

## **LEGISLATIVE COUNCIL BRIEF**

### **COMPETITION BILL**

#### **INTRODUCTION**

A 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), at Annex A, 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)<sup>(1)</sup>, 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.

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<sup>(1)</sup> 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<sup>(2)</sup>. 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

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<sup>(2)</sup> 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 B. The proposal has no productivity, environmental or sustainability implications.

B

## **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 is issued on 2 July 2010 when the Bill is published in the Gazette. A spokesman will be 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.

## **ENQUIRIES**

26. Any enquiries on this brief may be addressed to Miss Wendy Chung, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry) at telephone number 2918 7470.

**Commerce, Industry and Tourism Branch**  
**Commerce and Economic Development Bureau**  
**2 July 2010**

# COMPETITION BILL

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# A BILL

To

Prohibit conduct that prevents, restricts or distorts competition in Hong Kong; to prohibit mergers that substantially lessen competition in Hong Kong; to establish a Competition Commission and a Competition Tribunal; and to provide for incidental and connected matters.

Enacted by the Legislative Council.

## PART 1

### PRELIMINARY

#### **1. Short title and commencement**

(1) This Ordinance may be cited as the Competition Ordinance.

(2) This Ordinance comes into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

#### **2. Interpretation**

In this Ordinance –

“agreement” (協議) includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings;

“Broadcasting Authority” (廣管局) means the Broadcasting Authority established by section 3 of the Broadcasting Authority Ordinance (Cap. 391);

“Commission” (競委會) means the Competition Commission established by section 128;

“company” (公司), in addition to the meaning given by section 2(1) of the Companies Ordinance (Cap. 32), includes a “non-Hong Kong company” within the meaning of that Ordinance and a company registered under Part IX of that Ordinance;

“competition matter” (競爭事宜) means any matter involving or having a connection with –

- (a) a contravention or alleged contravention of a competition rule; or
- (b) any decision relating to a competition rule, that has been made or is to be made under this Ordinance;

“competition regulator” (競爭規管者) means any one of the following –

- (a) the Commission;
- (b) the Telecommunications Authority; or
- (c) the Broadcasting Authority;

“competition rule” (競爭守則) means –

- (a) the first conduct rule;
- (b) the second conduct rule; or
- (c) the merger rule;

“conduct” (行為) means any conduct, whether by act or omission;

“conduct rule” (行為守則) means –

- (a) the first conduct rule; or
- (b) the second conduct rule;

“confidential information” (機密資料) has the meaning given by section 122;

“contract of employment” (僱傭合約) means any agreement, whether in writing or oral, express or implied, under which one person (an “employer”) agrees to employ another and that other agrees to serve the employer as an employee, and also includes a contract of apprenticeship;

- “director” (董事) includes any person occupying the position of director or involved in the management of a company, by whatever name called, and includes a shadow director;
- “document” (文件) includes information recorded in any form;
- “first conduct rule” (第一行為守則) has the meaning given by section 6;
- “functions” (職能), except in section 129, includes powers and duties;
- “funds of the Commission” (競委會資金) means the funds of the Commission, as specified in section 21 of Schedule 5;
- “Government” (特區政府) does not include a company that is wholly or partly owned by the Government;
- “information” (資料) includes information contained in a document;
- “infringement notice” (違章通知書) means an infringement notice issued under section 66(2);
- “investigation” (調查) means an investigation conducted under Part 3;
- “leniency agreement” (寬待協議) means a leniency agreement made under section 79;
- “member” (委員), in relation to the Commission, means a member of the Commission appointed under section 2 of Schedule 5;
- “merger” (合併) has the meaning given by section 3 of Schedule 7 read together with section 5 of that Schedule;
- “merger rule” (合併守則) has the meaning given by section 3 of Schedule 7;
- “person” (人), in addition to the meaning given by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), includes an undertaking;
- “President” (主任法官) means the President of the Tribunal appointed under section 135;
- “reviewable determination” (可覆核裁定) has the meaning given by section 81;
- “second conduct rule” (第二行為守則) has the meaning given by section 21;

“shadow director” (幕後董事), in relation to a company, means a person in accordance with whose directions or instruction the directors of the company are accustomed to act, but a person is not to be regarded as a shadow director by reason only that the directors act on advice given by that person in a professional capacity;

“statutory body” (法定團體) means a body of persons, corporate or unincorporate, established or constituted by or under an Ordinance or appointed under an Ordinance, but does not include –

- (a) a company;
- (b) a corporation of trustees incorporated under the Registered Trustees Incorporation Ordinance (Cap. 306);
- (c) a society registered under the Societies Ordinance (Cap. 151);
- (d) a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33); or
- (e) a trade union registered under the Trade Unions Ordinance (Cap. 332);

“Telecommunications Authority” (電管局局長) means the Telecommunications Authority appointed under section 5 of the Telecommunications Ordinance (Cap. 106);

“Tribunal” (審裁處) means the Competition Tribunal established by section 133;

“undertaking” (業務實體) means 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.

### 3. Application to statutory bodies

- (1) The following provisions do not apply to a statutory body –
  - (a) Part 2 (The conduct rules);
  - (b) Part 4 (Enforcement powers of Commission);

- (c) Part 6 (Enforcement before Tribunal); and
  - (d) Schedule 7 (Mergers).
- (2) Despite subsection (1), the provisions referred to in that subsection apply to –
- (a) a specified statutory body; and
  - (b) a statutory body, to the extent that it is engaged in a specified activity.
- (3) In this section –
- (a) “specified” (指明) means specified in a regulation made for the purpose of this section by the Chief Executive in Council under section 5; and
  - (b) a reference to a statutory body includes an employee or agent of the statutory body, acting in that capacity.

#### **4. Application to specified persons and persons engaged in specified activities**

- (1) The provisions referred to in section 3(1) do not apply to –
- (a) a specified person; or
  - (b) a person, to the extent that the person is engaged in a specified activity.
- (2) In this section –
- (a) “specified” (指明) means specified in a regulation made for the purpose of this section by the Chief Executive in Council under section 5; and
  - (b) a reference to a person includes an employee or agent of the person, acting in that capacity.

#### **5. Regulations**

- (1) The Chief Executive in Council may, by regulation –
- (a) apply the provisions referred to in section 3(1) to –
    - (i) any statutory body; or



- (ii) any statutory body, to the extent that it is engaged in an activity specified in the regulation; and
- (b) disapply the provisions referred to in section 3(1) to –
  - (i) any person; or
  - (ii) any person, to the extent that the person is engaged in an activity specified in the regulation.

(2) The Chief Executive in Council may only make a regulation under subsection (1)(a)(i) or (ii) with respect to a statutory body if he or she is satisfied that –

- (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.

(3) In subsection (1), a reference to a statutory body or a person includes an employee or agent of the statutory body or person, acting in that capacity.

## PART 2

### THE CONDUCT RULES

#### **Division 1 – Agreements etc. Preventing, Restricting or Distorting Competition**

##### **Subdivision 1 – First Conduct Rule**

#### **6. Prohibition of anti-competitive agreements, concerted practices and decisions**

- (1) An undertaking must not –
- (a) make or give effect to an agreement;
  - (b) engage in a concerted practice; or
  - (c) as a member of an association of undertakings, make or give effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

(2) Subsection (1) applies in particular to agreements, concerted practices and decisions that –

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment; or
- (c) share markets or sources of supply.

(3) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).

(4) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “first conduct rule”.

## **7. “Object” of agreement**

(1) If an agreement, concerted practice or decision has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.

(2) An undertaking may be taken to have made or given effect to an agreement or decision or to have engaged in a concerted practice that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.

## **8. Territorial application of first conduct rule**

The first conduct rule applies to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if –

- (a) the agreement or decision is made or given effect to outside Hong Kong;
- (b) the concerted practice is engaged in outside Hong Kong;
- (c) any party to the agreement or concerted practice is outside Hong Kong; or
- (d) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

### **Subdivision 2 – Decisions**

## **9. Application for decision**

(1) An undertaking that has made or given effect to, is giving effect to or is proposing to make or give effect to an agreement may apply to the Commission for a decision as to whether or not the agreement is –

- (a) excluded from the application of the first conduct rule by or as a result of Schedule 1;
- (b) exempt from the application of the first conduct rule by virtue of a block exemption order issued under section 15;

- (c) exempt from the application of the first conduct rule by virtue of an order of the Chief Executive in Council made under section 31 (Exemptions on public policy grounds) or section 32 (Exemption to avoid conflict with international obligations); or
- (d) excluded from the application of this Part by virtue of section 3 (Application to statutory bodies) or section 4 (Application to specified persons and persons engaged in specified activities).

(2) The Commission is only required to consider an application under this section if –

- (a) the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions under this Ordinance;
- (b) the application raises a question of an exclusion or exemption under this Ordinance for which there is no clarification in existing case law or decisions of the Commission; and
- (c) it is possible to make a decision on the basis of the information provided.

(3) The Commission is not required to consider an application under this section if the application concerns hypothetical questions or agreements.

## **10. Consideration of application**

(1) Before making a decision on an application made under section 9, the Commission must –

- (a) publish notice of the application in any manner it considers appropriate for bringing the application to the

attention of those it considers likely to be affected by its decision; and

(b) consider any representations about the application that are made to it.

(2) A notice under subsection (1) must specify the period within which representations may be made to the Commission about the application.

(3) The period specified for the purpose of subsection (2) must be a period of at least 30 days beginning after the day on which the notice is first published.

## **11. Decision by Commission**

(1) After considering the representations, if any, made within the period referred to in section 10, the Commission may make a decision as to whether or not the agreement in question is excluded or exempt from the application of the first conduct rule or this Part.

(2) A decision by the Commission may include conditions or limitations subject to which it is to have effect.

(3) After the Commission has made its decision, it must inform the applicant in writing of the decision, the date of its decision and the reasons for it.

## **12. Effect of decision**

(1) Subject to subsection (2), if the Commission makes a decision that an agreement is excluded or exempt from the application of the first conduct rule or this Part then each undertaking specified in the decision is immune from any action under this Ordinance with regard to that agreement.

(2) The immunity provided by subsection (1) applies to an undertaking only in so far as that undertaking complies with every condition and limitation subject to which the decision is to have effect.

### **13. Non-compliance with condition or limitation**

(1) If an undertaking fails or ceases to comply with a condition or limitation subject to which a decision has effect, the immunity provided by section 12 ceases to apply with respect to that undertaking with effect from the date on which the non-compliance begins.

(2) If an undertaking starts to comply or resumes compliance with the condition or limitation, the immunity provided by section 12 applies to that undertaking with effect from the date on which the compliance begins or resumes.

(3) Action may be taken under this Ordinance against any undertaking relating to a contravention of the first conduct rule by that undertaking, that occurs during any period in which the immunity provided by section 12 does not apply to it.

### **14. Rescission of decision**

(1) The Commission may rescind a decision made under section 11 if it has reason to believe –

- (a) that there has been a material change of circumstances since the decision was made; or
- (b) that the information on which it based its decision was incomplete, false or misleading in a material particular.

(2) Before rescinding a decision under this section the Commission must –

- (a) give notice in writing in any manner it considers appropriate for bringing the proposed rescission to the attention of those undertakings it considers likely to be affected by the proposed rescission –
  - (i) stating that the Commission is considering rescinding the decision and the reasons why it is considering the rescission; and

(ii) inviting the undertakings to make representations about the proposed rescission within the period specified in the notice; and

(b) consider any representations received within the period specified in the notice.

(3) The period specified in a notice under subsection (2) must be a period of at least 30 days beginning after the day on which the notice is given.

(4) If, after –

(a) the expiry of the period specified in the notice given under subsection (2); and

(b) considering any representations received within that period,

the Commission is of the view that the decision should be rescinded, it may, by notice in writing given to each undertaking for which the decision provides immunity, rescind that decision.

(5) A notice of rescission given under subsection (4) must inform the undertakings of –

(a) the rescission and the reasons for the rescission;

(b) the date on which the determination to rescind the decision was made; and

(c) the date from which the rescission takes effect.

(6) If the Commission is satisfied that any information –

(a) on which it based its decision; and

(b) which was provided to it by a party to the agreement,

was incomplete, false or misleading in a material particular, the date specified in a notice under subsection (5)(c) may be earlier than the date on which the notice is given.

(7) If a decision is rescinded under this section, each undertaking specified in the notice of rescission loses its immunity from action under this

Ordinance, as from the date the rescission takes effect, with regard to anything done after that date.

(8) A rescission of a decision under this section may be made with regard to all of the undertakings for which the decision provides immunity or with regard to only one or more of them.

### **Subdivision 3 – Block Exemptions**

#### **15. Block exemption orders**

(1) If the Commission is satisfied that a particular category of agreement is an excluded agreement, it may issue a block exemption order in respect of that category of agreement.

(2) The Commission may, either of its own volition or on application by an undertaking or an association of undertakings, issue a block exemption order.

(3) The Commission may, in a block exemption order –

- (a) impose conditions or limitations subject to which the block exemption order is to have effect; and
- (b) specify a date from which the order is to cease to have effect.

(4) The Commission must, in a block exemption order, specify a date, being a date not more than 5 years after the date of the order, upon which it will commence a review of the block exemption order.

(5) In this section –

“excluded agreement” (豁除協議) means an agreement that is excluded from the application of the first conduct rule by or as a result of section 1 (Agreements enhancing overall economic efficiency) of Schedule 1.

#### **16. Procedures regarding block exemption orders**

(1) Before issuing a block exemption order, the Commission must –



- (a) publish notice of the proposed block exemption order in any manner it considers appropriate for bringing the proposed block exemption order to the attention of those it considers likely to be affected by it; and
- (b) consider any representations about the proposed block exemption order that are made to it.

(2) A notice under subsection (1) must specify the period within which representations may be made to the Commission about the proposed block exemption order.

(3) The period specified for the purpose of subsection (2) must be a period of at least 30 days beginning after the day on which the notice is first published.

#### **17. Effect of block exemption order**

(1) Subject to subsection (2), an agreement that falls within a category of agreement specified in a block exemption order is exempt from the application of the first conduct rule.

(2) The immunity provided by subsection (1) to undertakings making or giving effect to an agreement applies to an undertaking only if it complies with every condition and limitation subject to which the block exemption order has effect.

#### **18. Non-compliance with condition or limitation**

(1) If an undertaking fails or ceases to comply with a condition or limitation subject to which a block exemption order has effect, the block exemption order ceases to apply with respect to that undertaking with effect from the date on which the non-compliance begins.

(2) If an undertaking starts to comply or resumes compliance with the condition or limitation, the block exemption order applies to that undertaking with effect from the date on which the compliance begins or resumes.

(3) Action may be taken under this Ordinance against any undertaking relating to a contravention of the first conduct rule by that undertaking, that occurs during any period in which the block exemption order does not apply to it.

#### **19. Review of block exemption order**

(1) The Commission must commence a review of a block exemption order on the date specified in the order for the commencement of the review.

(2) Despite subsection (1), the Commission may review a block exemption order at any time if it considers it appropriate to do so.

(3) Without limiting the matters that may be considered in deciding, under subsection (2), whether or not to review a block exemption order, the Commission must consider the following –

- (a) the desirability of maintaining a stable and predictable regulatory environment in relation to competition;
- (b) any developments that have taken place in the economy of Hong Kong or in the economy of any place outside Hong Kong that affect the category of agreement that is the subject of the block exemption order; and
- (c) whether any significant new information relating to the particular category of agreement has come to the knowledge of the Commission since the block exemption order was first issued.

#### **20. Variation or revocation of block exemption order**

(1) If the Commission considers that it is appropriate to do so, after reviewing a block exemption order, it may issue an order varying or revoking the block exemption order with effect from a date specified in the order.

(2) Before varying or revoking a block exemption order, the Commission must –

- (a) publish notice of the proposed variation or revocation in any manner it considers appropriate for bringing the proposed variation or revocation to the attention of those it considers likely to be affected by the proposed variation or revocation; and
  - (b) consider any representations about the proposed variation or revocation that are made to it.
- (3) A notice under subsection (2) must specify the period within which representations may be made to the Commission about the proposed variation or revocation.
- (4) The period specified for the purpose of subsection (3) must be a period of at least 30 days beginning after the day on which the notice is first published.
- (5) An order made under this section –
  - (a) must specify the date on which it is to have effect; and
  - (b) may contain any transitional and savings provisions the Commission considers necessary or expedient.

## **Division 2 – Abuse of Market Power**

### **Subdivision 1 – Second Conduct Rule**

#### **21. Abuse of market power**

(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

(2) For the purpose of subsection (1), conduct may, in particular, constitute such an abuse if it involves –

- (a) predatory behaviour towards competitors; or
- (b) limiting production, markets or technical development to the prejudice of consumers.

(3) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “second conduct rule”.

## **22. “Object” of conduct**

(1) If conduct has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.

(2) An undertaking may be taken to have engaged in conduct that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.

## **23. Territorial application of second conduct rule**

The second conduct rule applies to conduct that has as its object or effect the prevention, restriction or distortion competition in Hong Kong even if –

- (a) the undertaking engaging in the conduct is outside Hong Kong; or
- (b) the conduct is engaged in outside Hong Kong.

### **Subdivision 2 – Decisions**

## **24. Application for decision**

(1) An undertaking that has engaged in, is engaging in or is proposing to engage in certain conduct may apply to the Commission for a decision as to whether or not the conduct is –

- (a) excluded from the application of the second conduct rule by or as a result of Schedule 1;
- (b) exempt from the application of the second conduct rule by virtue of an order of the Chief Executive in Council made under section 31 (Exemptions on public policy grounds) or section 32 (Exemption to avoid conflict with international obligations); or

- (c) excluded from the application of this Part by virtue of section 3 (Application to statutory bodies) or section 4 (Application to specified persons and persons engaged in specified activities).

(2) The Commission is only required to consider an application under this section if –

- (a) the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions or exemptions under this Ordinance;
- (b) the application raises a question of an exclusion or exemption under this Ordinance for which there is no clarification in existing case law or decisions of the Commission; and
- (c) it is possible to make a decision on the basis of the information provided.

(3) The Commission is not required to consider an application under this section if the application concerns hypothetical questions or conduct.

## **25. Consideration of application**

(1) Before making a decision on an application made under section 24, the Commission must –

- (a) publish notice of the application in any manner it considers appropriate for bringing the application to the attention of those it considers likely to be affected by its decision; and
- (b) consider any representations about the application that are made to it.

(2) A notice under subsection (1) must specify the period within which representations may be made to the Commission about the application.

(3) The period specified for the purpose of subsection (2) must be a period of at least 30 days beginning after the day on which the notice is first published.

## **26. Decision by Commission**

(1) After considering the representations, if any, made within the period referred to in section 25, the Commission may make a decision as to whether or not the conduct in question is excluded or exempt from the application of the second conduct rule or this Part.

(2) A decision by the Commission may include conditions or limitations subject to which it is to have effect.

(3) After the Commission has made its decision, it must inform the applicant in writing of the decision, the date of its decision and the reasons for it.

## **27. Effect of decision**

(1) Subject to subsection (2), if the Commission makes a decision that conduct is excluded or exempt from the application of the second conduct rule or this Part then each undertaking specified in the decision is immune from any action under this Ordinance with regard to that conduct.

(2) The immunity provided by subsection (1) applies to an undertaking only in so far as that undertaking complies with every condition and limitation subject to which the decision is to have effect.

## **28. Non-compliance with condition or limitation**

(1) If an undertaking fails or ceases to comply with a condition or limitation subject to which a decision has effect, the immunity provided by section 27 ceases to apply with respect to that undertaking with effect from the date on which the non-compliance begins.

(2) If an undertaking starts to comply or resumes compliance with the condition or limitation, the immunity provided by section 27 applies to that

undertaking with effect from the date on which the compliance begins or resumes.

(3) Action may be taken under this Ordinance against any undertaking relating to a contravention of the second conduct rule by that undertaking, that occurs during any period in which the immunity provided by section 27 does not apply to it.

