of services

of general economic interest. Undertakings can assess their agreements or conduct in accordance with the general exclusions from conduct rules provided in Schedule 1 of the Bill. The Commission will be empowered to decide, in response to an application, as to whether or not an agreement or conduct is excluded or exempt from the conduct rules in accordance with these criteria. If the Commission decides that the agreement or conduct is excluded or exempt from the conduct rules, such agreement or conduct will be immune from both public enforcement actions and private actions.

16. Further, the Bill will empower the CE in Council to make orders to exempt agreements or conducts from the conduct rules if the CE in Council is satisfied that there are exceptional and compelling reasons of public policy that the conduct rules ought not to apply. The Bill will also empower the CE in Council to make orders to exempt agreements or conducts from the application of the conduct rules if the agreements or conducts are required to avoid a conflict with international obligations.

17. As for the exclusion and exemption mechanism for mergers of licensees whose licenses are granted by the TA, the Bill will provide that the merger rule will not apply to any merger that enhances or would be likely to enhance overall economic efficiency. The CE in Council may also make orders to exempt a merger from the merger rule on public policy ground.

(H) Immunities for public officers and Commission and other issues

18. The Bill will provide protection from civil liabilities to public officers for anything done or omitted to be done by the public officers in good faith in the performance of a function or purported performance of a function under the Bill. Similar immunities will be provided for Commission members and employees. The Bill will also require the Commission (including the TA and the BA) to follow strict conditions on the disclosure of confidential information provided to it by complainants or persons under investigation. The Bill will also protect employees from abuse and punishment by their employers for assisting the Commission in the performance of its functions or giving evidence.

THE BILL

19. Main provisions of the Bill are set out below –
- (a) **Part 1** – sets out the interpretation of terms used in the Bill, application of the Ordinance to statutory bodies, to specified persons and to persons engaged in specified activities; and provides that the Secretary for Commerce and Economic Development may appoint a commencement date for the Bill;
 - (b) **Part 2** – sets out the conduct rules applicable to agreements, decisions and concerted practices, and the abuse of a substantial degree of market power in a market and the territorial applications of the conduct rules, as well as establishes a framework for exemptions and exclusions from the application of the conduct rules;
 - (c) **Part 3** – sets out the powers and procedures of the Commission in relation to the investigation of alleged contravention of the competition rules and creates offences in relation to investigations;
 - (d) **Part 4** – authorizes the Commission to accept, vary, substitute and release Commitments with persons and to issue infringement notice to persons in exchange for the Commission ceasing its investigation and / or not to institute or continue with proceedings against the persons; and provides a leniency procedure with regard to contraventions of the conduct rules;
 - (e) **Part 5** – sets out the conditions for review of the determinations of the Commission by the Tribunal and the operation of the review mechanism;
 - (f) **Part 6** – sets out the remedies which the Tribunal can grant in respect of breach of the competition rules;
 - (g) **Part 7** – provides for the private enforcement of the conduct rules and sets out the related procedures;

- (h) **Part 8** – requires the Commission to establish and maintain safeguards to prevent the unauthorized disclosure of confidential information in its possession; imposes a duty on ‘specified persons’ not to unlawfully disclose confidential information; and sets out how confidential information may be lawfully disclosed;
- (i) **Part 9** – establishes the Commission and sets out its functions and powers and its status in relation to the Government; and provides personal immunity from civil liability for acts done or omitted to be done in good faith by members of the Commission and others in the performance of functions under the Bill;
- (j) **Part 10** – establishes the Tribunal as a superior court of record, and sets out its jurisdiction and powers; makes provisions for the procedures of the Tribunal and appeal against decisions of the Tribunal; provides for the appointment of the President and Deputy President of the Tribunal and the making available of a Registrar and other staff to the Tribunal; and authorizes the Chief Judge of the High Court to make rules of the Tribunal;
- (k) **Part 11** – provides that the TA and BA may exercise the powers of the Commission with respect to telecommunications licensees and broadcasting licensees respectively, and requires the TA, BA and the Commission to sign an MOU to coordinate the performance of their concurrent functions;
- (l) **Part 12** – provides for miscellaneous provisions; empowers the Commission to charge fees and CE to prescribe such fees; provides personal immunity from civil liability for acts done or omitted to be done in good faith by public officers in the performance of functions under the Bill; sets out the details on service of documents on the Commission and others for the purpose of the Ordinance; prohibits provision of certain indemnities to officers, agents or employees; protects employees from abuse and punishment by their employers for

assisting the Commission in the performance of its functions or giving evidence; provides for offences for obstruction of performance of functions under the Bill; and provides for offence committed by a body corporate or partner in a partnership;

- (m) **Schedule 1** – provides the general exclusions from the conduct rules;
- (n) **Schedule 2** – sets out the procedural requirements relating to acceptance, variation, withdrawal and release of commitments;
- (o) **Schedule 3** – sets out the orders that may be made by the Tribunal in relation to contraventions of the competition rule;
- (p) **Schedule 4** – sets out the provisions that may be contained in orders made by the Tribunal in relation to anticipated mergers and mergers;
- (q) **Schedule 5** – contains constitutional, administrative and financial provisions relating to the Commission;
- (r) **Schedule 6** – lists matters that may be included in the MOU to be signed by the Commission, TA and BA in relation to the exercise of their concurrent functions;
- (s) **Schedule 7** – sets out the merger rule which is confined to carrier licences under the TO; details on investigation into a merger; and provides exclusions and exemptions from the merger rule; and provides for decisions to be made by the Commission in relation to mergers and anticipated mergers;
- (t) **Schedule 8** – makes consequential and related amendments to other enactments; and
- (u) **Schedule 9** – contains transitional and saving provisions.

