

LEGISLATIVE COUNCIL BRIEF

Competition Ordinance (Cap. 619)

Competition (Fees) Regulation

INTRODUCTION

At the meeting of the Executive Council on 14 July 2015, the Council ADVISED and the Chief Executive ORDERED that the Competition (Fees) Regulation (“the Regulation”) at **Annex A** should be made under section 164 of the Competition Ordinance (“CO”) (Cap. 619).

JUSTIFICATIONS

Legal framework

2. Section 164 of the CO¹ provides that the Commission may charge a fee for the making of an application to the Commission under the CO and the provision of any service. The CE may make regulations prescribing the amount of the fees chargeable under that section. Section 159 of the CO² provides that the CA may perform the functions of

¹ Section 164 of the CO provides that –

“(1) The Commission may charge a fee for—

(a) the making of an application to the Commission under this Ordinance; and
(b) the provision of any service.

(2) The Chief Executive may make regulations prescribing the amount of the fees chargeable under this section.

(3) The amount of any fee that may be prescribed in a regulation made under subsection (2) is not limited by reference to the amount of administrative or other costs incurred or likely to be incurred in relation to the application or service to which the fee relates.

(4) A regulation made under this section may provide for—

(a) the amount of any fee to be charged by reference to a scale set out in the regulation;
(b) the payment of different fees by different persons or different classes or descriptions of person;
(c) fees that are to be paid annually or at other intervals; and
(d) the reduction, waiver or refund, in whole or in part, of any fee, either upon the happening of a certain event or in the discretion of the Commission.

(5) The Commission may recover any fee payable under this section as a civil debt due to the Commission.”

² Section 159 of the CO provides that –

“(1) The Communications Authority may perform the functions of the Commission under this

the Commission under the CO in so far as they relate to the conduct of undertakings that are licensees under the Telecommunications Ordinance (“TO”) (Cap. 106) or the Broadcasting Ordinance (“BO”) (Cap. 562), or persons whose activities require them to be licensed under the TO or BO, or persons exempted from the TO. Moreover, section 160 of the CO³ provides for the transfer of competition matter between competition authorities (defined in section 2 of the CO as the Commission and the CA).

Applications for which fees would be charged

3. The Regulation seeks to make provision for the Commission and the CA to charge a fee for each of the following –

- (a) an application for a decision as to whether an agreement or conduct is excluded or exempt from the first or second conduct rule or Part 2 of the CO⁴ (“Conduct Rule Application”);
- (b) an application for a decision as to whether a merger is, or a proposed merger would if completed be, excluded from the application of the merger rule⁵ or the application of Schedule 7 of the CO (“Merger Application”); and

Ordinance, in so far as they relate to the conduct of undertakings that are—

- (a) licensees under the Telecommunications Ordinance (Cap 106) or the Broadcasting Ordinance (Cap 562);
- (b) persons who, although not such licensees, are persons whose activities require them to be licensed under the Telecommunications Ordinance (Cap 106) or the Broadcasting Ordinance (Cap 562); or
- (c) persons who have been exempted from the Telecommunications Ordinance (Cap 106) or from specified provisions of that Ordinance under section 39 of that Ordinance.

(2) So far as is necessary for the purpose of subsection (1), references in this Ordinance to the Commission are to be read as including the Communications Authority.”

³ Section 160 of the CO provides that –

- “(1) Where one competition authority is performing a function in relation to a competition matter and another competition authority also has jurisdiction to perform functions in relation to that matter, the 2 competition authorities may agree that the matter be transferred to and be dealt with by one of them.
- (2) Where more than one competition authority has jurisdiction to perform functions in relation to a competition matter, if one of them is performing or has performed a function in relation to that matter, then, unless there is an agreement of a kind mentioned in subsection (1), the other competition authority must not perform any function in relation to that matter.”

⁴ The first conduct rule (section 6 of the CO) prohibits agreements, concerted practices as well as decisions of an association of undertakings that have the object or effect to prevent, restrict or distort competition in Hong Kong. The second conduct rule (section 21 of the CO) prohibits an undertaking with a substantial degree of market power from abusing that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

⁵ The merger rule, which applies only to mergers involving undertakings directly or indirectly holding carrier licences issued under the TO (Cap. 106), prohibits against mergers or acquisitions that have, or are likely to have, the effect of substantially

- (c) an application for a decision as to whether to issue a block exemption order for a particular category of agreement (“Block Exemption Application”) to be exempt from the first conduct rule.