## **29. Rescission of decision**

(1) The Commission may rescind a decision made under section 26 if it has reason to believe –

- (a) that there has been a material change of circumstances since the decision was made; or
- (b) that the information on which it based its decision was incomplete, false or misleading in a material particular.

(2) Before rescinding a decision under this section the Commission must –

- (a) give notice in writing in any manner it considers appropriate for bringing the proposed rescission to the attention of those undertakings it considers likely to be affected by the proposed rescission –
  - (i) stating that the Commission is considering rescinding the decision and the reasons why it is considering the rescission; and
  - (ii) inviting the undertakings to make representations about the proposed rescission within the period specified in the notice; and
- (b) consider any representations received within the period specified in the notice.

(3) The period specified in a notice under subsection (2) must be a period of at least 30 days beginning after the day on which the notice is given.

- (4) If, after –
- (a) the expiry of the period specified in the notice given under subsection (2); and
  - (b) considering any representations received within that period,

the Commission is of the view that the decision should be rescinded, it may, by notice in writing given to each undertaking for which the decision provides immunity, rescind that decision.

(5) A notice of rescission given under subsection (4) must inform the undertakings of –

- (a) the rescission and the reasons for the rescission;
  - (b) the date on which the determination to rescind the decision was made; and
  - (c) the date from which the rescission takes effect.
- (6) If the Commission is satisfied that any information –
- (a) on which it based its decision; and
  - (b) which was provided to it by an undertaking engaging in the conduct,

was incomplete, false or misleading in a material particular, the date specified in a notice under subsection (5)(c) may be earlier than the date on which the notice is given.

(7) If a decision is rescinded under this section, each undertaking specified in the notice of rescission loses its immunity from action under this Ordinance, as from the date the rescission takes effect, with regard to anything done after that date.

(8) A rescission of a decision under this section may be made with regard to all of the undertakings for which the decision provides immunity or with regard to only one or more of them.



### **Division 3 – Exclusions and Exemptions**

#### **Subdivision 1 – Exclusions from Conduct Rules**

##### **30. Exclusions**

The conduct rules do not apply in any of the cases in which they are excluded by or as a result of Schedule 1.

#### **Subdivision 2 – Exemptions from Conduct Rules**

##### **31. Exemptions on public policy grounds**

(1) The Chief Executive in Council may, by order published in the Gazette, exempt –

- (a) a specified agreement or a specified class of agreement from the application of the first conduct rule; or
- (b) specified conduct or a specified class of conduct from the application of the second conduct rule,

if he or she is satisfied that there are exceptional and compelling reasons of public policy for doing so.

(2) An order under subsection (1) may be made subject to any conditions or limitations that the Chief Executive in Council considers appropriate.

(3) An order made under this section remains in force for the period that is specified in the order.

(4) Before the expiry of an order, the Chief Executive in Council may, by order published in the Gazette, extend the period of its validity.

(5) An order made under subsection (1) may provide that the conduct rule in question has never applied to any agreement or conduct specified in the order.

### **32. Exemption to avoid conflict with international obligations**

(1) The Chief Executive in Council may, by order published in the Gazette, exempt –

- (a) a specified agreement or a specified class of agreement from the application of the first conduct rule; or
- (b) specified conduct or a specified class of conduct from the application of the second conduct rule,

if he or she is satisfied that it is appropriate to do so, in order to avoid a conflict between this Ordinance and an international obligation that directly or indirectly relates to Hong Kong.

(2) An order under subsection (1) may be made subject to any conditions or limitations that the Chief Executive in Council considers appropriate.

(3) An order made under this section remains in force for the period that is specified in the order.

(4) Before the expiry of an order, the Chief Executive in Council may, by order published in the Gazette, extend the period of its validity.

(5) If an international obligation has ceased to have effect or has been varied, the Chief Executive in Council may, by order published in the Gazette, revoke an order made under this section, or (as the case requires) amend it to the extent warranted by the variation.

(6) An order made under subsection (1) may provide that the conduct rule in question has never applied to any agreement or conduct specified in the order.

(7) In this section –  
“international obligation” (國際義務) includes an obligation under –

- (a) an air service agreement or a provisional arrangement referred to in Article 133 of the Basic Law;
- (b) an international arrangement relating to civil aviation; and

- (c) any agreement, provisional arrangement or international arrangement designated as an international agreement, international provisional arrangement or international arrangement by the Chief Executive in Council by order published in the Gazette.

### **33. Orders to be published and placed before Legislative Council**

(1) The Chief Executive is to arrange for every order made under section 31 or 32 to be –

- (a) published in the Gazette; and
- (b) laid on the table of the Legislative Council at the next sitting of the Council after its publication in the Gazette.

(2) The Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which an order is laid on the table of the Council (the “relevant period”), amend the order in any manner consistent with the power of the Chief Executive in Council to make the order in question.

(3) If the relevant period would but for this section expire after the end of a session or a dissolution of the Legislative Council, but on or before the day of its second sitting in the next session, the period for amending the order is deemed to be extended and to expire on the day after that second sitting.

(4) The Legislative Council may, before the expiry of the relevant period, by resolution extend the period for amending the order to the first sitting of the Council held not earlier than the twenty-first day after the day of that expiry.

(5) If the relevant period is extended under subsection (3), the Legislative Council may, before the expiry of the extended period, by resolution extend that extended period to the first sitting of the Council held not earlier than the twenty-first day after the day of the second sitting in the next session referred to in that subsection.

(6) A resolution passed by the Legislative Council in accordance with this section must be published in the Gazette not later than 14 days after the passing of the resolution or within such further period as the Chief Executive may allow in any particular case.

(7) An order made by the Chief Executive in Council under section 31 or 32 comes into operation –

(a) if on the expiry of the relevant period or that period as extended under subsection (3), (4) or (5), the Legislative Council has not passed a resolution amending the order, on the expiry of the relevant period or that period as so extended (as the case may be); and

(b) if the Legislative Council passes a resolution amending the order, at the beginning of the day on which the resolution is published in the Gazette.

(8) If an order is not laid on the table of the Legislative Council in accordance with this section, it is of no effect.

(9) In this section –  
 “sitting” (會議), when used to calculate time, means the day on which the sitting commences and only includes a sitting at which subsidiary legislation is included on the order paper.

#### **Division 4 – Miscellaneous**

#### **34. Register of decisions and block exemption orders**

- (1) The Commission must establish and maintain a register of –
- (a) all decisions made in respect of applications made under section 9 or 24;
  - (b) all notices of rescissions of such decisions, made under section 14 or 29;
  - (c) all block exemption orders issued under section 15; and

(d) all orders varying or revoking block exemption orders, issued under section 20.

(2) The Commission may omit confidential information from any entry made in the register under this section; and where confidential information has been omitted, that fact must be disclosed on the register.

(3) The Commission must make the register available for inspection by any person at the offices of the Commission during ordinary business hours and in any other manner it considers appropriate.

### **35. Guidelines**

(1) The Commission must issue guidelines –

- (a) indicating the manner in which it expects to interpret and give effect to the conduct rules;
- (b) regarding the manner and form in which it will receive applications for a decision or block exemption order; and
- (c) indicating how it expects to exercise its power to make a decision or grant block exemptions.

(2) The Commission may amend any guidelines it issues under this section.

(3) Guidelines issued under this section, and any amendments made to them, may be published in any manner the Commission considers appropriate.

(4) Before issuing any guidelines or amendments to them under this section, the Commission must consult any persons it considers appropriate.

(5) The Commission must make available at the offices of the Commission during ordinary business hours, and in any other manner it considers appropriate, copies of all guidelines issued under this section and of all amendments made to them.

### **36. Amendment of Schedule 1**

(1) The Chief Executive in Council may by order amend Schedule 1.

(2) An order made under subsection (1) is subject to the approval of the Legislative Council.

## PART 3

### COMPLAINTS AND INVESTIGATIONS

#### Division 1 – Complaints

##### 37. Complaints

(1) Any person may, in accordance with guidelines issued under section 38, lodge a complaint with the Commission alleging that an undertaking has contravened, is contravening or is about to contravene a competition rule.

(2) The Commission is not required to investigate a complaint if it does not consider it reasonable to do so and may, in particular, refuse to investigate a complaint if it is satisfied that –

- (a) the complaint is trivial, frivolous or vexatious; or
- (b) the complaint is misconceived or lacking in substance.

##### 38. Guidelines regarding complaints

The Commission must issue guidelines indicating the manner and form in which complaints are to be made.

#### Division 2 – Investigations

##### 39. Power to conduct investigations

(1) The Commission may conduct an investigation into any conduct that constitutes or may constitute a contravention of a competition rule –

- (a) of its own volition;
- (b) where it has received a complaint under this Part;
- (c) where the Court of First Instance has referred any conduct to it for investigation under section 117; or

(d) where the Government has referred any conduct to it for investigation.

(2) Despite subsection (1), the Commission may only conduct an investigation under this Part if it has reasonable cause to suspect that a contravention of a competition rule has taken place, is taking place or is about to take place.

#### **40. Guidelines regarding investigations**

The Commission must issue guidelines indicating –

- (a) the procedures it will follow in deciding whether or not to conduct an investigation under this Part; and
- (b) the procedures it will follow in conducting any investigation under this Part.

#### **41. Powers to obtain documents and information**

(1) This section applies where the Commission has reasonable cause to suspect that a person has or may have possession or control of documents or information or may otherwise be able to assist it in relation to a matter that constitutes or may constitute a contravention of a competition rule.

(2) For the purpose of conducting an investigation, the Commission may by notice in writing require any person –

- (a) to produce to it any document or a copy of any document;  
or
- (b) to provide it with any specified information,

relating to any matter it reasonably believes to be relevant to the investigation.

(3) A notice under subsection (2) must indicate –

- (a) the subject matter and purpose of the investigation; and
- (b) the nature of the offences created by section 52 (Failure to comply with requirement or prohibition), section 53

(Destroying or falsifying documents) and section 55 (Providing false or misleading documents or information).

- (4) The Commission may also specify in the notice –
- (a) the time and place at which any document is to be produced or any information is to be provided; and
  - (b) the manner and form in which any document is to be produced or any information is to be provided.

(5) The power under this section to require a person to produce a document includes power –

- (a) if the document is produced –
  - (i) to make copies of it or to take extracts from it; or
  - (ii) to require that person or any other person who is a present or past employee or partner of that person, or was at any time employed by that person, to give an explanation of or further particulars about the document;
- (b) if the document is not produced, to require that person to state, to the best of the person’s knowledge and belief, where it is.

(6) The power under this section to require a person to provide specified information includes power –

- (a) in relation to information recorded otherwise than in legible form, to require the production of a copy of the information in a visible and legible form or in a form from which it can readily be produced in a visible and legible form; and
- (b) to require the provision of instruction on the operation of equipment containing information stored electronically.

(7) In this section –

“specified” (指明) means –



- (a) specified, or described, in the notice; or
- (b) falling within a category that is specified, or described, in the notice.

#### **42. Persons may be required to attend before Commission**

(1) For the purpose of conducting an investigation, the Commission may, by notice in writing, require any person to attend before the Commission, at a time and place specified in the notice, to answer questions relating to any matter it reasonably believes to be relevant to the investigation.

- (2) A notice under subsection (1) must indicate –
- (a) the subject matter and purpose of the investigation; and
  - (b) the nature of the offences created by section 52 (Failure to comply with requirement or prohibition), section 53 (Destroying or falsifying documents) and section 55 (Providing false or misleading documents or information).

#### **43. Statutory declaration regarding evidence**

(1) The Commission may require a person giving any explanation, further particulars, answer or statement to the Commission under this Part to verify the truth of the explanation, particulars, answer or statement, by statutory declaration.

(2) For the purpose of subsection (1) any member of the Commission may administer an oath or affirmation.

(3) If a person fails to comply with a requirement made under this Part to give any explanation, further particulars, answer or statement to the Commission, the Commission may require that person to state, by statutory declaration, the reasons for the failure.

#### **44. Immunity**

(1) A person who gives evidence to the Commission under this Part and any counsel, solicitor, or other person who appears before the Commission

under this Part has the same privileges and immunities as the person would have if the investigation were civil proceedings in the Court of First Instance.

(2) In subsection (1), the reference to the giving of evidence includes a reference to producing any document, making any statement, giving any information, explanation or further particulars and answering any question.

#### **45. Self-incrimination**

(1) A person is not excused –

(a) from giving any explanation or further particulars about a document; or

(b) from answering any question,

under this Division on the grounds that to do so might expose the person to proceedings referred to in subsection (3).

(2) No statement made by a person –

(a) in giving any explanation or further particulars about a document; or

(b) in answering any question,

under this Division is admissible against that person in proceedings referred to in subsection (3).

(3) The proceedings referred to in subsections (1) and (2) are –

(a) proceedings in which the Commission applies for an order for –

(i) a pecuniary penalty under section 91; or

(ii) a financial penalty under section 168; and

(b) any criminal proceedings other than proceedings for –

(i) an offence under section 55 (Providing false or misleading documents or information);

(ii) an offence under Part V (Perjury) of the Crimes Ordinance (Cap. 200); or

(iii) an offence of perjury.

**46. Obligation of confidence**

(1) A person is not excused from providing to the Commission any information or producing any document to the Commission under this Part in respect of which an obligation of confidence is owed to any other person.

(2) A person who, when required to do so under this Ordinance, produces any document or provides any information to the Commission, in respect of which an obligation of confidence is owed to any other person, is not personally liable for that act.

**Division 3 – Search and Seizure****47. Appointment of authorized officers**

The Commission may, in writing, appoint any employee of the Commission as an authorized officer of the Commission (an “authorized officer”) for the purposes of this Part.

**48. Warrant to enter and search premises**

A judge of the Court of First Instance may issue a warrant to enter and search any premises if the judge is satisfied, on application made on oath by an authorized officer, that there are reasonable grounds to suspect that there are or are likely to be, on the premises, documents that may be relevant to an investigation by the Commission.

**49. Duty to produce evidence of authority**

An authorized officer executing a warrant must, if requested, produce for inspection –

- (a) documentary evidence of his or her identity;
- (b) documentary evidence of his or her authorization under section 47; and
- (c) the warrant.

**50. Powers conferred by warrant**

(1) A warrant issued under section 48 authorizes the persons named in it –

- (a) to enter and search the premises specified in the warrant;
- (b) to use such force for gaining entry to the premises and for breaking open any article or thing found on the premises as is reasonable in the circumstances;
- (c) to make use of such equipment as is reasonable in the circumstances;
- (d) to remove by force any person or thing obstructing the execution of the warrant;
- (e) to require any person on the premises to produce any document that appears to be a relevant document, in the possession or under the control of that person;
- (f) to make copies of or take extracts from any document that appears to be a relevant document found on the premises or produced to a person executing the warrant;
- (g) to prohibit any person found on the premises from –
  - (i) altering or otherwise interfering with any document that appears to be a relevant document;
  - or
  - (ii) removing any such document from the premises or causing or permitting any other person to remove such document from the premises;
- (h) to take possession of any documents found on the premises that appear to be relevant documents if –
  - (i) such action appears to be necessary for preserving the documents or preventing interference with them; or

- (ii) it is not reasonably practicable to take copies of the documents on the premises;
- (i) to take any other steps that appear to be necessary for the purpose mentioned in paragraph (h)(i);
- (j) to take possession of any computer or other thing found on the premises that the person executing the warrant has reasonable grounds for believing will, on examination, afford evidence of a contravention of a competition rule;
- (k) to require any person on the premises to give an explanation of any document appearing to be a relevant document or to state, to the best of his or her knowledge and belief, where such an explanation may be found or obtained;
- (l) to require any information which is stored in electronic form and is accessible from the premises and which the person executing the warrant considers relates to any matter relevant to the investigation, to be produced in a form –
  - (i) in which it is visible and legible or from which it can readily be produced in a visible and legible form; and
  - (ii) in which it can be taken away.

(2) An authorized officer may call upon such other persons as he or she considers necessary to assist the officer in the performance of any function under this section.

(3) A person assisting an authorized officer executing a warrant issued under section 48 also has the powers referred to in subsection (1).

(4) In this section –  
 “relevant document” (有關文件) means a document of a kind that could be required to be produced to the Commission under this Part.

## **Division 4 – Offences in Relation to Investigations**

### **51. Interpretation**

In this Division –

“Commission” (競委會) includes any member, employee or authorized officer of the Commission;

“information” (資料) includes information provided in answer to a question.

### **52. Failure to comply with requirement or prohibition**

(1) A person who, without reasonable excuse, fails to comply with a requirement or prohibition imposed on that person under –

- (a) section 41 (Powers to obtain documents and information);
- (b) section 42 (Persons may be required to attend before Commission);
- (c) section 43 (Statutory declaration regarding evidence); or
- (d) section 50 (Powers conferred by warrant),

commits an offence.

(2) A person who commits an offence under subsection (1) is liable –

- (a) on conviction on indictment, to a fine of \$200,000 and to imprisonment for 1 year; or
- (b) on summary conviction, to a fine at level 5 and to imprisonment for 6 months.

### **53. Destroying or falsifying documents**

(1) A person commits an offence if, having been required to produce a document under section 41 (Powers to obtain documents and information) or section 50 (Powers conferred by warrant), the person –

- (a) intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it; or

- (b) causes or permits its destruction, disposal, falsification or concealment.
- (2) A person who commits an offence under subsection (1) is liable –
  - (a) on conviction on indictment, to a fine of \$1,000,000 and to imprisonment for 2 years; or
  - (b) on summary conviction, to a fine at level 6 and to imprisonment for 6 months.

#### **54. Obstruction of search**

- (1) It is an offence for a person to obstruct any person exercising a power under a warrant issued under section 48.
- (2) A person who commits an offence under subsection (1) is liable –
  - (a) on conviction on indictment, to a fine of \$1,000,000 and to imprisonment for 2 years; or
  - (b) on summary conviction, to a fine at level 6 and to imprisonment for 6 months.

#### **55. Providing false or misleading documents or information**

- (1) If any person produces or provides any document or information to the Commission under this Part, that person commits an offence if –
  - (a) the document or information is false or misleading in a material particular; and
  - (b) the person knows or is reckless as to whether the document or information is false or misleading in a material particular.
- (2) A person who –
  - (a) provides any document or information to another person, knowing the document or information to be false or misleading in a material particular; or

- (b) recklessly provides any document or information to another person that is false or misleading in a material particular,

knowing that the document or information is to be used for the purpose of providing information to the Commission in connection with any of its functions under this Part, commits an offence.

- (3) A person who commits an offence under this section is liable –
  - (a) on conviction on indictment, to a fine of \$1,000,000 and to imprisonment for 2 years; or
  - (b) on summary conviction, to a fine at level 6 and to imprisonment for 6 months.

### **Division 5 - Miscellaneous**

#### **56. Retention of property**

(1) If property is produced to the Commission in response to a requirement under this Part or is obtained under a warrant issued under section 48, the Commission may retain that property –

- (a) for as long as may be necessary for the purpose of its investigation; or
- (b) where it may be required for legal proceedings, for as long as may be necessary for the purpose of those proceedings.

(2) If a document obtained under this Part is in the possession of the Commission, the Commission must, if requested by a person otherwise entitled to possession of the document, supply that person with a copy of the document certified by a member of the Commission to be a true copy of the original.

(3) Until such a certified copy is issued, the Commission must, at any time and place it considers appropriate, allow a person otherwise entitled to possession of the document, or a person authorized by that person, to inspect and make copies of or take extracts from the document.



(4) A certified copy of a document issued under this section is admissible in evidence in all courts as if it were the original.

### **57. Disposal of property**

(1) If any property has come into possession of the Commission under this Ordinance, the Tribunal may order the disposal of the property in the manner provided in this section.