LEGISLATIVE TIMETABLE

20. The legislative timetable will be -

Publication in the Gazette	2 July 2010
First Reading and commencement of Second Reading Debate	14 July 2010
Resumption of Second Reading Debate, Committee Stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

21. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The proposal has economic, financial and civil service implications as set out in Annex. The proposal has no productivity, environmental or sustainability implications.

PUBLIC CONSULTATION

(A) Public consultation

22. In 2006, we conducted a consultation exercise to gauge public views on the introduction of a cross-sector competition law to be enforced by an independent Competition Commission. Feedback from the public indicated a high level of support but the business sector had some concerns on the effect that a new competition law might have on business, especially the small and medium sized enterprises (SMEs). In 2008, we launched another public consultation on the proposed key elements that will form the basis of the competition law, including: the regulatory structure; conduct to be prohibited; penalties that would apply for infringing the law; the right to take private legal action; and criteria and mechanisms for granting exemptions and exclusions from the

application of the competition law. Over 170 submissions were received. An overwhelming majority expressed general support for the law and proposed detailed proposals.

(B) LegCo Panel on Economic Development

23. We reported the outcome of the public consultation to the LegCo Panel on Economic Development (ED Panel) at its meeting on 26 March 2007 and 16 December 2008 respectively. Members in general considered a cross-sector competition law an appropriate way forward for implementing our competition policy and sustaining a competitive business environment. Some Members preferred heavier penalties such as criminal sanctions but others favoured our proposal and considered a civil regime appropriate. Moreover, feedback received in the consultation exercises generally supported a civil regime. Some Members suggested that there should be greater clarity and certainty in the prohibition provisions of the Bill. We briefed the ED Panel again on 30 March 2009 on our proposal to change the administrative model of the institutional framework of the Bill to a judicial enforcement model in light of comments from the public and some court judgments, as well as the revised legislative timetable of the Bill (from 2008-2009 to 2009-2010 legislative session). Members indicated understanding and support for the change and urged the Administration to introduce the Bill into the LegCo as soon as possible. A briefing on the core elements of the Bill and latest progress of the drafting was made to ED Panel at its meeting on 28 June 2010.

PUBLICITY

24. A LegCo Brief was issued on 2 July 2010 when the Bill was published in the Gazette. Spokesman was made available to handle the media and public enquiries.

BACKGROUND

25. The introduction of a new cross-sector competition law was recommended by the Competition Policy Review Committee (CPRC) in its report published in June 2006. The CPRC noted that whilst Hong Kong had a free and open economy with few market barriers, the small size of the local market had resulted in some sectors being dominated by a small number of big companies and concerns were frequently expressed about possible anti-competitive conduct. The CPRC considered that, to enable the authorities to investigate such cases more effectively and to impose sanctions, legislative backing is necessary. We conducted two public consultations in 2006 and 2008 to gauge public views on the competition law and wide community support was received. CE has also made a commitment in his 2009 Policy Address to introduce the Competition Bill within the 2009-2010 legislative session.

**Commerce and Economic Development Bureau
February 2011**

IMPLICATIONS OF THE PROPOSAL

(a) Financial and Civil Service Implications

The setting up of the Competition Commission (Commission) and the Competition Tribunal (Tribunal) would require additional resources. Having made reference to a number of local and overseas regulatory authorities and consulted the Judiciary, we estimate that the Commission would need to be supported by a full executive team including staff with professional legal, accounting and economics backgrounds.

2. The Tribunal is proposed to be presided by a Judge of the Court of First Instance (CFI) and every CFI judge will, by virtue of his or her appointment as CFI Judge, be a member of the Tribunal. To start off the Tribunal, at least one CFI judge, one additional Deputy Registrar of the High Court and some support staff to the Judge and registry staff would need to be added to the establishment. The Judiciary would also require additional resources to cope with the establishment needs of the Tribunal.

3. The additional resources required will be sought in accordance with established resources allocation procedures.

4. In respect of the exercise of concurrent jurisdiction by the Telecommunications Authority (TA) and the Broadcasting Authority (BA) in the telecommunications and broadcasting sectors respectively, no additional resources are expected to be incurred by the TA and the BA as at present they are already assuming a regulatory role in enforcing the competition-related provisions under the Telecommunications Ordinance and the Broadcasting Ordinance.

(b) Sustainability Implications

5. As far as sustainability implications are concerned, the guiding principle of achieving a competitive and prosperous market-based economy which provides the resources to meet the needs and aspirations of the population will be observed.

(c) Economic Implications

6. By providing a level-playing field for all, the Competition Bill would help contribute to the free play of market forces and enhance competition. It would also strengthen the implementation of our stated policy objective for competition, which is to enhance economic efficiency and free flow of trade, thereby reinforcing business confidence and benefiting consumer welfare. The economic benefits would likely be higher output, lower prices and more choices of products. Experience from other jurisdictions suggests that small businesses would not face a significant increase in compliance costs, given that they would unlikely be targeted by competition regulation. Large businesses might look to engage additional resources to help ensure compliance, especially at the initial stage. Multi-nationals, which already have to comply with competition regulatory regime elsewhere, should be able to adapt to the new legal regime. For the economy as a whole, any additional cost to businesses should be more than offset by the longer-term benefits of a more effective and credible competition regime.