It is usually up to undertakings to assess for themselves whether their agreements, conducts or mergers are in compliance with the competition rules⁶. In case they are under investigation by the Commission or the CA, the Commission or the CA will automatically apply the exclusion or exemption criteria before arriving at decisions on whether certain agreements, conducts or mergers have contravened the competition rules. Therefore, undertakings do not have to make any applications in order to benefit from the exclusion and exemption provisions. An undertaking only has to consider making an application if it wants to seek greater legal certainty from the Commission and the CA as to whether its agreement, conduct or merger has met the exclusion or exemption criteria.

Levels of fees to be charged

4. In considering the levels of fees to be charged, the Commission has taken into account fees payable to other regulatory authorities in Hong Kong, fees charged by competition authorities in other jurisdictions and the Government’s “user pays” principle. The Commission has also consulted stakeholders. While the CO is new and no precedent is available to provide accurate cost estimates, the Commission has sought to make an estimate with their best endeavour, and took into account the CA’s experience in handling merger applications under the current TO. As a result, the Regulation sets maximum levels of fees that, while not expected to fully recover cost in every case, would generally reflect the complexity of the cases and resources needed to handle them. The fees set out in the following table will be the maximum level that could be charged for each type of application -

Type of application	Fee per application
Conduct Rule Application (except an application in respect of an exclusion on the	up to HKD 50,000

lessening competition in Hong Kong (section 3 of Schedule 7 to the CO).

⁶ Section 2(1) of the CO provides that “Competition rule” means the first conduct rule, second conduct rule or the merger rule.

ground of an agreement enhancing overall economic efficiency) ⁷	
Conduct Rule Application in respect of an exclusion on the ground of an agreement enhancing overall economic efficiency ⁸	up to HKD 100,000
Merger Application	up to HKD 500,000
Block Exemption Application ⁹	up to HKD 500,000

Cost-recovery elements

5. In view of the fact that the CA currently processes applications for consent to proposed changes in carrier licensees under the TO, which is similar to Merger Applications under the CO, the Regulation maintains CA's current charging mechanism, i.e. to charge the fee after the application has been processed and a decision has been made, by recovering as a civil debt from the applicant any cost or expenses incurred by the CA for the processing of the application, subject to the maximum fee levels proposed in paragraph 4 above. Given that the CA only has jurisdiction under the CO over undertakings regulated by the TO or BO or exempted from the TO as referred to under section 159(1) of the CO, it is appropriate to adopt the current charging method as it is well-understood by the relevant trades. There is little risk of dispute over cost or difficulty in recovering the fees as a civil debt due to the manageable number of licensees and their on-going relationship with the CA. Moreover, as the

⁷ Exclusions or exemptions from the conduct rules which are not provided on the ground of agreements enhancing overall economic efficiency include agreements or conducts which (a) are for compliance with legal requirements; (b) are for services of general economic interest; (c) result in a merger; (d) are of lesser significance; (e) fall under the exemption provided by a block exemption order; (f) fall under the exemption provided by an order made by the CE in Council on the ground of public policy or avoidance of conflict with international obligations; or (g) fall under the disapplication provided for statutory bodies or specified persons or specified persons engaged in specified activities.

⁸ The first conduct rule does not apply to any agreement which enhances overall economic efficiency, which means that that agreement contributes to improving production or distribution, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which does not impose restrictions that are not indispensable to the attainment of the above, and which does not make it possible to eliminate competition in respect of a substantial part of the goods or services in question.

⁹ A block exemption order may be made if the Commission is satisfied that a particular category of agreements are excluded from the application of the first conduct rule because they are agreements which enhance overall economic efficiency.

Office of the Communications Authority (“OFCA”), the executive arm of the CA and the actual collector of the fees, operates as a trading fund, it is necessary as a matter of policy to set fees chargeable under the CO based on the cost recovery principle, i.e. to recover full costs (including the cost of capital) on an overall basis, while maintaining a maximum fees cap to balance the need to give the trades some level of certainty.

6. As for the Commission, it will charge the maximum fees when the applications are received unless the Commission has agreed to exercise its discretion to reduce or waive the fees. The charging of fees up front would deter frivolous applications and reduce the risk of difficulty in recovering fees after the applications have been processed (especially in cases of adverse decisions). Nonetheless, if the cost involved in processing an application is lower than the maximum fee level, the Commission is prepared to exercise its discretion to refund part of the collected fee to reflect the cost.

Discretion to reduce, waive or refund fees

7. Section 164(4)(d) of the CO provides that in making regulations for fees, such regulations may provide for “the reduction, waiver or refund, in whole or in part, of any fee, either upon the happening of a certain event or in the discretion of the Commission.” The Commission requested that the discretion be provided to the Commission such that it could charge fees according to the arrangement set out in paragraph 6 above. The Commission will publish guidance outlining the criteria it would take into account in exercising this discretion. Relevant factors to be considered by the Commission would include the cost incurred in processing the applications, the appropriateness of waivers or reductions for certain undertakings if the fees are too burdensome, and the extent of general public interest or benefit arising from the application.