(2) The Tribunal may, either of its own motion or on application –

- (a) make an order for the delivery of the property to the person who appears to the Tribunal to be entitled to the property;
- (b) if the person entitled to the property is unknown or cannot be found, make an order that the property be sold or retained in the possession of the Tribunal or the Commission; or
- (c) if the property is of no value, order that the property be destroyed.

(3) An order for the delivery, sale or destruction of property must not, except where the property is perishable, be made under subsection (2) unless the Tribunal is satisfied that the property will not be required for the purpose of any proceedings before the Tribunal or any other court.

(4) If –

- (a) the Tribunal orders the sale or retention of any property under subsection (2); and
- (b) no person establishes a claim to the property or the proceeds of sale of the property within 6 months after the day on which the order is made,

the Tribunal may, either of its own motion or on application by the Commission, order that the property or the proceeds of sale become the property of the Government.

(5) An order made under subsection (2), other than an order for the retention of property, must not, except where the property is perishable, be carried out until the period allowed for making an appeal against the order has expired or, where such an appeal is made, until the appeal is finally disposed of.

- (6) An appeal is finally disposed of, for the purpose of subsection (5) –
- (a) if it is determined and the period for bringing any further appeal has ended; or
  - (b) if it is abandoned or otherwise ceases to have effect.

## **58. Guidelines**

(1) The Commission may amend any guidelines it issues under this Part.

(2) Guidelines issued under this Part, and any amendments made to them, may be published in any manner the Commission considers appropriate.

(3) Before issuing any guidelines or amendments to them under this Part, the Commission must consult any persons it considers appropriate.

(4) The Commission must make available at the offices of the Commission during ordinary business hours, and in any other manner it considers appropriate, copies of all guidelines issued under this Part and all amendments made to them.

## **PART 4**

### **ENFORCEMENT POWERS OF COMMISSION**

#### **Division 1 – Commitments**

## **59. Commitments**

- (1) The Commission may accept from a person a commitment to –
- (a) take any action; or
  - (b) refrain from taking any action,

that the Commission considers appropriate to address its concerns about a possible contravention of a competition rule.

(2) If the Commission accepts a commitment under this section, it may agree –

- (a) not to commence an investigation or, if it has commenced an investigation, to terminate it; and
- (b) not to bring proceedings in the Tribunal or, if it has brought proceedings, to terminate them.

(3) If the Commission accepts a commitment under this section, it may not –

- (a) commence or continue an investigation; or
- (b) bring or continue proceedings in the Tribunal,

in relation to any alleged contravention of a competition rule in so far as that investigation or those proceedings relate to matters that are addressed by the commitment.

(4) To avoid doubt, the Commission may still commence or continue an investigation or bring or continue proceedings in the Tribunal, after accepting a commitment under this section –

- (a) in relation to matters that are not addressed by the commitment; or
- (b) in relation to persons who are not subject to the commitment.

(5) If the Commission decides to accept a commitment under this section, it must, as soon as practicable after accepting it –

- (a) give notice in writing of that decision to the person who made the commitment, together with a copy of the commitment; and
- (b) register the commitment on the register of commitments maintained under section 63 (Register of commitments).

## **60. Withdrawal of acceptance of commitment**

(1) The Commission may, by notice in writing given to the person who made the commitment, withdraw its acceptance of a commitment, with effect from the date specified in the notice, if –

- (a) it has reasonable grounds for believing that there has been a material change of circumstances since the commitment was accepted;
- (b) it has reasonable grounds for suspecting that the person who made the commitment has failed to comply with the commitment; or
- (c) it has reasonable grounds for suspecting that the information on which it based its decision to accept the commitment was incomplete, false or misleading in a material particular.

(2) If the Commission is satisfied that any information –

- (a) on which it based its decision to accept the commitment; and
- (b) which was provided to it by the person who made the commitment,

was incomplete, false or misleading in a material particular, the date specified in the notice given under subsection (1) may be earlier than the date on which the notice is given.

(3) If an acceptance is withdrawn under this section –

- (a) the commitment is no longer binding on the person who made it; and
- (b) subject to subsection (4), the Commission may –
  - (i) commence an investigation; or
  - (ii) bring proceedings in the Tribunal,

with respect to any alleged contravention of the relevant competition rule that has occurred after the date specified in the notice given under subsection (1).

(4) The Commission may not bring proceedings authorized by subsection (3) more than 2 years after the date specified in the notice given under subsection (1).

#### **61. Variation, substitution and release of commitment**

(1) At any time after the Commission has accepted a commitment, it may accept from the person who has made it –

- (a) a variation of the commitment; or
- (b) a commitment in substitution for it,

if it is satisfied that the variation or new commitment will address its concerns about a possible contravention of a competition rule.

(2) The Commission may release any person from a commitment that the person has made under this Part if –

- (a) it is requested to do so by that person; or
- (b) it has reasonable grounds for believing that its concerns about the alleged contravention of the competition rule no longer arise.

#### **62. Enforcement of commitment**

(1) If the Commission considers that a person has failed to comply with any commitment that the person has made under this Part (including a commitment to comply with the requirements of an infringement notice) and which has been accepted by the Commission, it may apply to the Tribunal for an order under subsection (2).

(2) If the Tribunal is satisfied that a person has failed to comply with a commitment that the person has made under this Part and which has been accepted by the Commission, the Tribunal may make all or any of the following orders –

- (a) an order directing the person to take such action or refrain from taking such action, as is specified in the commitment;

- (b) an order directing the person to pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the person's failure to comply with the commitment;
- (c) an order directing the person to compensate any person for any loss or damage caused by the person's failure to comply with the commitment; and
- (d) any other order that the Tribunal considers appropriate.

### **63. Register of commitments**

(1) The Commission must establish and maintain a register of commitments made under this Part (including commitments to comply with the requirements of an infringement notice) containing –

- (a) a copy of all commitments accepted under this Part (including any commitment accepted in substitution for another);
- (b) a copy of all variations of commitments accepted under this Part;
- (c) where any acceptance of a commitment has been withdrawn, notice of that withdrawal; and
- (d) where any commitment has been released, notice of that release.

(2) The Commission may omit confidential information from any entry made in the register under this section; and where confidential information has been omitted, that fact must be disclosed on the register.

(3) The Commission must make the register available for inspection by any person at the offices of the Commission during ordinary business hours and in any other manner it considers appropriate.

#### **64. Procedural requirements regarding commitments**

Schedule 2 has effect regarding the procedural requirements for –

- (a) the acceptance of commitments;
- (b) the withdrawal of acceptance of commitments; and
- (c) the variation and release of commitments,

under this Division.

### **Division 2 – Infringement Notices**

#### **65. Interpretation**

In this Division –

“compliance period” (遵守限期) means the period within which a person who has notified the Commission that the person proposes to comply with the requirements of an infringement notice must make a commitment to comply with the requirements of the notice;

“notification period” (通知限期) means the period (being a period of not more than 28 days) within which a person to whom an infringement notice has been issued must notify the Commission whether or not the person proposes to comply with the requirements of the notice.

#### **66. Commission may issue infringement notice**

(1) Subsection (2) applies where the Commission has reasonable cause to believe that a contravention of a conduct rule has occurred, but has not yet brought proceedings in the Tribunal in respect of that contravention.

(2) The Commission may, instead of bringing proceedings in the Tribunal in the first instance, issue a notice (an “infringement notice”) to the person against whom it proposes to bring proceedings, offering not to bring those proceedings on condition that the person makes a commitment to comply with requirements of the notice.

(3) The requirements of an infringement notice may include, but are not limited to, the following requirements –

- (a) to pay a sum not exceeding \$10,000,000 to the Government;
- (b) to refrain from any specified conduct, or to take any specified action, that the Commission considers appropriate; and
- (c) to admit to a contravention of the relevant conduct rule.

#### **67. Person not obliged to make commitment**

A person is not obliged to make a commitment to comply with the requirements of an infringement notice, but if a person does not make the commitment within the compliance period, the Commission may bring proceedings against that person in the Tribunal in relation to the alleged contravention of the conduct rule.

#### **68. Contents of infringement notice**

An infringement notice must –

- (a) identify the conduct rule alleged to have been contravened;
- (b) describe the conduct that is alleged to contravene that conduct rule;
- (c) identify the person whose conduct is alleged to constitute the contravention;
- (d) identify the evidence or other materials that the Commission relies on in support of its allegations;
- (e) specify the requirements to be complied with by the person to whom the notice is addressed;
- (f) specify both the notification period and the compliance period; and
- (g) be accompanied by a copy of section 67 (Person not obliged to make commitment).



**69. Notice of proposal to issue infringement notice**

(1) Before issuing an infringement notice to any person under section 66, the Commission must –

- (a) give that person a notice under this section; and
- (b) consider any representations made in accordance with the notice.

(2) A notice under this section must –

- (a) state that an infringement notice is proposed to be issued;
- (b) contain a draft of the proposed infringement notice; and
- (c) specify a period, being a period of not less than 15 days, within which representations may be made as to why the infringement notice should not be issued.

(3) If a person makes a representation in response to a notice issued under this section –

- (a) evidence or information provided to the Commission in that representation may not be used against that person; and
- (b) no person may obtain discovery of that information or evidence against the Commission,

in any proceedings, other than proceedings against that person for an offence under section 171 (Provision of false information).

**70. Decision not to issue infringement notice**

If after considering any representations made in response to a notice given under section 69, the Commission decides not to issue an infringement notice, it must give notice of that decision to the person to whom the notice under section 69 was given.

**71. Effect of issue of infringement notice**

(1) If an infringement notice has been issued to any person, no proceedings may be brought by the Commission against that person in respect of the contravention referred to in the notice if –

- (a) the compliance period has not expired; and
- (b) the infringement notice has not been withdrawn.

(2) The Commission may not publish an infringement notice (or disclose the whole or any part of its contents) –

- (a) before the expiry of its compliance period;
- (b) if a commitment to comply with the requirements of the notice is not made within the compliance period; or
- (c) if the Commission has withdrawn the notice.

**72. Withdrawal of infringement notice**

The Commission may at any time before the expiry of the compliance period, by notice in writing given to a person to whom an infringement notice has been issued, withdraw the infringement notice with effect from a date specified in the notice.

**73. Extension of compliance period**

(1) The Commission may, either of its own volition or on application made to it in writing, extend the compliance period specified in an infringement notice if it considers that there is a good reason for doing so.

(2) An application for an extension under subsection (1) must be made before the expiry of the period sought to be extended.

**74. Effect of commitment to comply with requirements of infringement notice**

If a person makes a commitment to comply with the requirements of an infringement notice within the compliance period, the Commission may not bring proceedings in the Tribunal against that person in respect of the alleged contravention specified in the notice.

**75. Failure to comply with requirements of infringement notice**

(1) This section applies where a person has made a commitment to the Commission to comply with the requirements of an infringement notice.

(2) Nothing in section 74 prevents the Commission from bringing proceedings in the Tribunal, where it has reasonable grounds for suspecting that the person who has made the commitment has failed to comply with one or more of the requirements of the infringement notice.

**76. Registration of commitments**

The Commission must register commitments made under this Division in the register maintained by the Commission under section 63 (Register of commitments) and the provisions of that section also apply, with any necessary modifications that the circumstances require, to commitments made under this Division.

**77. Publication of infringement notices**

If a person has made a commitment under this Division to comply with the requirements of an infringement notice, the Commission may publish the infringement notice in any manner it considers appropriate.

**Division 3 – Leniency****78. Interpretation**

In this Division –

“Commission” (競委會) includes any member or employee of the Commission;

“officer” (高級人員) means –

- (a) in relation to a corporation, a director, manager or secretary of the corporation, and any other person involved in the management of the corporation; and

- (b) in relation to an undertaking (other than a corporation or partnership), any member of the governing body of that undertaking.

### **79. Commission may make leniency agreements**

(1) The Commission may, in exchange for a person's co-operation in an investigation or in proceedings under this Ordinance, make an agreement (a "leniency agreement") with the person, on any terms it considers appropriate, that it will not bring or continue proceedings under Part 6 for a pecuniary penalty in respect of an alleged contravention of a conduct rule against –

- (a) if the person is a natural person, that person or any employee or agent of that person;
- (b) if the person is a corporation, that corporation or any officer, employee or agent of the corporation;
- (c) if the person is a partner in a partnership, that partnership or any partner in the partnership, or any employee or agent of the partnership; or
- (d) if the person is an undertaking other than one referred to in paragraph (a), (b) or (c), that undertaking or any officer, employee or agent of the undertaking,

in so far as the contravention consists of the conduct specified in the agreement.

(2) The Commission must not, while a leniency agreement is in force, bring or continue proceedings under Part 6 for a pecuniary penalty in breach of that leniency agreement.

### **80. Termination of leniency agreement**

- (1) The Commission may terminate a leniency agreement if –
  - (a) the other party to the agreement agrees to the termination;
  - (b) it has reasonable grounds to suspect that the information on which it based its decision to make the agreement was incomplete, false or misleading in a material particular;

- (c) the other party to the agreement, or if the agreement was made by a person as an officer, employee or agent of an undertaking, that undertaking has been convicted of an offence under Part 3; or
- (d) it is satisfied that the other party to the agreement, or if the agreement was made by a person as an officer, employee or agent of an undertaking, that undertaking has failed to comply with the terms of the agreement.

(2) The Commission may terminate a leniency agreement by giving notice in writing to the other party to the agreement and to any other person who appears to the Commission to be likely to benefit from the agreement, stating –

- (a) the date of the termination; and
- (b) the reasons for the termination.

(3) Before terminating a leniency agreement, the Commission must give –

- (a) the other party to the agreement; and
- (b) any other person who appears to the Commission to be likely to benefit from the agreement,

a reasonable opportunity to make representations about the proposed termination, and must consider all representations made.

## PART 5

### REVIEW BY TRIBUNAL

#### **81. Interpretation**

In this Part –

“reviewable determination” (可覆核裁定) means –

- (a) a decision regarding an agreement, made by the Commission under section 11;

- (b) a rescission of a decision regarding an agreement, made by the Commission under section 14;
- (c) a decision regarding specific conduct, made by the Commission under section 26;
- (d) a rescission of a decision regarding specific conduct, made by the Commission under section 29;
- (e) a decision relating to the variation of a commitment, made by the Commission under section 61;
- (f) a decision relating to the release of a person from a commitment, made by the Commission under section 61;
- (g) a decision relating to the termination of a leniency agreement, made by the Commission under section 80;
- (h) a decision regarding a merger or proposed merger, made by the Commission under section 13 of Schedule 7; or
- (i) a rescission of a decision regarding a merger or proposed merger, made by the Commission under section 15 of Schedule 7.

## **82. Review of reviewable determination**

(1) An application may be made to the Tribunal by any person or undertaking specified or referred to in section 83 for a review of a reviewable determination.

(2) An application under subsection (1) may only be made with the leave of the Tribunal.

(3) Leave may not be granted under subsection (2) unless the Tribunal is satisfied that –

- (a) the review has a reasonable prospect of success; or
- (b) there is some other reason in the interests of justice why the review should be heard.

### **83. Who may apply for review**

- (1) An application for a review under this Part may be made –
- (a) in the case of a decision or a rescission of a decision, by the undertaking that applied for the decision;
  - (b) in the case of a decision relating to the variation of a commitment or the release of a person from a commitment, by the person who made the commitment; or
  - (c) in the case of a decision relating to the termination of a leniency agreement, by a party to the agreement.

(2) A person who does not fall under subsection (1) may also apply to the Tribunal for a review of a reviewable determination, other than a decision regarding a merger or proposed merger, if the Tribunal is satisfied that the person has a sufficient interest in the reviewable determination.

### **84. Tribunal may state case for Court of Appeal**

(1) Before or after the determination of an application for review made under section 82, the Tribunal may, either of its own motion or on application, refer any question of law arising in, or that has arisen in, the review to the Court of Appeal for determination by way of case stated.

(2) The Tribunal may only refer a question of law to the Court of Appeal under subsection (1) if it is satisfied –

- (a) that the party who has applied for the question of law to be referred has a reasonable prospect of success; or
- (b) that there is some other reason in the interests of justice why the question of law should be referred.

(3) On the hearing of the case, the Court of Appeal may amend the case or require the Tribunal to amend the case in any manner the Court specifies.

### **85. Decision of Tribunal on application for review**

In determining an application for a review, the Tribunal may –

- (a) confirm or set aside the whole or part of the determination to which it relates; and
- (b) where it sets aside the whole or part of a determination, refer the matter back to the Commission with a direction to reconsider and make a new determination in accordance with the decision of the Tribunal.

#### **86. Time limit for applying for review**

(1) An application for the review of a reviewable determination must be made within 30 days after the day on which the determination was made.

(2) Despite subsection (1), the Tribunal may extend the time referred to in that subsection if it is satisfied that –

- (a) there is a good reason for doing so; and
- (b) no injustice would be caused as a result of the extension.

(3) Despite subsection (2), an application for a review of a reviewable determination may not be made more than 3 years after the day on which the determination was made.

#### **87. Stay of execution of reviewable determination**

(1) The making of an application for review does not by itself operate as a stay of execution of the determination to which the application relates.

(2) A person or undertaking that has made an application for review may, at any time before the application is determined by the Tribunal, apply to the Tribunal for a stay of execution of the determination to which the application relates.

(3) When an application is made under subsection (2), the Tribunal must, as soon as reasonably practicable, conduct a hearing to determine the application, and may, where it considers it appropriate, order a stay of execution of the determination to which the application relates.



(4) An order for a stay of execution under this section may be made subject to such conditions as to costs, payment of money into the Tribunal or otherwise as the Tribunal considers appropriate.

## PART 6

### ENFORCEMENT BEFORE TRIBUNAL

#### Division 1 – Introductory

#### **88. Interpretation**

In this Part –

“disqualification order” (取消資格令) means an order made by the Tribunal under section 99 disqualifying a person from being a director of a company or from otherwise being concerned in the affairs of a company;

“pecuniary penalty” (罰款) means a pecuniary penalty ordered to be paid, under section 91.

#### **89. Persons involved in contravention of competition rule**

A reference in this Part to a person being involved in a contravention of a competition rule means a person who –

- (a) attempts to contravene the rule;
- (b) aids, abets, counsels or procures any other person to contravene the rule;
- (c) induces or attempts to induce any other person, whether by threats or promises or otherwise, to contravene the rule;
- (d) is in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule; or
- (e) conspires with any other person to contravene the rule.

## Division 2 – Pecuniary Penalty

### 90. Commission may apply for pecuniary penalty

(1) If, after carrying out such investigation as it considers appropriate, the Commission considers it appropriate to do so, it may apply to the Tribunal for a pecuniary penalty to be imposed on any person it has reasonable cause to believe –

- (a) has contravened a competition rule; or
  - (b) has been involved in a contravention of a competition rule.
- (2) An application under subsection (1) may not be made –
- (a) in the case of an application with respect to a contravention of the merger rule, more than 6 months after the day on which the merger was completed or the Commission became aware of the merger, whichever is the later; or
  - (b) in the case of an application with respect to a contravention of a conduct rule, more than 5 years after the day on which the contravention ceased or the Commission became aware of the contravention, whichever is the later.

### 91. Tribunal may impose pecuniary penalty

(1) If the Tribunal is satisfied, on application by the Commission under section 90, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate.

(2) Without limiting the matters that the Tribunal may have regard to, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters –

- (a) the nature and extent of the conduct that constitutes the contravention;
- (b) the loss or damage, if any, caused by the conduct;
- (c) the circumstance in which the conduct took place; and
- (d) whether the person has previously been found by the Tribunal to have contravened this Ordinance.

(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total –

- (a) 10% of the turnover of the undertaking concerned, for the year in which the contravention occurred; or
- (b) if the contravention has continued for more than one year, 10% of the turnover of the undertaking concerned, for each year in which the contravention has continued.

(4) In this section –

“turnover” (營業額) means the total gross revenues of an undertaking whether obtained in Hong Kong or outside Hong Kong;

“year” (年) means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.

### **Division 3 – Other Orders**

#### **92. Other orders of Tribunal**

(1) If the Tribunal is satisfied that a person has contravened, or been involved in a contravention of a competition rule, it may (whether or not it makes an order under section 91 imposing a pecuniary penalty), either of its own motion or on application made for this purpose, make any order it considers appropriate against that person, including all or any of the orders specified in Schedule 3.

(2) An application for an order under subsection (1) may not be made –

(a) in the case of an application with respect to a contravention of the merger rule, more than 6 months after the day on which the merger was completed or the Commission became aware of the merger, whichever is the later; or

(b) in the case of an application with respect to a contravention of a conduct rule, more than 5 years after the day on which the contravention ceased or the Commission became aware of the contravention, whichever is the later.

(3) Despite subsection (2)(a), the Tribunal may, on application made before the expiry of the period referred to in that subsection, extend the period within which an application under subsection (1) may be made with respect to a contravention of the merger rule if the Tribunal considers it reasonable to do so.

### **93. Interim orders**

(1) Subject to subsection (2), if the Tribunal is satisfied that a person is engaged in or is proposing to engage in conduct that constitutes or would constitute a contravention of the competition rules, it may, either of its own motion or on application made for this purpose, make an interim order pending its determination of an application for an order under section 92.

(2) A person other than the Commission is not entitled to make an application under subsection (1) by reason that any other person is engaged in or is proposing to engage in conduct that contravenes or would contravene the merger rule.

(3) An interim order remains in force for the period, being a period of not more than 180 days, specified in the order, but this period may be extended

by the Tribunal for a further period of not more than 180 days on any one occasion.

(4) An interim order may be made whether or not an application for a pecuniary penalty under section 90 or an order under section 92 has been made.

(5) The Tribunal may make an order under this section whether or not –

- (a) the person against whom the order is to be made intends to engage again in or intends to continue to engage in the conduct that is to be the subject of the order;
- (b) the person against whom the order is to be made has previously engaged in the conduct that is to be the subject of the order; or
- (c) there is an imminent danger of damage or loss being incurred by any person if the order is not made.

#### **94. Order to pay costs of Commission investigation**

(1) The Tribunal may order any person who has contravened a competition rule to pay to the Government an amount equal to the amount of the costs of and incidental to any investigation into the conduct or affairs of that person, reasonably incurred by the Commission in connection with proceedings for the contravention.

(2) In this section –  
“costs” (開支) include fees, charges, disbursements, expenses and remuneration.

## **Division 4 – Contraventions of Merger Rule**

### **Subdivision 1 – Anticipated Mergers**

#### **95. Proceedings in relation to anticipated mergers**

(1) If the Commission, after conducting an investigation, has reasonable cause to believe that arrangements are in progress or in contemplation which, if carried into effect, will result in a merger that is likely to contravene the merger rule, it may apply to the Tribunal for an order under this section.

(2) If the Tribunal is satisfied, on application made under this section, that arrangements are in progress or in contemplation which, if carried into effect, will result in a merger that is likely to contravene the merger rule, it may make an order directed against a party to the arrangements or any other person –

- (a) ordering the person against whom the order is directed not to proceed with the merger;
- (b) ordering the person against whom the order is directed not to proceed with a part of the merger;
- (c) in addition to or instead of an order referred to in paragraph (b), prohibiting the person against whom the order is directed from doing anything that will result in a merger.

(3) If the Tribunal is not satisfied that an arrangement, if carried into effect, will result in a merger that is likely to contravene the merger rule, it may make a declaration to that effect.

(4) An order under this section may contain anything permitted by Schedule 4.

#### **96. Interim orders**

(1) If an application has been made to the Tribunal under section 95 but has not yet been finally determined, the Tribunal may, either of its own

motion or on application by the Commission, make interim orders for the purpose of preventing pre-emptive action, including orders –

- (a) prohibiting or restricting the doing of things that the Tribunal considers would constitute pre-emptive action;
- (b) imposing on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
- (c) providing for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on any terms and with any powers that may be specified or described in the order) or in any other manner.

(2) In this section –

“pre-emptive action” (先發制人行動) means any action that might prejudice the hearing of the application under section 95 or any final order that the Tribunal might make on the hearing of the application.

## **Subdivision 2 - Mergers**

### **97. Application to Tribunal for order**

(1) If the Commission, after carrying out such investigation as it considers appropriate, has reasonable cause to believe that a merger contravenes the merger rule, it may apply to the Tribunal for an order under section 98.

(2) An application for an order under subsection (1) must be made within the period of 6 months after the day on which the merger was completed or the Commission became aware of the merger, whichever is the later.

(3) Despite subsection (2), the Tribunal may, on application by the Commission made before the expiry of the period referred to in that subsection, extend the period within which an application under subsection (1) may be made if the Tribunal considers it reasonable to do so.

### **98. Proceedings in relation to mergers**

(1) If the Tribunal is satisfied, on application by the Commission under section 97, that a merger contravenes the merger rule, it may make any order it considers appropriate for the purpose of bringing the contravention to an end.

(2) An order made under subsection (1) may contain anything permitted by Schedule 4.

## **Division 5 – Disqualification Orders**

### **99. Disqualification order**

(1) In the circumstances specified in section 100, the Tribunal may, on application by the Commission, make a disqualification order against a person.

(2) A disqualification order is an order that a person may not, without the leave of the Tribunal –

- (a) be, or continue to be, a director of a company;
- (b) be a liquidator of a company;
- (c) be a receiver or manager of a company's property; or
- (d) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company,

for a specified period, not exceeding 5 years, beginning with the date of the order.

(3) In this section –  
 “specified” (指明) means specified in the disqualification order.

### **100. Circumstances in which disqualification order may be made**

The Tribunal may only make a disqualification order against a person if both of the following conditions are satisfied in relation to that person –

- (a) it has determined that a company of which the person is a director has contravened a competition rule; and



- (b) it considers that the person's conduct as a director makes the person unfit to be concerned in the management of a company.

### **101. Unfitness to be concerned in management of company**

(1) For the purpose of deciding under section 100(b) whether a person is unfit to be concerned in the management of a company, the Tribunal –

- (a) must have regard to whether subsection (2) applies to the person; and
- (b) may have regard to the conduct of the person as the director of a company, in connection with any other contravention of a competition rule.

(2) This subsection applies to a person if as a director of the company –

- (a) the person's conduct contributed to the contravention of the competition rule;
- (b) the conduct of the person did not contribute to the contravention, but the person had reasonable grounds to suspect that the conduct of the company constituted the contravention and took no steps to prevent it; or
- (c) the person did not know but ought to have known that the conduct of the company constituted the contravention.

### **102. Applications for disqualification order and for leave under an order**

(1) An application for a disqualification order may be made only by the Commission.

(2) An application for leave of the Tribunal to participate in the affairs of a company in one of the ways prohibited under section 99(2) (Disqualification

order) may be made only by or on behalf of the person against whom the order was made.

### **103. Contravention of disqualification order**

A person who contravenes a disqualification order commits an offence and is liable –

- (a) on conviction on indictment, to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction, to a fine at level 6 and to imprisonment for 6 months.

## **PART 7**

### **PRIVATE ACTIONS**

#### **Division 1 – General**

### **104. Interpretation**

In this Part –

“follow-on action” (後續訴訟) means an action brought by a person who has a right to bring the action under section 108(1);

“stand-alone action” (獨立訴訟) means an action brought by a person who has a right to bring the action under section 111(1).

### **105. Persons involved in contravention of conduct rule**

A reference in this Part to a person being involved in a contravention of a conduct rule means a person who –

- (a) attempts to contravene the rule;
- (b) aids, abets, counsels or procures any other person to contravene the rule;
- (c) induces or attempts to induce any other person, whether by threats or promises or otherwise, to contravene the rule;

- (d) is in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule; or
- (e) conspires with any person to contravene the rule.

**106. No proceedings independent of this Ordinance**

No person may bring any proceedings independently of this Ordinance, whether under any rule of law or any enactment, in any court in Hong Kong, if the cause of action is the defendant's contravention, or involvement in a contravention, of a conduct rule.

**107. Pure competition proceedings not to be brought in Court of First Instance**

No person may bring any proceedings in the Court of First Instance under this Part if the cause of action is only the defendant's contravention, or involvement in a contravention, of a conduct rule.

**Division 2 – Follow-on Action**

**108. Follow-on right of action**

(1) A person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule has a right of action under this section against –

- (a) any person who has contravened or is contravening the rule; and
- (b) any person who is, or has been, involved in that contravention.

(2) Subject to subsection (3), a claim to which this section applies may only be made in proceedings brought before the Tribunal.

(3) A claim to which this section applies may be made in proceedings before the Court of First Instance if the cause of action in those proceedings is

not solely the defendant's contravention, or involvement in a contravention, of a conduct rule.

(4) For the purpose of subsection (1), an act is taken to have been determined to be a contravention of a conduct rule if –

- (a) the Tribunal has made a decision that the act is a contravention of a conduct rule;
- (b) the Court of Appeal has decided, on an appeal from a decision of the Tribunal, that the act is a contravention of a conduct rule;
- (c) the Court of Final Appeal has decided, on an appeal from a decision of the Court of Appeal, that the act is a contravention of a conduct rule; and
- (d) a person has made an admission, in a commitment that has been accepted by the Commission, that the person has contravened a conduct rule.

#### **109. Commencement of follow-on actions**

(1) The periods during which proceedings for a follow-on action may not be brought are –

- (a) in the case of a decision of the Tribunal that conduct is a contravention of a conduct rule, the period during which an appeal may be made to the Court of Appeal under section 153; and
- (b) in the case of a decision of the Court of Appeal, the period during which a further appeal may be made to the Court of Final Appeal,

and, where any such appeal or further appeal is made, the period specified in paragraph (a) or (b) includes the period before the appeal is determined.

(2) Despite subsection (1), the Tribunal may, on the application of the Commission or of the party seeking to bring the proceedings, permit proceedings for a follow-on action to be brought within any period specified in subsection (1).

(3) Proceedings for a follow-on action may not be brought more than 3 years after the earliest date on which the action could have been commenced following the expiry of a relevant period specified in subsection (1).

### **110. Tribunal orders in follow-on actions**

The Tribunal in a follow-on action may make any one or more of the orders specified in Schedule 3.

## **Division 3 – Stand-alone Action**

### **111. Stand-alone right of action**

(1) A person who has suffered loss or damage as a result of a contravention of a conduct rule has a right of action under this section against –

- (a) any person who has contravened or who is contravening the rule; and
- (b) any person who is, or has been, involved in that contravention.

(2) Subject to subsection (3), a claim to which this section applies may only be made in proceedings brought before the Tribunal.

(3) A claim to which this section applies may be made in proceedings before the Court of First Instance if the cause of action in those proceedings is not solely the defendant's contravention, or involvement in a contravention, of a conduct rule.

(4) An action may be brought under this section even if –

- (a) a leniency agreement has been made by the Commission regarding the contravention; or
- (b) a commitment has been accepted by the Commission regarding the contravention.

## **112. Commencement of stand-alone actions**

(1) A stand-alone action may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered by the claimant.

(2) Despite subsection (1), a stand-alone action may not be commenced more than 5 years beginning after the day on which the cause of action accrued.

## **113. Tribunal orders in stand-alone actions**

The Tribunal in a stand-alone action may make any one or more of the orders specified in Schedule 3.

### **Division 4 – Procedure**

## **114. Tribunal may adjourn proceedings pending completion of Commission investigation**

(1) The Tribunal may, either of its own motion or on application by the Commission or a party to the proceedings, adjourn the hearing of a stand-alone action in order to allow the Commission to complete any current or proposed investigation, before proceeding with the hearing.

(2) The Tribunal may adjourn the hearing of a stand-alone action under subsection (1) on such terms as it thinks fit –

- (a) for a fixed period; or
- (b) until the investigation by the Commission has been completed.

(3) The Tribunal may, in relation to an adjournment made under this section, either of its own motion or on application by the Commission or a party to the proceedings –

- (a) extend the period of the adjournment; or
- (b) vary the terms of the adjournment.

### **115. Transfer of proceedings from Court of First Instance to Tribunal**

(1) This section applies to proceedings with respect to an alleged contravention of a conduct rule only where neither the Court of First Instance nor the Tribunal has made a decision that the rule has been contravened.

(2) The Court of First Instance may transfer to the Tribunal so much of any proceedings brought in the Court which –

- (a) are within the jurisdiction of the Tribunal; and
- (b) the Court considers should, in the interests of justice, be transferred to the Tribunal.

(3) If the Court of First Instance transfers proceedings under subsection (2), the practice and procedure of the Tribunal apply after the transfer.

(4) If the Court of First Instance does not transfer proceedings to the Tribunal under subsection (2), the Court has the same power in the proceedings as the Tribunal has in a follow-on or stand-alone action.

### **116. Costs in transferred proceedings**

(1) If the Court of First Instance makes an order transferring proceedings to the Tribunal under section 115, it may make an order for costs prior to the transfer and of the transfer.

(2) The costs of the whole proceedings, both before and after the transfer, are in the discretion of the Tribunal, subject to any order made by the Court of First Instance.

- (3) The Tribunal may make –
- (a) an order for costs; and
  - (b) an order as to the scales on which the costs of the proceedings are to be taxed,

as if the proceedings were originally brought in the Tribunal.

- (4) The costs of the whole proceedings are to be taxed in the Tribunal.

### **117. Reference by Court of First Instance to Commission for investigation**

(1) In any proceedings brought in the Court of First Instance or in the Tribunal in which a contravention of a conduct rule is alleged, the Court or the Tribunal may, either of its own motion or on application by a party to the proceedings, refer the alleged contravention to the Commission for investigation under this Ordinance.

(2) Where the Court of First Instance or the Tribunal has referred an alleged contravention of a conduct rule to the Commission for investigation, it may stay the proceedings before it pending –

- (a) in the case of a referral by the Tribunal, the completion of the Commission's investigation; or
- (b) in the case of a referral by the Court, the completion of the Commission's investigation and any subsequent proceedings in the Tribunal brought as a result of the investigation.

### **118. Findings of contravention of conduct rules**

(1) This section applies to proceedings under this Part brought in the Court of First Instance or in the Tribunal in which a contravention of a conduct rule is alleged in relation to a particular act.

(2) In any such proceedings the Court of First Instance or the Tribunal (as the case requires) is bound, once any period specified in subsection (3) has expired, by any earlier decision of the Court or Tribunal that the act in question is a contravention of the conduct rule.

(3) The period mentioned in subsection (2) is –

- (a) the period during which an appeal may be made to the Court of Appeal under section 153; and
- (b) where an appeal has been made to the Court of Appeal, the period during which a further appeal may be made to the Court of Final Appeal,



and, where any such appeal or further appeal is made, the period specified in paragraph (a) or (b) includes the period before the appeal is determined.

### **119. Intervention by Commission**

(1) This section applies to proceedings involving an alleged contravention of a conduct rule, before the Tribunal or any other court, that are brought by a person other than the Commission.

(2) The Commission may, with the leave of the Tribunal or other court, and subject to any conditions imposed by the Tribunal or other court, intervene in any such proceedings.

(3) An application for leave under this section must be made in the prescribed form and must be served by the Commission on each party to the proceedings.

(4) If the Commission intervenes in proceedings under this section, the Commission becomes, as from the date of the grant of leave, a party to the proceedings and has all the rights, duties and liabilities of a party to the proceedings.

### **120. Commission may participate in proceedings**

The Commission may, with the leave of or at the invitation of the Tribunal or other court (as the case requires) participate in proceedings before the Tribunal or any other court involving an alleged contravention of a conduct rule that have been brought by another person and, in particular may –

- (a) make written submissions to the Tribunal or other court; or
- (b) apply for, or join an application for, the adjournment of the proceedings pending the completion of the Commission's investigation into the alleged contravention that is in issue in the proceedings.

## PART 8

### DISCLOSURE OF INFORMATION

#### 121. Interpretation

In this Part –

“employee” (僱員) means a person engaged for the provision of services, whether under a contract of employment or otherwise;

“specified person” (指明人士) means –

- (a) the Commission;
- (b) any person who is or was a member, employee or agent of the Commission;
- (c) any person who is or was a member of a committee of the Commission, established under section 28 of Schedule 5;
- (d) any person who is or was a public officer serving in the Office of the Telecommunications Authority;
- (e) any person who is or was an employee or agent of the Office of the Telecommunications Authority;
- (f) any person who is or was a public officer serving in the Television and Entertainment Licensing Authority;
- (g) any person who is or was an employee or agent of the Television and Entertainment Licensing Authority;
- (h) any person who is or was a member of the Broadcasting Authority; or
- (i) any person appointed to assist any person referred to in paragraphs (a), (b), (c), (d), (e), (f), (g) and (h) in the exercise of the powers of the Commission under Part 3.

#### 122. Confidential information

(1) In this Part –

“confidential information” (機密資料) means –

- (a) information that has been provided to or obtained by the Commission in the course of, or in connection with, the performance of its functions under this Ordinance, that relates to –
    - (i) the private affairs of a natural person;
    - (ii) the commercial activities of any person that are of a confidential nature; or
    - (iii) the identity of any person who has given information to the Commission;
  - (b) information that has been given to the Commission on terms that or in circumstances that require it to be held in confidence; or
  - (c) information given to the Commission that has been identified as confidential information in accordance with subsection (2).
- (2) If a person –
- (a) identifies information that the person has given to the Commission as confidential; and
  - (b) provides a statement in writing setting out the reasons why, in that person’s opinion, the information is confidential,

the information is also to be regarded as confidential information under this Part.

### **123. Duty to establish and maintain safeguards**

(1) The Commission, the Telecommunications Authority and the Broadcasting Authority must establish and maintain adequate procedural safeguards to prevent the unauthorized disclosure of confidential information.

(2) In this section –

“unauthorized disclosure” (在未經授權下披露) means disclosure that is either prohibited or not authorized by or under this Ordinance.

**124. Preservation of confidentiality**

- (1) A specified person –
  - (a) must preserve and aid in preserving the confidentiality of any confidential information;
  - (b) must not disclose confidential information to any other person; and
  - (c) must not suffer or permit any other person to have access to confidential information.

(2) Subsection (1) does not apply to the disclosure of confidential information with lawful authority within the meaning of section 125.

(3) A specified person who contravenes subsection (1) commits an offence and is liable –

- (a) on conviction on indictment, to a fine of \$1,000,000 and to imprisonment for 2 years; or
- (b) on summary conviction, to a fine at level 6 and to imprisonment for 6 months.

(4) It is a defence for a person charged with an offence under this section to show that at the time of the alleged offence the defendant –

- (a) believed that there was lawful authority for the disclosure of the information concerned and the defendant had no reasonable cause to believe otherwise; or
- (b) did not know and had no reasonable cause to believe that the information disclosed was confidential information.

**125. Disclosure with lawful authority**

(1) Disclosure of confidential information is to be regarded as made with lawful authority if the disclosure is made –

- (a) subject to section 126, with the required consent, as specified in subsection (2);

- (b) subject to subsection (3), in the performance of any function of the Commission or in carrying into effect or doing anything authorized by this Ordinance;
  - (c) in accordance with an order of the Tribunal or any other court or in accordance with a law or a requirement made by or under a law;
  - (d) in connection with judicial proceedings arising under this Ordinance;
  - (e) for the purpose of obtaining advice from counsel, a solicitor or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance;
  - (f) with a view to the bringing of, or otherwise for the purposes of, any criminal proceedings, or any investigation carried out under the laws of Hong Kong, in Hong Kong;
  - (g) with respect to information that has already been lawfully disclosed to the public on an earlier occasion; or
  - (h) by one competition regulator to another.
- (2) The consent required for the purposes of subsection (1)(a) is –
- (a) if the information was obtained from a person who had the information lawfully and the Commission knows the identity of that person, the consent of that person;
  - (b) if the information relates to the affairs of a natural person, the consent of that person;
  - (c) if the information relates to the activities of an undertaking, the consent of that undertaking, and that consent may be given –
    - (i) if the undertaking is a company, by a director or secretary of the company;

- (ii) if the undertaking is a partnership, by a partner; or
- (iii) if the undertaking is an unincorporated body (other than a partnership), by a person concerned in the management or control of the body.