8. As for the CA, due to the cost recovery principle for OFCA, the Regulation does not confer such discretion to the CA to reduce, waive or refund any fees due to non-cost considerations.

Declining to consider applications

9. The Commission (or the CA) is only required to consider Conduct Rule Applications and Merger Applications if those applications pose novel or unresolved questions of wider importance or public interest, raise a question for which there is no clarification in existing case law or

decisions of the Commission (or the CA), and provide sufficient information for which a decision may be made (sections 9(2) and 24(2) of the CO and section 11(3) of Schedule 7 to the CO). Moreover, neither the Commission nor the CA is required to consider applications that concern hypothetical questions, agreements or conducts (sections 9(3) and 24(3) of the CO and section 11(4) of Schedule 7 to the CO). The Commission and the CA also may on application issue a block exemption order under section 15 of the CO. Should the Commission and the CA decline to consider an application, no fee will be charged.

Transfer of applications between the Commission and the CA

10. For applications involving undertakings regulated under the TO or the BO or exempted from the TO as referred to under section 159(1) of the CO, the Commission and the CA have concurrent jurisdictions and an application may be transferred from one to the other if they consider it appropriate to do so, in accordance with a Memorandum of Understanding to be entered into by the two authorities pursuant to section 161 of the CO. In case of such transfer, the authority to which the case has been transferred would charge the fees and the authority who initially received the application would not charge any fees.

THE REGULATION

11. This Regulation prescribes the amount of the fee payable for an application to the Commission or the CA under the CO referred to in paragraph 4 above at levels referred to in that paragraph —

- (a) for an application made to the Commission, a fixed fee is payable on the making of the application but the Commission has a discretion to reduce, waive or refund the fee (Section 3);
- (b) for an application made to the CA, the CA may recover the costs and expenses incurred by it in relation to the application, subject to a cap that is equal to the fixed fee applicable to the Commission (Section 5).
- (c) Sections 4 and 6 provide for the liability to pay the fee for an application if it is transferred from the Commission to the CA, and vice versa.

LEGISLATIVE TIMETABLE

12. The legislative timetable will be as follows –

Publication in the Gazette	17 July 2015
Tabling at the Legislative Council	14 October 2015

13. The Regulation will commence on the day on which all its empowering provisions, including sections 164, 159 and 160, come into operation.

IMPLICATIONS

14. The proposals are in conformity with the Basic Law, including the provisions concerning human rights. They do not affect the binding effect of the CO. They have no civil service, productivity, environmental, sustainability, economic, gender or family implications. On financial implication, the cost incurred in processing applications is expected to be recovered in general subject to maximum caps. The fee caps, having been proposed after best-endeavour costing exercises, are also expected to enable OFCA to comply with the general fee charging principle of trading funds to recover full costs (including the cost of capital) on an overall basis. The exercise of discretion by the Commission to reduce or waive fees is justified on ground of facilitating implementation of the CO but it may lead to less than cost-recovery fees in some cases. It is not possible to estimate the financial implication arising from applications whose processing may exceed the fee caps or the exercise of discretion for the time being as whether or how many such cases may arise is not predictable. In any event, the level of fees and the fee charging arrangements should be reviewed having regard to actual experience in processing the applications.

PUBLIC CONSULTATION

15. The Commission consulted stakeholders on the fee proposal set out in paragraphs 3 and 4 above in April 2015. The Commission approached the major chambers of commerce and SME associations

inviting their feedback. Four written submissions were thereafter received, two of the submissions suggested that the Commission should consider handling applications free of charge and one suggested lower fees, but all supported that if fees are chargeable, the Commission should be given discretion to reduce, waive or refund the fees. The Commission also consulted the Economic Development Panel of LegCo on 27 April 2015 on the proposal.

PUBLICITY

16. A press release will be issued when the Regulation is published in the Gazette. A spokesperson will be available to answer media and public enquiries.

ENQUIRIES

17. Enquiries relating to this brief can be addressed to Mr Sam Hui, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry), at 2810 2858.

Commerce and Economic Development Bureau
15 July 2015

Competition (Fees) Regulation

(Made by the Chief Executive under section 164 of the Competition Ordinance (Cap. 619) after consultation with the Executive Council)

Part 1

Preliminary

1. Commencement

This Regulation comes into operation on the day appointed for the commencement of Part 11 of the Competition Ordinance (Cap. 619).

2. Interpretation

(1) In this Regulation—

specified amount (指明款額), in relation to a specified application, means the amount specified in column 3 of the Schedule opposite that application;

specified application (指明申請) means an application described in column 2 of the Schedule.

(2) In this Regulation, a reference to the Commission does not include the Communications Authority.