(3) In deciding whether or not to disclose confidential information, where disclosure is lawful under subsection (1)(b), the specified person must consider and have regard to –

- (a) the need to exclude as far as is practical, from such disclosure –
  - (i) information the disclosure of which would, in the opinion of the specified person, be contrary to public interest;
  - (ii) commercial information the disclosure of which would or might be likely to, in the opinion of the specified person, significantly harm the legitimate business interests of the person to whom it relates; and
  - (iii) information relating to the private affairs of a natural person, the disclosure of which might (in the opinion of the specified person) significantly harm the interest of that person; and
- (b) the extent to which the disclosure is necessary for the purpose sought to be achieved by the disclosure.

### **126. Notice of proposed disclosure**

(1) If the disclosure of confidential information is lawful by virtue of section 125(1)(a), a specified person must, before disclosing any such information –

- (a) give notice of the proposed disclosure to –

- (i) the person who provided the information to the Commission; and
  - (ii) any person who is, in the opinion of the specified person, likely to be affected by the disclosure; and
- (b) consider any representations that are made about the proposed disclosure.
- (2) A notice under subsection (1) must –
- (a) give a description of the information (having due regard to the requirements of confidentiality) that the specified person proposes to disclose;
  - (b) state the reasons why the disclosure is proposed;
  - (c) identify the person to whom it is proposed to disclose the information; and
  - (d) state any other facts that the specified person considers relevant to the question of the proposed disclosure.
- (3) A notice under this section must specify the period within which representations may be made about the proposed disclosure.
- (4) The period specified for the purpose of subsection (3) must be a period of at least 30 days beginning after the day on which the notice is given.

**127. Obligation of third party not to disclose confidential information**

- (1) A person, other than a specified person, who –
- (a) has received confidential information from the Commission; or
  - (b) has otherwise, directly or indirectly, received such information from a specified person,
- must not disclose that information to any other person or suffer or permit any other person to have access to that information.
- (2) Subsection (1) does not apply to the disclosure of information where –

- (a) the Commission has consented to the disclosure;
  - (b) the information has already been lawfully disclosed to the public on an earlier occasion;
  - (c) the disclosure is for the purpose of obtaining advice from counsel, a solicitor or other professional adviser, acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance;
  - (d) the disclosure is made in connection with any judicial proceedings arising under this Ordinance; or
  - (e) the disclosure is made in accordance with an order of the Tribunal or any other court or in accordance with a law or a requirement made by or under a law.
- (3) A person who contravenes subsection (1) commits an offence and is liable –
- (a) on conviction on indictment, to a fine of \$1,000,000 and to imprisonment for 2 years; or
  - (b) on summary conviction, to a fine at level 6 and to imprisonment for 6 months.

## PART 9

### COMPETITION COMMISSION

#### **Division 1 – Establishment, Functions and Powers**

##### **128. Establishment of Commission**

- (1) There is established, by virtue of this section, a body to be known as the Competition Commission.
- (2) The Commission is a body corporate and may –
  - (a) acquire, hold and dispose of movable and immovable property;
  - (b) sue and be sued in its own name; and



(c) so far as is possible for a body corporate, exercise all the rights and powers, enjoy all the privileges and incur all the liabilities of a natural person of full age and capacity.

(3) Schedule 5 (which contains constitutional, administrative and financial provisions) has effect with respect to the Commission.

### **129. Functions of Commission**

The Commission has the following functions –

- (a) to investigate conduct that may contravene the competition rules and enforce the provisions of this Ordinance;
- (b) to promote public understanding of the value of competition and how this Ordinance promotes competition;
- (c) to promote the adoption by undertakings carrying on business in Hong Kong of appropriate internal controls and risk management systems, to ensure their compliance with this Ordinance;
- (d) to advise the Government on competition matters in Hong Kong and outside Hong Kong;
- (e) to conduct market studies into matters affecting competition in markets in Hong Kong; and
- (f) to promote research into and the development of skills in relation to the legal, economic and policy aspects of competition law in Hong Kong.

### **130. Powers of Commission**

(1) The Commission may do all such things as appear to it to be necessary, advantageous or expedient for it to do for, or in connection with, the performance of its functions.

(2) Without limiting the scope of subsection (1), the Commission may –

- (a) make, give effect to, assign or accept the assignment of, vary or rescind any agreement;
- (b) receive and spend money;
- (c) with the approval of the Financial Secretary, borrow money;
- (d) invest funds of the Commission that are not immediately required, in a manner approved by the Financial Secretary;
- (e) with the approval of the Chief Executive, become a member or affiliate of any international body, whose functions or objects include the promotion of competition or competition law.

## **Division 2 – Relationship to Government**

### **131. Commission not servant or agent of Government**

The Commission is not a servant or agent of the Government and does not enjoy any status, immunity or privilege of the Government.

### **132. Personal immunity of members of Commission etc.**

(1) A person to whom this subsection applies is not personally liable for anything done or omitted to be done by the person in good faith in the performance or purported performance of any function of the Commission under this Ordinance.

(2) The persons to whom subsection (1) applies are –

- (a) members of the Commission;
- (b) any person who is an officer or employee of the Commission;
- (c) any person who is a member of any committee of the Commission; and

(d) any person who is performing any service for the Commission under a contract of services.

(3) The protection conferred by subsection (1) does not affect any liability of the Commission for the act or omission.

## PART 10

### COMPETITION TRIBUNAL

#### Division 1 – Constitution

##### **133. Establishment of Tribunal**

(1) There is established, by virtue of this section, a tribunal to be known as the Competition Tribunal.

(2) The Tribunal is a superior court of record.

##### **134. Constitution of Tribunal**

(1) The Tribunal consists of the judges of the Court of First Instance appointed in accordance with section 6 of the High Court Ordinance (Cap. 4), by virtue of their appointments as such judges.

(2) A Justice of Appeal who sits in the Court of First Instance is not a member of the Tribunal.

#### **Subdivision 1 – President and Deputy President**

##### **135. President**

(1) The Chief Executive, acting in accordance with the recommendation of the Judicial Officers Recommendation Commission, is to appoint one of the members of the Tribunal to be the President of the Tribunal.

(2) The President is to hold office for a term of at least 3 years, but not more than 5 years, as is stated in his or her letter of appointment, but is eligible for re-appointment.

(3) The President may give directions as to the arrangement of the business of the Tribunal, and is to perform such other functions as are assigned to the President under this Ordinance.

### **136. Deputy President**

(1) The Chief Executive, acting in accordance with the recommendation of the Judicial Officers Recommendation Commission, is to appoint one of the members of the Tribunal to be the Deputy President of the Tribunal.

(2) The Deputy President is to hold office for a term of at least 3 years, but not more than 5 years, as is stated in his or her letter of appointment, but is eligible for re-appointment.

(3) The Deputy President may, subject to any directions given by the President, perform all the functions of the President.

(4) Every decision or other act or omission of the Deputy President while acting under subsection (3) is to be regarded as a decision, act or omission of the President.

### **137. Acting President**

(1) If for any reason the President is unable, whether temporarily or otherwise, to perform the functions of the President, the Deputy President may act as President.

(2) If for any reason the Deputy President is unable, whether temporarily or otherwise, to perform the functions of the President when the President is unable to perform them himself or herself, the Chief Justice may appoint another member of the Tribunal to act as President.

(3) A person acting as President under this section may perform all the functions of the President.

(4) Every decision or other act or omission of a person acting as President under this section is to be regarded as the decision, act or omission of the President.

(5) The Chief Justice may at any time revoke an appointment made under subsection (2).

### **138. Resignation as President or Deputy President**

(1) The President and Deputy President may, at any time, resign from their office by giving written notice of resignation to the Chief Executive.

(2) If the President or Deputy President resigns from office under this section, he or she continues to be a member of the Tribunal.

### **139. Vacancy in office of President or Deputy President**

(1) The office of President or Deputy President becomes vacant if the President or Deputy President (as the case may be) –

- (a) dies;
- (b) ceases to be a judge of the Court of First Instance;
- (c) is appointed to be a Justice of Appeal, or to a higher judicial office; or
- (d) resigns his or her office under section 138.

(2) If the office of President or Deputy President has become vacant, the Chief Executive, acting in accordance with the recommendation of the Judicial Officers Recommendation Commission, may appoint one of the members of the Tribunal to be the President or Deputy President (as the case requires).

(3) The President or Deputy President appointed under this section is to hold office for a term of at least 3 years, but not more than 5 years, as is stated in his or her letter of appointment, but is eligible for re-appointment.

## **Subdivision 2 – Assessors**

### **140. Assessors**

(1) In any proceedings under this Ordinance, the Tribunal may appoint one or more specially qualified assessors and may dispose of the proceedings, wholly or in part, with the assistance of such assessor or assessors, but the decision of the Tribunal is that of the members of Tribunal only.

(2) The Tribunal may determine the remuneration, if any, to be paid to an assessor appointed under this section, but no remuneration may be paid to an assessor who is a public officer.

(3) An assessor is not personally liable for anything done or omitted to be done by the assessor in good faith in the performance of his or her functions or purported performance of his or her functions under this Ordinance.

## **Division 2 – Jurisdiction and Powers**

### **141. Jurisdiction of Tribunal**

- (1) The Tribunal has jurisdiction to hear and determine –
- (a) applications made by the Commission with regard to alleged contraventions of the competition rules;
  - (b) applications for the review of reviewable determinations;
  - (c) private actions in respect of contraventions of the conduct rules;
  - (d) applications for the disposal of property;
  - (e) applications for the enforcement of commitments; and
  - (f) any matter related to a matter referred to in paragraphs (a), (b), (c), (d) and (e).

(2) In the exercise of its jurisdiction, the Tribunal has the same jurisdiction to grant remedies and reliefs, equitable or legal, as the Court of First Instance.

## **142. Powers of Tribunal**

- (1) The Tribunal has, with respect to –
- (a) the attendance, swearing and examination of witnesses;
  - (b) the production and inspection of documents;
  - (c) the enforcement of its orders; and
  - (d) all other matters necessary for the exercise of its jurisdiction,

all the powers, rights and privileges of a superior court of record.

(2) Without limiting the scope of subsection (1), in proceedings before the Tribunal, the Tribunal may –

- (a) receive and consider any evidence, whether by way of oral evidence, written statements, documents or otherwise, and whether or not it would otherwise be admissible in civil or criminal proceedings in a court of law;
- (b) determine the manner in which it will receive evidence referred to in paragraph (a);
- (c) by notice in writing, signed by the presiding member of the Tribunal, summon any person –
  - (i) to produce any article or document that is relevant to the proceedings and is in that person's possession or under that person's control;
  - (ii) to appear before it and to give any evidence relevant to the proceedings; and
- (d) exercise such other powers as may be necessary or ancillary to the conduct of any proceedings.

## **Division 3 – Practice and Procedure**

### **143. Procedures**

(1) The Tribunal may decide its own procedures and may, in so far as it thinks fit, follow the practice and procedure of the Court of First Instance in

the exercise of its civil jurisdiction, and for this purpose, has the same jurisdiction, powers and duties of the Court in respect of such practice and procedure, including the jurisdiction, powers and duties of the Court in respect of costs.

(2) Without limiting subsection (1), the Tribunal has the same jurisdiction, powers and duties of the Court of First Instance in respect of the punishment of a person guilty of contempt.

(3) The Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice.

#### **144. Hearing and determination of applications**

(1) An application to the Tribunal may be heard and determined by a Tribunal constituted by any of the following –

- (a) the President;
- (b) the President and one or more other members appointed by the President; or
- (c) one or more other members appointed by the President.

(2) If the President is sitting with one or more other members, the President is to preside over the hearing; if the President is not sitting and there is more than one other member sitting, the President is to appoint one of those other members to preside over the sitting.

(3) Any difference between the members exercising the jurisdiction of the Tribunal is to be decided by majority vote and, in the event of an equality of votes, the member presiding is to have a second or casting vote.

#### **145. Absence of member during course of proceedings**

(1) If, after the commencement of any proceedings, a member of the Tribunal, other than the presiding member, is absent for any reason, the presiding member may, with the consent of the parties –



- (a) direct that the proceedings be continued in the absence of that member; or
  - (b) direct that another specified member take the place of the absent member in the proceedings.
- (2) If, after the commencement of proceedings, the presiding member of the Tribunal is absent for any reason, then –
- (a) if there is only one member of the Tribunal remaining, and the parties agree, the proceedings may be continued in the absence of the presiding member; or
  - (b) if there is more than one member of the Tribunal remaining, and the parties agree –
    - (i) the proceedings may be continued in the absence of the presiding member; and
    - (ii) the most senior of the remaining members is to preside, with seniority determined according to the priority of their appointments as judges of the Court of First Instance.
- (3) If –
- (a) the presiding member has given a direction under subsection (1); or
  - (b) the members and parties have agreed to proceed under subsection (2),

the Tribunal as so constituted is to be regarded as properly constituted.

#### **146. Rules of evidence**

In proceedings under this Ordinance, other than proceedings in which the Commission applies for an order for –

- (a) a pecuniary penalty under section 91; or
- (b) a financial penalty under section 168,

the Tribunal is not bound by the rules of evidence and may receive and take into account any relevant evidence or information, whether or not it would be otherwise admissible in a court of law.

#### **147. Evidence that might tend to incriminate**

(1) A person appearing before the Tribunal to give evidence, other than in proceedings in which the Commission applies for an order for –

- (a) a pecuniary penalty under section 91; or
- (b) a financial penalty under section 168,

is not excused from answering any question on the grounds that to do so might expose the person to proceedings referred to in subsection (3).

(2) No statement or admission made by a person answering any question put to the person, in any proceedings to which subsection (1) applies, is admissible in evidence against that person in proceedings referred to in subsection (3).

(3) The proceedings referred to in subsections (1) and (2) are –

- (a) proceedings in which the Commission applies for an order for –
  - (i) a pecuniary penalty under section 91; or
  - (ii) a financial penalty under section 168; and
- (b) any criminal proceedings, other than proceedings for –
  - (i) an offence under section 55 (Providing false or misleading documents or information);
  - (ii) an offence under Part V (Perjury) of the Crimes Ordinance (Cap. 200); or
  - (iii) an offence of perjury.

#### **148. Findings of fact by Tribunal**

(1) A finding of fact by the Tribunal, which is relevant to an issue arising in any other proceedings, either in the Tribunal or in the Court of First

Instance, relating to a contravention of a conduct rule, is evidence of that fact in those proceedings if –

- (a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal; or
- (b) the final decision of a court on such appeal has confirmed the finding.

(2) In this section –

“relevant party” (有關一方) means –

- (a) in relation to the first conduct rule, a party to the agreement which is the subject of the alleged contravention; and
- (b) in relation to the second conduct rule, the undertaking whose conduct is alleged to have contravened the conduct rule or any other person involved in the contravention.

#### **149. Findings of fact by Court of First Instance**

(1) A finding of any fact by the Court of First Instance, which is relevant to an issue arising in any other proceedings, either in the Court or in the Tribunal, relating to a contravention of a conduct rule, is evidence of that fact in those proceedings if –

- (a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal; or
- (b) the final decision of a court on such appeal has confirmed the finding.

(2) In this section–

“relevant party” (有關一方) has the meaning given by section 148(2).

**150. Order not to disclose material**

(1) The Tribunal may order a person not to publish or otherwise disclose any material the Tribunal receives.

(2) A person who fails to comply with an order made under subsection (1) commits an offence and is liable to a fine at level 6 and to imprisonment for 6 months.

**151. Decisions of Tribunal**

(1) A decision of the Tribunal must be recorded in writing.

(2) Where it is appropriate to give reasons for a decision, the decision may be made initially without giving reasons but, if this is done, the reasons must be recorded in writing.

**152. Orders of Tribunal**

An order made by the Tribunal must be recorded in writing.

**153. Appeal to Court of Appeal**

(1) An appeal lies to the Court of Appeal against any decision (including a decision as to the amount of any compensatory sanction or pecuniary penalty), determination or order of the Tribunal made under this Ordinance.

(2) An appeal under this section may only be brought –

(a) by a person who was a party to the proceedings in which the decision, determination or order of the Tribunal was made; and

(b) with the leave of the Court of Appeal.

(3) Leave to appeal may not be granted under subsection (2)(b) unless the Court of Appeal is satisfied that –

(a) the appeal has a reasonable prospect of success; or

(b) there is some other reason in the interests of justice why the appeal should be heard.

(4) The Court of Appeal has jurisdiction to hear and determine an appeal under subsection (1) and may –

- (a) confirm, set aside or vary the decision, determination or order of the Tribunal;
- (b) where the decision, determination or order of the Tribunal is set aside, substitute any other decision, determination or order it considers appropriate; or
- (c) remit the matter in question to the Tribunal for reconsideration in the light of the decision of the Court.

(5) Except in the case of an appeal against the imposition, or the amount, of a pecuniary penalty, the making of an appeal under this section does not suspend the effect of the decision, determination or order to which the appeal relates.

#### **Division 4 – Miscellaneous**

##### **154. Registrar and other staff of Tribunal**

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.

##### **155. Seal of Tribunal**

(1) The Tribunal is to have a seal approved by the Chief Justice.

(2) All writs, judgments, orders and other documents, and any exemplification or copies of writs, judgments, orders and other documents, are to be sealed with the seal.

(3) All writs, judgments, orders and other documents, and any exemplification or copies of writs, judgments, orders and other documents, when purporting to be so sealed, are admissible in evidence in any criminal or civil proceedings before any court on production without further proof.

**156. Tribunal rules**

(1) The Chief Judge may, after consulting the President, make rules regulating and prescribing –

- (a) the practice and procedure to be followed in the Tribunal in all matters with respect to which the Tribunal has jurisdiction; and
- (b) any matters incidental to or relating to that practice or procedure.

(2) Without limiting subsection (1), rules may be made for the following purposes –

- (a) prescribing fees and regulating matters relating to the fees payable in connection with applications to the Tribunal and proceedings in the Tribunal;
- (b) prescribing the manner and form in which documents are to be issued or served in relation to proceedings in the Tribunal;
- (c) prescribing the manner in which and the terms on which proceedings are conducted with the assistance of an assessor;
- (d) prescribing the manner and form in which documents may be filed in the Tribunal and the manner in which evidence may be given in proceedings; and
- (e) prescribing the allowances to be paid to witnesses appearing before the Tribunal.

## PART 11

### CONCURRENT JURISDICTION RELATING TO TELECOMMUNICATIONS AND BROADCASTING

#### **157. Interpretation**

In this Part –

“concurrent jurisdiction” (共享管轄權) means the jurisdiction to perform the functions of the Commission under this Ordinance, enjoyed by either of 2 competition regulators.

#### **158. Concurrent jurisdiction with Telecommunications Authority**

(1) The Telecommunications Authority may perform the functions of the Commission under this Ordinance, in so far as they relate to the conduct of undertakings that are –

- (a) licensees under the Telecommunications Ordinance (Cap. 106) other than licensees under Part IIIA of that Ordinance;
- (b) persons who, although not such licensees, are persons whose activities require them to be licensed under the Telecommunications Ordinance (Cap. 106) other than persons who are required to be licensed under Part IIIA of that Ordinance; 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 Telecommunications Authority.

**159. Concurrent jurisdiction with Broadcasting Authority**

(1) The Broadcasting Authority may perform the functions of the Commission under this Ordinance, other than functions relating to mergers, in so far as they relate to the conduct of undertakings that are –

- (a) licensees under the Broadcasting Ordinance (Cap. 562);
- (b) persons who, although not such licensees, are persons whose activities require them to be licensed under the Broadcasting Ordinance (Cap. 562); or
- (c) licensees under the Telecommunications Ordinance (Cap. 106) for whom functions are conferred on the Broadcasting Authority under Part IIIA 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 Broadcasting Authority.