Part 2

Fees Payable for Specified Applications

3. Fee payable for specified application to Commission

- (1) For every specified application made to the Commission, the applicant must pay a fee of the specified amount to the Commission when the applicant makes the application.
- (2) The Commission is to refund the fee paid for the specified application if the Commission declines to consider the application.
- (3) The Commission may, in its discretion, reduce, waive or refund, in whole or in part, a fee payable or paid to the Commission in a particular case.
- (4) This section has effect subject to section 4.

4. Paid fee refundable if specified application transferred to Communications Authority

If a specified application made to the Commission is transferred to the Communications Authority under section 160 of the Ordinance—

- (a) the Commission is to refund to the applicant any fee paid under section 3 for the application; and
- (b) a fee is payable for the application in accordance with section 5 as if the application were made to the Communications Authority.

5. Fee payable for specified application to Communications Authority

- (1) For every specified application made to the Communications Authority for it to perform a function falling within section

159 of the Ordinance, the applicant must pay a fee to the Communications Authority.

- (2) The amount of the fee—
 - (a) is equal to the costs and expenses incurred by the Communications Authority in making a decision on the specified application or in relation to the processing of the application; but
 - (b) must not exceed the specified amount.
- (3) On receipt of a notice given by the Communications Authority of the amount of the fee payable, the applicant must pay the fee to the Communications Authority by the time specified in the notice.
- (4) No fee is payable to the Communications Authority for a specified application if the Communications Authority declines to consider the application.
- (5) This section has effect subject to section 6.

6. Fee payable if specified application transferred to Commission

If a specified application made to the Communications Authority is transferred to the Commission under section 160 of the Ordinance—

- (a) the fee referred to in section 3 is payable to the Commission by the time specified in a notice given by the Commission to the applicant after the transfer; and
- (b) the fee referred to in section 5 is not payable for the application.

Schedule

[s. 2]

Specified Amount for Specified Application Made to Commission or Communications Authority

Column 1	Column 2	Column 3
Item	Description	Amount
1.	Application under section 9(1)(a) of the Ordinance for a decision as to whether an agreement is excluded from the application of the first conduct rule by or as a result of section 1 of Schedule 1 to the Ordinance.	\$100,000
2.	Application under section 9(1) of the Ordinance for a decision as to one of the following— <ul style="list-style-type: none"> (a) whether an agreement is excluded from the application of the first conduct rule by or as a result of Schedule 1 to the Ordinance (except section 1 of that Schedule); (b) whether an agreement is exempt from the application of the first conduct rule by virtue of a block exemption order issued under section 15 of the Ordinance; (c) whether an agreement is exempt from the application of the first conduct rule by virtue of an order 	\$50,000

Competition (Fees) Regulation

Schedule

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Column 1 Item	Column 2 Description	Column 3 Amount
	made under section 31 or 32 of the Ordinance;	
	(d) whether an agreement is excluded from the application of Part 2 of the Ordinance by virtue of section 3 or 4 of the Ordinance.	
3.	Application under section 15 of the Ordinance for the issue of a block exemption order in respect of a particular category of agreement.	\$500,000
4.	Application under section 24 of the Ordinance for a decision as to one of the following—	\$50,000
	(a) whether certain conduct is excluded from the application of the second conduct rule by or as a result of Schedule 1 to the Ordinance;	
	(b) whether certain conduct is exempt from the application of the second conduct rule by virtue of an order made under section 31 or 32 of the Ordinance;	
	(c) whether certain conduct is excluded from the application of Part 2 of the Ordinance by virtue of section 3 or 4 of the Ordinance.	

Competition (Fees) Regulation

Schedule

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Column 1 Item	Column 2 Description	Column 3 Amount
5.	Application under section 11 of Schedule 7 to the Ordinance for a decision as to one of the following—	\$500,000
	(a) whether a merger is, or a proposed merger would (if completed) be, excluded from the application of the merger rule by or as a result of section 8 of that Schedule;	
	(b) whether a merger is, or a proposed merger would (if completed) be, excluded from the application of that Schedule by virtue of section 3 or 4 of the Ordinance.	



Chief Executive

14 July 2015

Explanatory Note

This Regulation is made under section 164 of the Competition Ordinance (Cap. 619) (*Ordinance*) for prescribing the amount of the fees payable for applications to the Competition Commission (*Commission*) or the Communications Authority when the latter performs the functions of the Commission under section 159 of the Ordinance.

2. The applications are—
 - (a) an application for a decision—
 - (i) about the application of the first or second conduct rule or Part 2 of the Ordinance; or
 - (ii) about the application of the merger rule or Schedule 7 to the Ordinance; and
 - (b) an application for the issue of a block exemption order.