**160. Transfer of competition matter between competition regulators**

(1) Where one competition regulator is performing a function in relation to a competition matter and another competition regulator also has jurisdiction to perform functions in relation to that matter, the 2 competition regulators may agree that the matter be transferred to and be dealt with by one of them.

(2) Unless there is an agreement as is mentioned in subsection (1), where one competition regulator is performing or has performed a function, in respect of which it has concurrent jurisdiction, in relation to a competition matter, no other competition regulator may perform any function in relation to that matter.



### **161. Memorandum of Understanding**

(1) As soon as is reasonably practicable after the coming into operation of this section, the Commission, the Telecommunications Authority and the Broadcasting Authority must prepare and sign a Memorandum of Understanding, for the purpose of co-ordinating the performance of their functions under this Ordinance.

(2) Without limiting subsection (1), the Memorandum of Understanding may provide for any or all of the matters set out in Schedule 6.

(3) The Commission, the Telecommunications Authority and the Broadcasting Authority may amend or replace any Memorandum of Understanding prepared and signed under this section.

(4) The parties to a Memorandum of Understanding must, within 6 weeks after the Memorandum, or any amendment of it, is signed by all parties, publish it in any manner the parties consider appropriate.

## **PART 12**

### **MISCELLANEOUS**

#### **Division 1 – General**

### **162. Merger**

Schedule 7 (Mergers) has effect.

### **163. Fees**

(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.

#### **164. Personal immunity of public officers**

(1) A public officer is not personally liable for anything done or omitted to be done by the public officer in good faith in the performance of a function or purported performance of a function under this Ordinance.

(2) The protection conferred by subsection (1) does not affect any liability of the Government for the act or omission.

### **Division 2 – Service of Documents**

#### **165. Service of documents on Commission**

(1) A notice or other document required to be served on the Commission under this Ordinance may be served –

- (a) by sending it by post to the offices of the Commission;
- (b) by leaving it at the offices of the Commission;

- (c) by sending it by facsimile transmission to the facsimile number of the Commission;
- (d) by sending it by electronic mail transmission to the electronic mail address of the Commission; or
- (e) by sending it by any other method specified in rules made by the Commission for this purpose under section 32 of Schedule 5.

(2) A notice or other document served in accordance with subsection (1) is to be taken, in the absence of evidence to the contrary, to have been served –

- (a) if served by post, on the second day after the day on which it was posted;
- (b) if left at the offices of the Commission, on the day after the day on which it was so left;
- (c) if sent by facsimile transmission, on the day after the day on which it was transmitted; or
- (d) if sent by electronic mail transmission, on the day after the day on which it was transmitted.

#### **166. Service of documents other than on Commission**

(1) A notice, direction or other document required to be served by the Commission for the purposes of this Ordinance may be served –

- (a) in the case of service on a natural person –
  - (i) by delivering it to the person personally;
  - (ii) by sending it by post in a letter addressed to the person at the person's usual place of residence or business or, if the person's address is unknown, addressed to the person's last known place of residence or business;

- (iii) by sending it by facsimile transmission to the facsimile number of the person or, if that number is unknown, to the last known facsimile number of the person; or
  - (iv) by sending it by electronic mail transmission to the electronic mail address of the person or, if that address is unknown, to the last known electronic mail address of the person;
- (b) in the case of service on a body corporate –
- (i) by delivering it to any place in Hong Kong at which the body corporate carries on business and giving it to any person in the place who appears to be concerned in the management of, or employed by, the body corporate;
  - (ii) by sending it by post in a letter addressed to the body corporate at its registered office in Hong Kong or at any place in Hong Kong at which the body corporate carries on business or, if the body corporate's address is unknown, addressed to the body corporate's last known place of business;
  - (iii) by sending it by facsimile transmission to the facsimile number of the body corporate or, if that number is unknown, to the last known facsimile number of the body corporate; or
  - (iv) by sending it by electronic mail transmission to the electronic mail address of the body corporate or, if that address is unknown, to the last known electronic mail address of the body corporate;
- (c) in the case of service on a partnership –

- (i) by delivering it to any place in Hong Kong at which the partnership carries on business and giving it to any person in the place who appears to be concerned in the management of, or employed by, the partnership;
  - (ii) by sending it by post in a letter addressed to the partnership at any place in Hong Kong at which the partnership carries on business or, if the partnership's address is unknown, addressed to the partnership's last known place of business;
  - (iii) by sending it by facsimile transmission to the facsimile number of the partnership or, if that number is unknown, to the last known facsimile number of the partnership; or
  - (iv) by sending it by electronic mail transmission to the electronic mail address of the partnership or, if that address is unknown, to the last known electronic mail address of the partnership; or
- (d) in the case of service on an undertaking other than a natural person, a body corporate or a partnership –
- (i) by delivering it personally to an officer of the undertaking or a member of its governing body;
  - (ii) by sending it by post in a letter addressed to the undertaking's usual place of business or, if the undertaking's address is unknown, to the last known place of business of the undertaking in Hong Kong;
  - (iii) by sending it by facsimile transmission to the facsimile number of the undertaking or, if that

number is unknown, to the last known facsimile number of the undertaking; or

- (iv) by sending it by electronic mail transmission to the electronic mail address of the undertaking or, if that address is unknown, to the last known electronic mail address of the undertaking.

(2) A notice, direction or other document served in accordance with subsection (1) is to be taken to have been served –

- (a) if served by post, on the second day after the day on which it was posted;
- (b) if sent by facsimile transaction, on the day after the day on which it was transmitted; or
- (c) if sent by electronic mail transmission, on the day after the day on which it was transmitted.

### **Division 3 – Indemnities**

#### **167. Certain indemnities of officers, employees or agents void**

(1) Subject to section 169, no person may indemnify another person who is or was an officer, employee or agent of an undertaking against liability for paying –

- (a) a pecuniary penalty under Part 6; or
  - (b) costs incurred in defending an action in which that other person is –
    - (i) convicted of contempt of the Tribunal;
    - (ii) convicted of an offence under Part 3; or
    - (iii) required to pay a pecuniary penalty under Part 6.
- (2) An indemnity given in contravention of subsection (1) is void.
- (3) In this section –

“employee” (僱員), in relation to an undertaking, means a person engaged by the undertaking for the provision of services, whether under a contract of employment or otherwise;

“officer” (高級人員) means –

- (a) in relation to an undertaking being a corporation, a director, manager or secretary of the undertaking, and any other person involved in the management of the undertaking; and
- (b) in relation to an undertaking not being a corporation, any member of the governing body of that undertaking.

#### **168. Financial penalty for contravention of section 167**

(1) If it appears to the Commission that a person has indemnified any other person in contravention of section 167, the Commission may apply to the Tribunal for an order imposing a financial penalty on that person.

(2) If the Tribunal is satisfied that a person has contravened section 167, it may make an order imposing a financial penalty on that person.

(3) The amount of a financial penalty imposed under this section may not exceed twice the value of the indemnity given in contravention of section 167.

#### **169. Provision of funds for indemnity for defending proceedings**

(1) Section 167 does not prohibit any person from providing funds to another person who is or was an officer, employee or agent of an undertaking to meet expenditure incurred or to be incurred by that other person in defending any proceedings under Part 6 for a pecuniary penalty, if it is done on the following terms –

- (a) that the funds are to be repaid in the event of the other person being required by the Tribunal to pay the pecuniary penalty; and
  - (b) that they are to be repaid not later than the date when the decision of the Tribunal becomes final.
- (2) For the purpose of this section a decision of the Tribunal becomes final –
- (a) if not appealed against, at the end of the period for bringing an appeal; or
  - (b) if appealed against, when the appeal or further appeal is finally disposed of.
- (3) An appeal is finally disposed of, for the purpose of subsection (2) –
- (a) if it is determined and the period for bringing any further appeal has ended; or
  - (b) if it is abandoned or otherwise ceases to have effect.
- (4) In this section –
- “employee” (僱員) has the meaning given by section 167(3);
- “officer” (高級人員) has the meaning given by section 167(3).

#### **Division 4 – Offences**

##### **170. Criminal proceedings not to be brought in Tribunal**

- (1) Criminal proceedings for an offence under this Ordinance may not be brought in the Tribunal.
- (2) To avoid doubt, subsection (1) does not affect the jurisdiction, powers and duties of the Tribunal in respect of the punishment of a person guilty of contempt, granted by section 143(2).



**171. Provision of false information**

(1) A person commits an offence if the person, in any representation made to the Commission under this Ordinance –

- (a) provides any information that is false or misleading in a material particular; and
- (b) knows or is reckless as to whether the information is false or misleading in a material particular.

(2) A person who commits an offence under this section is liable to a fine at level 6 and to imprisonment for 6 months.

**172. Employees not to suffer termination etc. for assisting Commission**

(1) A person who employs another person under a contract of employment (an “employee”) must not –

- (a) terminate or threaten to terminate the employment of that employee;
- (b) discriminate in any way against that employee;
- (c) intimidate or harass that employee; or
- (d) cause that employee any injury, loss or damage,

because the employee has taken any action referred to in subsection (2).

(2) The actions referred to in subsection (1) are –

- (a) providing any material to the Commission in connection with the Commissions functions; or
- (b) giving evidence or agreeing to give evidence in any proceedings brought by the Commission for the enforcement of this Ordinance.

(3) A person who contravenes subsection (1) commits an offence and is liable to a fine at level 4 and to imprisonment for 3 months.

### **173. Obstruction of specified persons**

(1) A person who, without reasonable excuse, obstructs a specified person in the performance of any function under this Ordinance commits an offence and is liable –

- (a) on conviction on indictment, to a fine of \$1,000,000; or
- (b) on summary conviction, to a fine at level 6.

(2) In this section –

“specified person” (指明人士) has the meaning given by section 121.

### **174. Offences by bodies corporate and partners**

(1) If a person by whom an offence under this Ordinance is committed is a body corporate, and it is proved that the offence –

- (a) was committed with the consent or connivance of a director, manager, secretary or other person concerned in the management of the body corporate; or
- (b) was attributable to any neglect or omission on the part of a director, manager, secretary or other person concerned in the management of the body corporate,

the director, manager, secretary or other person also commits the offence.

(2) If a person by whom an offence under this Ordinance is committed is a partner in a partnership, and it is proved that the offence –

- (a) was committed with the consent or connivance of any other partner or any person concerned in the management of the partnership; or
- (b) was attributable to any neglect or omission on the part of any other partner or any person concerned in the management of the partnership,

the partner or the person concerned in the management of the partnership also commits the offence.

## **Division 5 – Consequential, Related, Transitional and Savings Provisions**

### **175. Consequential and related amendments**

Schedule 8 contains consequential and related amendments to other enactments.

### **176. Transitional and savings provisions in relation to amendments made by this Ordinance**

(1) Schedule 9 contains transitional and savings provisions in relation to amendments made by this Ordinance to the Telecommunications Ordinance (Cap. 106), the Broadcasting Authority Ordinance (Cap. 391) and the Broadcasting Ordinance (Cap. 562).

(2) The Chief Executive may make regulations containing transitional provisions and savings that are necessary or convenient for the transition to the provisions of this Ordinance from the provisions of the Telecommunications Ordinance (Cap. 106), the Broadcasting Authority Ordinance (Cap. 391) or the Broadcasting Ordinance (Cap. 562) as amended by this Ordinance.

(3) Without limiting subsection (2), regulations made under this section may, in particular, provide for –

- (a) the application of provisions of this Ordinance to telecommunications services or broadcasting services; or
- (b) the continued application of provisions of the Telecommunications Ordinance (Cap. 106), the Broadcasting Authority Ordinance (Cap. 391) or the Broadcasting Ordinance (Cap. 562) in force immediately before the commencement of any provision of this Ordinance to telecommunications services or broadcasting services.

(4) Regulations made under this section may, if they so provide, be deemed to have come into operation on a date earlier than the date on which they

are published in the Gazette but not earlier than the date on which this Ordinance is published in the Gazette.

(5) To the extent that any regulations made under this section come into operation on a date earlier than the date on which they are published in the Gazette, those regulations are to be construed so as not to –

- (a) affect, in a manner prejudicial to any person, the rights of that person existing before the date on which the regulations are published in the Gazette; or
- (b) impose liabilities on any person in respect of anything done, or omitted to be done, before that date.

(6) If there is any inconsistency between any regulations made under this section and the provisions of Schedule 9, Schedule 9 prevails to the extent of the inconsistency.

## SCHEDULE 1

[ss. 9, 15, 24, 30  
& 36]

### GENERAL EXCLUSIONS FROM CONDUCT RULES

#### 1. **Agreements enhancing overall economic efficiency**

The first conduct rule does not apply to any agreement that –

- (a) contributes to –
  - (i) improving production or distribution; or
  - (ii) promoting technical or economic progress; and
- (b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a); and
- (c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

## 2. **Compliance with legal requirements**

(1) The first conduct rule does not apply to an agreement to the extent that it is made for the purpose of complying with a legal requirement.

(2) The second conduct rule does not apply to conduct to the extent that it is engaged in for the purpose of complying with a legal requirement.

(3) In this section –

“legal requirement” (法律規定) means a requirement –

(a) imposed by or under any enactment in force in Hong Kong; or

(b) imposed by any national law applying in Hong Kong.

## 3. **Services of general economic interest etc.**

Neither the first conduct rule nor the second conduct rule applies to an undertaking entrusted by the Government with the operation of services of general economic interest in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to it.

## SCHEDULE 2

[s. 64]

### COMMITMENTS

#### PART 1

#### PROCEDURAL REQUIREMENTS FOR ACCEPTANCE AND VARIATION OF COMMITMENTS

### 1. **Application**

Section 2 of this Schedule applies where the Commission proposes to –

(a) accept a commitment under section 59; or

(b) accept a variation of such a commitment under section 61.

### 2. **Notice**

- (1) Before accepting a commitment or variation, the Commission must –
  - (a) give notice of the proposed commitment or variation in any manner it considers appropriate for bringing it to the attention of those it considers likely to be affected by it; and
  - (b) consider any representations made (and not withdrawn) in response to the notice.
- (2) A notice under subsection (1) must state –
  - (a) that the Commission proposes to accept the commitment or variation;
  - (b) the intended object and effect of the commitment or variation;
  - (c) whether the commitment or variation constitutes an admission of contravention of a competition rule;
  - (d) the situation that the commitment or variation is seeking to deal with;
  - (e) any other facts that the Commission considers to be relevant to the acceptance or variation of the commitment;
  - (f) a means of gaining access, at all reasonable times, to an accurate version of the proposed commitment or variation; and
  - (g) the period within which representations may be made in relation to the proposed commitment or variation.
- (3) The period stated for the purpose of subsection (2)(g) must be at least 15 days beginning on the day on which the notice is given.

### 3. **Notice of decision not to accept**

If, after giving notice under section 2 of this Schedule, the Commission decides not to accept the commitment or variation concerned, the Commission must give notice that it has so decided.

**4. Notice of acceptance**

As soon as practicable after accepting a commitment or a variation of a commitment, the Commission must publish the commitment or variation in any manner it considers appropriate.

**5. Manner of giving notice**

A notice under section 2 or 3 of this Schedule must be given by –

- (a) sending a copy of the notice to any person or persons the Commission considers are likely to be affected by the matter to which the notice relates; or
- (b) publishing the notice in any manner the Commission considers appropriate for the purpose of bringing the matter to which the notice relates to the attention of those it considers likely to be affected by it.

## PART 2

### PROCEDURAL REQUIREMENTS FOR WITHDRAWAL OF ACCEPTANCE OF COMMITMENTS

**6. Application**

Section 7 of this Schedule applies where the Commission proposes to withdraw its acceptance of a commitment under section 60.

**7. Notice**

(1) Before withdrawing its acceptance of a commitment, the Commission must –

- (a) give notice of the proposed withdrawal in any manner it considers appropriate for bringing it to the attention of those it considers likely to be affected by it; and
  - (b) consider any representations made (and not withdrawn) in response to the notice.
- (2) A notice under subsection (1) must state –
- (a) that the Commission proposes to withdraw its acceptance of the commitment;
  - (b) the reasons for the proposed withdrawal;
  - (c) any other facts that the Commission considers to be relevant to the proposed withdrawal; and
  - (d) the period within which representations may be made in relation to the proposed withdrawal.

(3) The period stated for the purpose of subsection (2)(d) must be at least 15 days beginning on the day on which the notice is given.

#### **8. Notice of decision not to withdraw**

If, after giving notice under section 7 of this Schedule, the Commission decides not to withdraw its acceptance of the commitment concerned, the Commission must give notice that it has so decided.

#### **9. Notice of withdrawal**

As soon as practicable after withdrawing its acceptance of a commitment, the Commission must publish the withdrawal in any manner it considers appropriate.

#### **10. Manner of giving notice**

A notice under section 7 or 8 of this Schedule must be given by –

- (a) sending a copy of the notice to any person or persons the Commission considers are likely to be affected by the matter to which the notice relates; or



- (b) publishing the notice in any manner the Commission considers appropriate for the purpose of bringing the matter to which the notice relates to the attention of those it considers likely to be affected by it.

### PART 3

#### PROCEDURAL REQUIREMENTS FOR RELEASE OF COMMITMENTS

##### 11. **Application**

Section 12 of this Schedule applies where the Commission proposes to release a person from a commitment, under section 61.

##### 12. **Notice**

(1) Before releasing the person from the commitment, the Commission must –

- (a) give notice of the proposed release in any manner it considers appropriate for bringing it to the attention of that person; and
- (b) consider any representations made (and not withdrawn) in response to the notice.

(2) A notice under subsection (1) must state –

- (a) that the Commission proposes to release the person from the commitment;
- (b) the reasons for the proposed release; and
- (c) the period within which representations may be made in relation to the proposed release.

(3) The period stated for the purpose of subsection (2)(c) must be at least 15 days beginning on the day on which the notice is given.

##### 13. **Notice of decision not to proceed**

If, after giving notice under section 12 of this Schedule, the Commission decides not to proceed with the release, it must –

- (a) give notice that it has so decided; and
- (b) send a copy of the notice to the person who made the commitment.

#### 14. **Notice of decision to release**

As soon as practicable after releasing a person from a commitment, the Commission must –

- (a) publish the release in any manner it considers appropriate; and
- (b) send a copy of the release to the person who made the commitment.

#### 15. **Manner of giving notice**

A notice under section 12 or 13 of this Schedule is given by –

- (a) sending a copy of the notice to any person or persons the Commission considers are likely to be affected by the matter to which the notice relates; or
- (b) publishing the notice in any manner the Commission considers appropriate for the purpose of bringing the matter to which the notice relates to the attention of those it considers likely to be affected by it.

### SCHEDULE 3

[ss. 92, 110  
&113]

## ORDERS THAT MAY BE MADE BY TRIBUNAL IN RELATION TO CONTRAVENTIONS OF COMPETITION RULES

### 1. **Orders**

The Tribunal may make the following orders with respect to a contravention of the competition rules –

- (a) a declaration that a person has contravened a competition rule;
- (b) an order restraining or prohibiting a person from engaging in any conduct that constitutes the contravention or the person's involvement in the contravention;
- (c) an order requiring a person who has contravened a competition rule or been involved in the contravention to do any act or thing, including the taking of steps for the purpose of restoring the parties to any transaction to the position in which they were before the transaction was entered into;
- (d) an order restraining or prohibiting a person from acquiring, disposing of or otherwise dealing with any property specified in the order;
- (e) an order requiring a person to dispose of such operations, assets or shares of any undertaking specified in the order, in the manner specified in the order;
- (f) an order appointing a person to administer the property of another person;
- (g) an order prohibiting a person from making or giving effect to an agreement;
- (h) an order requiring the parties to an agreement (the making or giving effect to which constitutes the contravention of the competition rules) to modify or terminate that agreement;
- (i) an order declaring any agreement (the making or giving effect to which constitutes the contravention of the

- competition rules) to be void or voidable to the extent specified in the order;
- (j) an order prohibiting the withholding from any person of –
    - (i) any goods or services; or
    - (ii) any orders for any such goods or services;
  - (k) an order requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention;
  - (l) an order prohibiting requiring as a condition of the supply of goods or services to any person –
    - (i) the buying of any goods or services;
    - (ii) the making of any payment in respect of goods or services other than the goods or services supplied;  
or
    - (iii) the doing of any other similar thing or the refraining from doing of anything mentioned in subparagraph (i) or (ii) or any other similar thing;
  - (m) an order prohibiting a person from exercising any right to vote that is exercisable by virtue of the holding of any shares, stock or securities;
  - (n) an order requiring that any person or class of person be given access to goods, facilities or services specified in the order on the terms specified in the order;
  - (o) an order requiring that any person or class of person be given the right to use goods, facilities or services specified in the order on the terms specified in the order;
  - (p) an order requiring any person to pay to the Government or to any other specified person, as the Tribunal considers appropriate, an amount not exceeding the amount of any

profit gained or loss avoided by that person as a result of the contravention; or

- (q) for the purpose of securing compliance with any other order made under this section, an order requiring any person who has contravened or been involved in the contravention to do or refrain from doing anything specified in the order.

## 2. **Registration of orders relating to immovable property**

If any property specified in an order made under section 1(d) of this Schedule is immovable property, the order is, for the purpose of the Land Registration Ordinance (Cap. 128) –

- (a) to be regarded as an instrument affecting land; and  
 (b) registrable, as an instrument affecting land, in the Land Registry under that Ordinance in any manner the Land Registrar considers appropriate.

## 3. **Interpretation**

In section 1(j) of this Schedule, a reference to “withholding” includes –

- (a) agreeing or threatening to withhold; and  
 (b) procuring others to withhold or to agree or threaten to withhold.

### SCHEDULE 4

[ss. 95 & 98]

#### PROVISIONS THAT MAY BE CONTAINED IN ORDERS MADE BY TRIBUNAL IN RELATION TO ANTICIPATED MERGERS AND MERGERS

1. An order may provide for –

- (a) the division of any business (whether by the sale of any part of its assets or otherwise); or
- (b) the division of any undertaking or association of undertakings.

2. An order made under section 1 of this Schedule may contain any provisions that the Tribunal considers appropriate to effect or take account of the division including, in particular, provision as to –

- (a) the transfer or creation of property, rights, liabilities or obligations;
- (b) the number of persons to whom the property, rights, liabilities or obligations are to be transferred or in whom they are to be vested;
- (c) the time within which the property, rights, liabilities or obligations are to be transferred or vested;
- (d) the adjustment of contracts (whether by discharge or reduction of any liability or obligation or otherwise);
- (e) the creation, allotment, surrender or cancellation of any shares, stock or securities;
- (f) the formation or winding up of any company or other body of persons corporate or unincorporate;
- (g) the amendment of the memorandum and articles or other instruments regulating any such company or other body of persons;
- (h) the extent to which, and the circumstances in which, provisions of the order affecting a company or other body of persons corporate or unincorporate in its share capital, constitution or other matters may be altered by the company or other body of persons concerned;

- (i) the registration of the order under any enactment by a company or other body of persons corporate or unincorporate which is affected by it as mentioned in paragraph (h);
- (j) the continuation, with any necessary change of parties, of any legal proceedings;
- (k) the approval by any person of anything required by virtue of the order to be done or of any person to whom anything is to be transferred, or in whom anything is to be vested, by virtue of the order; or
- (l) the appointment of trustees or other persons to do anything on behalf of another person which is required of that person by virtue of the order or to monitor the doing by that person of any such thing.

3. An order may prohibit or restrict –

- (a) the acquisition by any person of the whole or part of another person's business; or
- (b) the doing of anything that will or may result in a merger.

4. An order may provide that if –

- (a) an acquisition of the kind mentioned in section 3(a) of this Schedule is made; or
- (b) anything is done that results in a merger,

the persons concerned or any of them must observe any prohibitions or restrictions imposed by or under the order.

## COMPETITION COMMISSION

### PART 1

#### INTERPRETATION

##### 1. Interpretation

In this Schedule –

“auditor” (核數師) means the auditor appointed under section 24 of this Schedule;

“Chairperson” (主席) means the Chairperson of the Commission appointed under section 8 of this Schedule;

“Chief Executive Officer” (行政總裁) means the Chief Executive Officer of the Commission appointed under section 10 of this Schedule;

“financial year” (財政年度) means the financial year of the Commission as defined in section 20 of this Schedule;

“statement of accounts” (帳目報表) means the statement of the accounts of the Commission required to be prepared by section 23 of this Schedule.

### PART 2

#### MEMBERS OF COMMISSION

##### 2. Composition of Commission

(1) The Commission is to consist of not less than 5 members appointed by the Chief Executive.

(2) In considering the appointment of a person as a member of the Commission, the Chief Executive may have regard to that person’s expertise or experience in industry, commerce, economics, law, small and medium enterprises or public policy.



(3) Subject to this Schedule, a member holds office for the period, not exceeding 3 years, that is specified in the member's letter of appointment, but is eligible for re-appointment.

(4) The Chief Executive must publish a notice in the Gazette of all appointments made under this section.

### 3. **Terms of appointment**

(1) A member is entitled to such terms (including remuneration and allowances) as the Chief Executive may determine.

(2) The remuneration and allowances of a member are to be paid out of the funds of the Commission.

### 4. **Resignation of member**

(1) A member may, at any time, resign from office by giving written notice of resignation to the Chief Executive.

(2) A notice of resignation is not effective unless it is signed by the member concerned.

(3) A notice of resignation takes effect –

(a) on the date on which the notice is received by the Chief Executive; or

(b) if a later date is specified in the notice, on that later date.

### 5. **Removal from office**

(1) The Chief Executive may remove a member from office if the member –

(a) fails to attend 3 consecutive meetings of the Commission without (in the opinion of the Chief Executive) sufficient cause;

(b) fails to comply with a conflict of interest disclosure obligation set out in any rules made by the Commission under section 32 of this Schedule;

- (c) becomes bankrupt or is for the time being bound by a voluntary arrangement with his or her creditors;
- (d) is, under the Mental Health Ordinance (Cap. 136), found by the Court of First Instance (or any judge of the Court of First Instance) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs;
- (e) has been found by the Tribunal or another court to have contravened a competition rule;
- (f) is an officer of an undertaking that has been found by the Tribunal or another court to have contravened a competition rule;
- (g) has made a commitment with the Commission under this Ordinance, or is an officer of an undertaking that has made such a commitment;
- (h) becomes a member of the Tribunal or a judge of another court;
- (i) is appointed by the Tribunal as an assessor under section 140; or
- (j) is otherwise, in the opinion of the Chief Executive, unable or unfit to perform the functions of a member.

(2) If a member is removed from office under this section, the Chief Executive must give that member notice in writing informing the member of his or her removal from office.

(3) In this section –  
 “officer” (高級人員) means –

- (a) in relation to a corporation, a director, manager or secretary of the corporation, and any other person involved in the management of the corporation; and

- (b) in relation to an undertaking (other than a corporation or partnership), any member of the governing body of that undertaking.

## 6. **Vacancy in office of member**

The office of a member becomes vacant if the member –

- (a) dies;
- (b) completes a term of office and is not reappointed;
- (c) resigns from office by written notice of resignation given to the Chief Executive; or
- (d) is removed from office by the Chief Executive under section 5 of this Schedule.

## 7. **Filling of vacancy**

(1) If the office of a member becomes vacant, the Chief Executive may appoint a suitable person to fill the vacancy.

(2) A person appointed to fill a vacancy under this section holds office for the term that is specified in the member's letter of appointment and that term may extend beyond the term of the member whose office became vacant.

## 8. **Chairperson**

(1) The Chief Executive is to appoint one of the members of the Commission (other than a member who is a public officer) to be the Chairperson of the Commission.

(2) The Chairperson may, at any time, resign from that office by giving written notice of resignation to the Chief Executive.

(3) A notice of resignation is not effective unless it is signed by the Chairperson.

(4) A notice of resignation takes effect –

- (a) on the date on which the notice is received by the Chief Executive; or

(b) if a later date is specified in the notice, on that later date.

(5) The resignation of a person from the office of Chairperson does not affect that person's term of office as a member.

(6) If the Chairperson ceases to be a member, he or she also ceases to be the Chairperson.

#### 9. **Acting chairperson**

If the Chairperson is temporarily unable to perform the functions of the office of Chairperson because of illness or absence from Hong Kong or for any other cause or if the office of Chairperson becomes vacant, the Chief Executive may appoint another member to act in place of the Chairperson and perform the functions of the office of Chairperson.

### PART 3

#### CHIEF EXECUTIVE OFFICER, STAFF, ETC.

#### 10. **Chief Executive Officer**

(1) The Commission is, with the approval of the Chief Executive, to appoint a Chief Executive Officer of the Commission on such terms as, subject to subsection (3), the Commission may determine.

(2) The Chief Executive Officer is responsible for –

(a) managing the administrative affairs of the Commission;  
and

(b) performing any other functions that may be assigned or delegated to the Chief Executive Officer by the Commission.

(3) The Chief Executive Officer is to be paid out of the funds of the Commission such remuneration, benefits and expenses as the Commission, with the approval of the Chief Executive, may determine.

#### 11. **Power to employ staff etc.**

(1) The Commission may employ such staff and engage on contract for services such other persons as it considers necessary to perform its functions.

(2) The Commission may determine the remuneration and other conditions of employment of its staff and persons engaged on contracts for services.

(3) The Commission may provide and maintain schemes (whether contributory or not) for the payment of retirement benefits, gratuities or other allowances to its employees or former employees and their dependants.

## PART 4

### MEETINGS

#### 12. **General procedure for meetings of Commission**

(1) Meetings of the Commission are to be held as often as necessary to enable the Commission to perform its functions.

(2) A meeting of the Commission may be convened by the Chairperson.

(3) The Chairperson must convene a meeting of the Commission on being given a notice for that purpose by 2 or more other members.

(4) The procedure for convening meetings of the Commission and for the conduct of business at those meetings is, subject to this Schedule and to any rules made under section 32 of this Schedule, to be determined by the Commission.

#### 13. **Quorum for meetings of Commission**

(1) The quorum for a meeting of the Commission is a majority of its members.

(2) For the purpose of determining the quorum, a member who participates in the meeting by telephone, video conferencing or other electronic means is to be regarded as being present at the meeting if –

- (a) that member is able to hear the other members who are actually present at the meeting; and
- (b) the members who are actually present at the meeting are able to hear that member.

#### 14. **Presiding member at meetings of Commission**

A meeting of the Commission is to be presided over by –

- (a) the Chairperson; or
- (b) in the absence of the Chairperson, the acting chairperson.

#### 15. **Voting at meetings of Commission**

(1) Subject to subsection (2), each member who is present at a meeting of the Commission has one vote at the meeting.

(2) The member presiding at a meeting of the Commission has a deliberative vote and also has a casting vote if the number of votes for and against a motion is equal.

(3) Voting must not be carried out by secret ballot. The member presiding at a meeting of the Commission must ask each member to indicate how he or she has voted, and the result of the vote, showing which way each member has voted, must be recorded in the minutes.

(4) A decision supported by a majority of the votes cast at the meeting of the Commission at which a quorum is present is the decision of the Commission.

#### 16. **Minutes**

The Commission must cause minutes of the proceedings, including a record of all decisions made, at each meeting of the Commission to be recorded and preserved.

#### 17. **Written resolutions**

(1) A resolution is a valid resolution of the Commission, even if it is not passed at a meeting of the Commission, if –

- (a) it is in writing;
- (b) proper notice of it is given to all members; and
- (c) it is signed, or assented to, by a majority of the members by letter, fax or other electronic transmission.

(2) Subject to subsection (3), the date of a resolution referred to in this section is the date on which the last of the members constituting a majority of the members signs or assents to the resolution.

(3) If any member requests, by notice in writing addressed to the Chairperson, that a resolution proposed to be made under subsection (1) be referred to a meeting of the Commission for consideration, the proposed resolution must be referred to a meeting of the Commission.

(4) A request under subsection (3) must be made within 14 days after the day on which the notice referred to in subsection (1)(b) is given.

#### **18. Decisions not invalidated by defects in appointment etc.**

Decisions of the Commission are not invalidated solely by –

- (a) any defect in the appointment of a member;
- (b) a vacancy amongst its members;
- (c) the absence of a member from the meeting at which the decision was taken; or
- (d) any irregularity in the procedures adopted by the Commission that does not affect the merit of the decision taken.

## **PART 5**

### **FINANCIAL PROVISIONS**

#### **19. Commission to submit estimates**

The Commission must, not later than 31 December in each financial year, submit to the Chief Executive estimates of its income and expenditure for the next financial year.

**20. Financial year**

The financial year of the Commission is the period –

- (a) beginning on the day on which this Schedule comes into operation and ending on the next 31 March; and
- (b) the period of 12 months ending on 31 March in each subsequent year.

**21. Funds of Commission**

The funds of the Commission consist of –

- (a) all money paid by the Government to the Commission and appropriated for that purpose by the Legislative Council;
- (b) all other money and property, including fees, interest and accumulations of income, received by the Commission.

**22. Commission is exempt from taxation**

(1) The Commission is exempt from taxation under the Inland Revenue Ordinance (Cap. 112).

(2) To avoid doubt, subsection (1) does not apply to or in relation to any remuneration, benefits or expenses paid out of the funds of the Commission to a member of the Commission.

## PART 6

### ACCOUNTS, AUDIT AND ACCOUNT REPORT

**23. Accounts**

(1) The Commission must –



- (a) keep accounts and other records that accurately record and explain its financial transactions and its financial position; and
  - (b) ensure that a statement of accounts is prepared as soon as practicable after the end of each financial year.
- (2) The statement of accounts must give a true and fair view of –
  - (a) the state of affairs of the Commission as at the end of that financial year; and
  - (b) the results of the operations and cash flows of the Commission in that financial year.

#### **24. Commission to appoint auditor**

- (1) As soon as practicable after the commencement of this section, the Commission must appoint an auditor to audit its statement of accounts.
- (2) The auditor must, as soon as practicable after the end of each financial year –
  - (a) audit the accounts and statement of accounts required under section 23 of this Schedule; and
  - (b) submit a report on the statement of accounts to the Commission.

#### **25. Annual report**

- (1) As soon as practicable, and in any case within 6 months after the end of each financial year, the Commission must prepare a report dealing with its activities in the preceding financial year.
- (2) The report must contain the following information in relation to the financial year –
  - (a) an outline of the investigations carried out by the Commission;
  - (b) a summary of complaints received; and
  - (c) an outline of all proceedings brought before the Tribunal.

**26. Annual report and audited accounts to be laid on table of Legislative Council**

As soon as practicable, and in any case within 6 months after the end of a financial year, the Commission must give a copy of –

- (a) its annual report, prepared under section 25 of this Schedule;
- (b) its statement of accounts; and
- (c) the auditor's report on the statement of accounts,

to the Chief Executive who must arrange for them to be laid on the table of the Legislative Council.

**27. Director of Audit's examination**

(1) The Director of Audit may, in respect of any financial year of the Commission, conduct an examination into the economy, efficiency and effectiveness with which the Commission has used its resources in performing its functions.

(2) For the purpose of conducting an examination under this section, the Director of Audit is entitled, at all reasonable times –

- (a) to have full and free access to all accounts, records and documents in the custody or under the control of the Commission;
- (b) to make a copy of the whole or any part of those accounts, records and documents; and
- (c) to require any person who holds or is accountable for the accounts, records or documents to give any information or explanation that the Director of Audit considers necessary.

(3) The Director of Audit may report to the President of the Legislative Council the results of an examination conducted under this section.

## PART 7

### COMMITTEES

#### 28. **Commission may establish committees**

- (1) The Commission may establish one or more committees –
  - (a) to advise the Commission on such matters (within the scope of the Commission's functions) as the Commission refers to it; and
  - (b) to perform such functions of the Commission as the Commission delegates to it.

(2) A committee may consist of such persons, whether members of the Commission or not, as the Commission determines.

(3) The Commission may appoint one member of a committee to be the chairperson of that committee.

(4) When the Commission establishes a committee under this section, it must specify, in writing, its terms of reference.

(5) The Commission may, by notice in writing, amend the terms of reference of a committee.

(6) A committee is subject to the control of the Commission and may be discharged or reconstituted at any time by the Commission.

(7) Subject to any directions that may be given by the Commission, a committee may regulate its own procedure, including the determination of its quorum.

## PART 8

### DELEGATION

#### 29. **Delegation by Commission**

(1) Subject to subsection (2), the Commission may delegate any of the functions of the Commission to –

- (a) a person who is a member of the Commission;
- (b) a committee established by the Commission;
- (c) the Chief Executive Officer;
- (d) an employee of the Commission by name; or
- (e) the holder of any office in the Commission, designated by the Commission.

(2) Despite subsection (1), the Commission may not delegate any of the following functions –

- (a) subject to sections 30 and 31 of this Schedule, its power to delegate the Commission's functions under subsection (1);
- (b) the power to issue a block exemption order under section 15;
- (c) the power to appoint the Chief Executive Officer and to determine that officer's terms of employment, under section 10 of this Schedule;
- (d) the power to establish any committee under section 28 of this Schedule;
- (e) the power to refer any matter to a committee;
- (f) the power to appoint any person to be the chairperson or a member of a committee (or to revoke any such appointment) under section 28 of this Schedule;
- (g) the power to amend the terms of reference of a committee under section 28 of this Schedule;
- (h) the power to discharge or reconstitute a committee under section 28 of this Schedule;
- (i) the duty to submit the Commission's estimates of income and expenditure to the Chief Executive under section 19 of this Schedule;
- (j) the duty to ensure that an annual statement of accounts is prepared, under section 23 of this Schedule;

- (k) the duty to prepare and issue guidelines under this Ordinance;
- (l) the power to make any application to the Tribunal, under this Ordinance other than an application for an interim order under section 93 or 96;
- (m) the power to borrow money under section 130 with the approval of the Financial Secretary;
- (n) the power to invest funds of the Commission, in a manner approved by the Financial Secretary, under section 130; or
- (o) the power to authorize a person to authenticate the application of the seal of the Commission under section 33 of this Schedule.

(3) A person purporting to act under an authorization granted under subsection (1) is to be regarded, unless the contrary is proved, to have been lawfully authorized under this section.

### **30. Subdelegation**

(1) When the Commission delegates a function under section 29 of this Schedule, it may, subject to any condition it considers appropriate, authorize the delegate to subdelegate the performance of that function, in whole or in part, to any person.

(2) A person purporting to act under an authorization granted under subsection (1) is to be regarded, unless the contrary is proved, to have been lawfully authorized under this section.

### **31. Delegation of power to obtain documents and information**

Despite section 29 of this Schedule (Delegation by Commission) and section 30 of this Schedule (Subdelegation), the Commission may delegate its power under section 41 (Powers to obtain documents and information) only to a member of the Commission, and that member may not subdelegate that power.

## PART 9

### MISCELLANEOUS

#### 32. **Rules**

The Commission may make rules –

- (a) regulating the procedure to be followed at meetings of the Commission and at meetings of its committees;
- (b) regulating the administration of the Commission; and
- (c) regarding conflict of interest.

#### 33. **Seal of Commission**

(1) The Commission must provide itself with a seal.

(2) The application of the seal must be authenticated by the Chairperson, or by some other member of the Commission authorized by the Commission for this purpose.

(3) Judicial notice is to be taken of the seal of the Commission and any document sealed with the seal is –

- (a) admissible in evidence; and
- (b) presumed to have been properly sealed unless the contrary is proved.

### SCHEDULE 6

[s. 161]

#### MATTERS THAT MAY BE PROVIDED FOR IN MEMORANDUM OF UNDERSTANDING

1. The manner in which the parties to a Memorandum of Understanding will perform the functions that they have jurisdiction to perform concurrently under this Ordinance.

2. The manner in which the parties will resolve any dispute between themselves.
3. The provision of assistance by one party to another.
4. The allocation between the parties of responsibility for particular matters or classes of matters.
5. Arrangements for the supply of information relating to a competition matter by one party to another.
6. Arrangements for the keeping of other parties informed about progress when one party is performing functions that may be performed concurrently under this Ordinance.
7. The joint authorship of educational material or guidelines on competition matters.

## SCHEDULE 7

[ss. 2, 3, 81 &  
162]

### MERGERS

#### PART 1

#### PRELIMINARY

##### 1. **Interpretation**

In this Schedule –

“carrier licence” (傳送者牌照) means a carrier licence within the meaning of the Telecommunications Ordinance (Cap. 106).

##### 2. **Territorial application**

This Schedule applies to a merger even if –

- (a) the arrangements for the creation of the merger take place outside Hong Kong;
- (b) the merger takes place outside Hong Kong; or
- (c) any party to the arrangements for the creation of the merger, or any party involved in the merger is outside Hong Kong.

## PART 2

### THE MERGER RULE

#### 3. **Mergers substantially lessening competition prohibited**

(1) An undertaking must not, directly or indirectly, carry out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong.

(2) For the purpose of this section, a merger takes place if –

- (a) 2 or more undertakings previously independent of each other cease to be independent of each other;
- (b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- (c) an acquisition by one undertaking (the “acquiring undertaking”) of the whole or part of the assets (including goodwill) of another undertaking (the “acquired undertaking”) has the result set out in subsection (3).

(3) The result referred to in subsection (2)(c) is that the acquiring undertaking is in a position to replace the acquired undertaking, or to substantially replace the acquired undertaking, in the business or in part of the business concerned (as the case requires) in which the acquired undertaking was engaged immediately before the acquisition.



(4) The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity also constitutes a merger within the meaning of subsection (2)(b).

(5) The prohibition imposed by subsection (1) is referred to in this Ordinance as the “merger rule”.

#### 4. **Application of merger rule**

The merger rule applies only in the following cases –

- (a) in the case referred to in section 3(2)(a) of this Schedule, one or more of the undertakings participating in the merger holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence;
- (b) in the case referred to in section 3(2)(b) of this Schedule, the undertaking or the person or persons acquiring control or the undertaking in which control is acquired holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence; and
- (c) in the case referred to in section 3(2)(c) of this Schedule –
  - (i) the acquiring undertaking or the acquired undertaking holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence; and
  - (ii) the relevant business conducted by the acquired undertaking immediately before the acquisition was conducted under a carrier licence.

#### 5. **Control**

(1) For the purposes of this Schedule, control, in relation to an undertaking, is to be regarded as existing if, by reason of rights, contracts or any other means, or any combination of rights, contracts or other means, decisive

influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by –

- (a) ownership of, or the right to use all or part of, the assets of an undertaking; or
- (b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of any governing body of an undertaking.

(2) For the purposes of this Schedule, control is acquired by any person or other undertaking if the person or undertaking –

- (a) becomes a holder of the rights or contracts, or entitled to use the other means, referred to in subsection (1); or
- (b) although not becoming such a holder or entitled to use those other means, acquires the power to exercise the rights derived from them.

(3) In determining whether influence of the kind referred to in subsection (1) is capable of being exercised, regard must be had to all the circumstances of the matter and not solely to the legal effect of any instrument, deed, transfer, assignment or other act done or made.

**6. Matters to be considered in determining whether competition substantially lessened**

Without limiting the matters that may be taken into account in determining whether a merger has, or is likely to have, the effect of substantially lessening competition in Hong Kong, the following matters may be taken into consideration in any such determination –

- (a) the extent of competition from competitors outside Hong Kong;
- (b) whether the acquired undertaking, or part of the acquired undertaking, has failed or is likely to fail in the near future;
- (c) the extent to which substitutes are available or are likely to be available in the market;

- (d) the existence and height of any barriers to entry into the market;
- (e) whether the merger would result in the removal of an effective and vigorous competitor;
- (f) the degree of countervailing power in the market; and
- (g) the nature and extent of change and innovation in the market.

## PART 3

### INVESTIGATIONS

#### 7. **Time limit for commencement of investigation of merger**

(1) Despite section 39 (Power to conduct investigations), the Commission may only commence an investigation of a merger within 30 days after the day on which the Commission first became aware, or ought to have become aware, that the merger has taken place.

(2) The Commission is to be taken to have become aware that a merger has taken place if it has been notified, in accordance with guidelines issued under this Schedule, of that fact by one of the parties to the merger.

(3) If the Commission –

- (a) has made a decision under section 13 of this Schedule that a merger or proposed merger is or would be excluded from the application of the merger rule or this Schedule; and
- (b) has rescinded that decision,

the date on which the Commission became aware that the merger has taken place is to be taken to be the date of the rescission of its decision.

## PART 4

### EXCLUSIONS AND EXEMPTIONS

#### **Division 1 – Exclusions from Merger Rule**

##### **8. Exclusions**

(1) The merger rule does not apply to a merger if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong.

(2) In any proceedings in which it is alleged that the merger rule has been contravened by a merger, any undertaking claiming the benefit of subsection (1) has the burden of proving that the conditions of that subsection are satisfied.

#### **Division 2 – Exemption from Merger Rule**

##### **9. Exemption of merger on public policy grounds**

(1) The Chief Executive in Council may, by order published in the Gazette, exempt a specified merger or proposed merger from the application of the merger rule if he or she is satisfied that there are exceptional and compelling reasons of public policy for doing so.

(2) An order under subsection (1) may be made subject to any conditions or limitations that the Chief Executive in Council considers appropriate.

##### **10. Orders to be published and placed before Legislative Council**

(1) The Chief Executive is to arrange for every order made under section 9 of this Schedule to be –

(a) published in the Gazette; and

(b) laid on the table of the Legislative Council at the next sitting of the Council after its publication in the Gazette.

(2) The Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which an order is laid on the table of the Council (the “relevant period”), amend the order in any manner consistent with the power of the Chief Executive in Council to make the order in question.

(3) If the relevant period would but for this section expire after the end of a session or a dissolution of the Legislative Council, but on or before the day of its second sitting in the next session, the period for amending the order is deemed to be extended and to expire on the day after that second sitting.

(4) The Legislative Council may, before the expiry of the relevant period, by resolution extend the period for amending the order to the first sitting of the Council held not earlier than the twenty-first day after the day of that expiry.

(5) If the relevant period is extended under subsection (3), the Legislative Council may, before the expiry of the extended period, by resolution extend that extended period to the first sitting of the Council held not earlier than the twenty-first day after the day of the second sitting in the next session referred to in that subsection.

(6) A resolution passed by the Legislative Council in accordance with this section must be published in the Gazette not later than 14 days after the passing of the resolution or within such further period as the Chief Executive may allow in any particular case.

(7) An order made by the Chief Executive in Council under section 9 of this Schedule comes into operation –

(a) if on the expiry of the relevant period or that period as extended under subsection (3), (4) or (5), the Legislative Council has not passed a resolution amending the order,

on the expiry of the relevant period or that period as so extended (as the case may be); and

- (b) if the Legislative Council passes a resolution amending the order, at the beginning of the day on which the resolution is published in the Gazette.

(8) If an order is not laid on the table of the Legislative Council in accordance with this section, it is of no effect.

(9) In this section –

“sitting” (會議), when used to calculate time, means the day on which the sitting commences and only includes a sitting at which subsidiary legislation is included on the order paper.

## PART 5

### DECISIONS

#### 11. Application for decision

(1) If an undertaking –

- (a) carries out a merger; or
- (b) is carrying out, or is proposing to carry out a merger,

it may apply to the Commission for a decision under subsection (2).

(2) The decision referred to in subsection (1) is a decision as to whether or not the merger is, or the proposed merger would if completed be –

- (a) excluded from the application of the merger rule by or as a result of section 8 of this Schedule (Exclusions); or
- (b) excluded from the application of this Schedule by virtue of –
  - (i) section 3 (Application to statutory bodies); or
  - (ii) section 4 (Application to specified persons and persons engaged in specified activities).

(3) The Commission is only required to consider an application under this section if –

- (a) the application poses novel or unresolved questions of wider importance or public interest in relation to the application of exclusions under this Ordinance;
- (b) the application raises a question of an exclusion under this Ordinance for which there is no clarification in existing case law or decisions of the Commission; and
- (c) it is possible to make a decision on the basis of the information provided.

(4) The Commission is not required to consider an application for a decision if the application concerns hypothetical questions or conduct.

## 12. **Consideration of application**

(1) Before making a decision on an application made under section 11 of this Schedule, the Commission must –

- (a) publish notice of the application in any manner it considers appropriate for bringing the application to the attention of those it considers likely to be affected by its decision; and
- (b) consider any representations about the application that are made to it.

(2) A notice under subsection (1) must specify the period within which representations may be made to the Commission about the application.

(3) The period specified for the purpose of subsection (2) must be a period of at least 30 days beginning after the day on which the notice is first published.

## 13. **Decision by Commission**

(1) After considering the representations, if any, made within the period referred to in section 12 of this Schedule, the Commission may make a

decision as to whether or not the merger is, or the proposed merger would if completed be, excluded from the application of the merger rule or this Schedule.

(2) A decision by the Commission may include conditions or limitations subject to which it is to have effect including, in the case of a proposed merger, specifying a date by which the proposed merger must be completed.

(3) After the Commission has made its decision, it must inform the applicant in writing of the decision, the date of the decision and the reasons for it.

#### **14. Effect of decision**

If the Commission makes a decision that –

- (a) a merger is excluded from the application of the merger rule or this Schedule; or
- (b) a proposed merger would if completed be excluded from the application of the merger rule or this Schedule,

then the Commission may not take any action under this Ordinance with respect to the merger or proposed merger unless it rescinds its decision under section 15 of this Schedule or the merger as implemented is materially different from the proposed merger to which the decision relates.

#### **15. Rescission of decision**

(1) The Commission may rescind a decision made under section 13 of this Schedule if it has reason to believe –

- (a) if the merger has not been carried into effect, that there has been a material change of circumstances since the decision was made; or
- (b) whether or not the merger has been carried into effect –
  - (i) that the information provided by a person involved in the merger, on which it based its decision was incomplete, false or misleading in a material particular; or



- (ii) that an undertaking has failed to observe any condition or limitation subject to which the decision has effect.

(2) Before rescinding any decision under this section the Commission must –

- (a) give notice in writing in any manner it considers appropriate for bringing the proposed rescission to the attention of those persons it considers likely to be affected by its decision –
  - (i) stating that the Commission is considering rescinding the decision and the reasons why it is considering the rescission; and
  - (ii) inviting the persons to make representations about the proposed rescission within the period specified in the notice; and
- (b) consider any representations received within the period specified in the notice.

(3) The period specified in a notice under subsection (2) must be a period of at least 30 days beginning after the day on which the notice is given.

(4) If, after –

- (a) the expiry of the period specified in the notice given under subsection (2); and
- (b) considering any representations received within that period,

the Commission is of the view that the decision should be rescinded, it may, by notice in writing given to each undertaking specified in the decision, rescind that decision.

(5) A notice of rescission given under subsection (4) must inform the undertakings of –

- (a) the rescission and the reasons for the rescission;

(b) the date on which the determination to rescind the decision was made; and

(c) the date from which the rescission takes effect.

(6) If a decision is rescinded under this section, each undertaking specified in the notice of rescission loses its immunity from action under this Ordinance, as from the date the rescission takes effect, with regard to anything done after that date.

#### **16. Register of merger decisions**

(1) The Commission must establish and maintain a register of –

(a) all decisions made in respect of applications made under section 11 of this Schedule; and

(b) all notices of rescissions of such decisions, made under section 15 of this Schedule.

(2) The Commission may omit confidential information from any entry made in the register under this section; and where confidential information has been omitted, that fact must be disclosed on the register.

(3) The Commission must make the register available for inspection by any person at the offices of the Commission during ordinary business hours and in any other manner it considers appropriate.

## **PART 6**

### **GUIDELINES**

#### **17. Guidelines**

(1) The Commission must issue guidelines indicating the manner in which it expects to interpret and give effect to the provisions of this Schedule including, in particular –

(a) the manner in which it will determine whether or not a merger has, or would be likely to have, the effect of substantially lessening competition in Hong Kong;

- (b) the manner in which it will determine whether or not a merger would fall within the exclusion referred to in section 8(1) of this Schedule; and
  - (c) the manner and form in which it should be notified of any merger.
- (2) The Commission may amend any guidelines it issues under this section.
- (3) Guidelines issued under this section, and any amendments made to them, may be published in any manner the Commission considers appropriate.
- (4) Before issuing any guidelines or amendments to them under this section, the Commission must consult any persons it considers appropriate.
- (5) The Commission must make available at the offices of the Commission during ordinary business hours, and in any other manner it considers appropriate, copies of all guidelines issued under this section and of all amendments made to them.

## SCHEDULE 8

[s. 175]

### CONSEQUENTIAL AND RELATED AMENDMENTS

#### PART 1

##### AMENDMENTS TO COMPANIES ORDINANCE

#### 1. **Register of disqualification orders**

(1) Section 168R(5) of the Companies Ordinance (Cap. 32) is amended, in the definition of “court” –

- (a) in paragraph (b), by repealing “and”;
- (b) in paragraph (c), by adding “and” at the end;
- (c) by adding –

“(d) the Competition Tribunal established by section 133 of the Competition Ordinance ( of 2010);”.

(2) Section 168R(5) is amended, in the definition of “disqualification order” –

(a) in paragraph (b), by repealing “or” at the end;

(b) in paragraph (c), by adding “or” at the end;

(c) by adding –

“(d) section 99 of the Competition Ordinance ( of 2010);”.

## PART 2

### AMENDMENTS TO COMPANIES (DISQUALIFICATION ORDERS) REGULATION

#### 2. **Officers of court to furnish particulars to Registrar**

Section 3(1) of the Companies (Disqualification Orders) Regulation (Cap. 32 sub. leg. I) is amended by adding –

“(ab) if a disqualification order is made by the Competition Tribunal established by section 133 of the Competition Ordinance ( of 2010), the Registrar of the Tribunal;”.

#### 3. **Schedule 1 amended**

Schedule 1 is amended, in Form D.O. 1, by repealing item (1) and substituting –

“(1) Section of the Companies Ordinance (“CO”), the repealed Securities (Insider Dealing) Ordinance (“SIDO”), the Securities and Futures Ordinance (“SFO”) or the Competition Ordinance (“ComO”) under which the order was made† –

Section 168E of CO	
Section 168F of CO	
Section 168G of CO	
Section 168H of CO	
Section 168J of CO	
Section 168L of CO	
Section 23(1)(a) of SIDO	
Section 24(1) of SIDO	
Section 214(2)(d) of SFO	
Section 257(1)(a) of SFO	
Section 258(1) of SFO	
Section 303(2)(a) of SFO	
Section 99 of ComO	”.

4. **Schedule 3 amended**

Schedule 3 is amended, in Form D.O. 3, by repealing “or the Securities and Futures Ordinance (Cap. 571)” and substituting “, the Securities and Futures Ordinance (Cap. 571) or the Competition Ordinance ( of 2010)”.

**PART 3**

**AMENDMENTS TO JUDICIAL OFFICERS RECOMMENDATION  
COMMISSION ORDINANCE**

5. **Judicial office**

Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap. 92) is amended by adding –

“President, Competition Tribunal  
Deputy President, Competition Tribunal  
Member, Competition Tribunal”

after –

“Recorder of the Court of First Instance”.

## PART 4

### AMENDMENTS TO TELECOMMUNICATIONS ORDINANCE

#### 6. Interpretation

(1) Section 2(1) of the Telecommunications Ordinance (Cap. 106) is amended by repealing the definitions of “associated corporation”, “associated person”, “control” and “relative”.

(2) Section 2(1) is amended, in the definition of “dominant position”, by repealing “section 7L” and substituting “section 7Q”.

(3) Section 2(1) is amended, in the definition of “telecommunications market”, by repealing “or customer equipment or services” and substituting “telecommunications services, or customer equipment”.

#### 7. Delegation of powers

(1) Section 6 is amended by renumbering it as section 6(1).

(2) Section 6(1) is amended, in the proviso, by repealing paragraph (a).

(3) Section 6(1) is amended, in the proviso, in paragraph (b), by repealing “this section” and substituting “this subsection”.

(4) Section 6 is amended by adding –

“(2) The Authority may, in writing, delegate to any public officer, either generally or for any particular occasion and either by name or by reference to a public office, any of the functions of the Commission under the Competition Ordinance ( of 2010) that the Authority may, under Part 11 of that Ordinance, perform concurrently with the Commission.

(3) In this section –

“Commission” (競委會) means the Competition Commission established by section 128 of the Competition Ordinance ( of 2010).”.

8. **Powers of Authority in relation to services with places outside Hong Kong**

Section 6B is repealed.

9. **Guidelines**

(1) Section 6D(2)(aa) and (2A) is repealed.

(2) Section 6D(4)(a) is amended by repealing “section 7L(2)” and substituting “section 7Q(2)”.

10. **Anti-competitive practices**

Section 7K is repealed.

11. **Abuse of position**

Section 7L is repealed.

12. **Non-discrimination**

Section 7N is repealed.

13. **Authority may regulate changes in relation to carrier licensees**

Section 7P is repealed.

14. **Section 7Q added**

The following is added –

**“7Q. Exploitative conduct**

(1) A licensee in a dominant position in a telecommunications market must not engage in conduct that in the opinion of the Authority is exploitative.

(2) A licensee is in a dominant position if, in the opinion of the Authority, it is able to act without significant competitive restraint from its competitors and customers.

(3) In considering whether a licensee is dominant, the Authority must take into account relevant matters including, but not limited to –

- (a) the market share of the licensee;
- (b) the licensee’s power to make pricing and other decisions;
- (c) any barriers to entry to competitors into the relevant telecommunications market;
- (d) the degree of product differentiation and sales promotion;
- (e) any other relevant matters specified in guidelines issued under section 6D for the purposes of this section.

(4) Without limiting subsection (1), the Authority may consider the following conduct to be exploitative –

- (a) fixing and maintaining prices or charges at an excessively high level; and
- (b) setting unfair trading terms and conditions,

for or in relation to the provision of interconnection of the type referred to in section 36A(3D).”.

## 15. **Part VC heading amended**

The heading of Part VC is amended by repealing “7K, 7L, 7M, 7N AND 7P” and substituting “7M AND 7Q”.

## 16. **Interpretation**

(1) Section 32L is amended, in the definition of “appeal”, by repealing “, (1A), (1B) or (1C)”.



(2) Section 32L is amended, in the definition of “appeal subject matter”, in paragraph (a)(i), by repealing “7K, 7L, 7M or 7N” and substituting “7M or 7Q”.

(3) Section 32L is amended, in the definition of “appeal subject matter”, by repealing paragraph (b).

#### **17. Appeals to Appeal Board**

(1) Section 32N(1)(a)(i) is amended by repealing “7K, 7L, 7M or 7N” and substituting “7M or 7Q”.

(2) Section 32N(1A), (1B) and (1C) is repealed.

(3) Section 32N(3) is amended by repealing “subsection (1A), (1B) or (1C) or”.

#### **18. Procedure and powers of Appeal Board, etc.**

Section 32O(2) is amended by repealing “, or before the opinion, direction or decision referred to in section 32N(1A), (1B) or (1C) was formed, issued or made, as the case may be”.

#### **19. Remedies**

Section 39A(1) is amended by repealing “7K, 7L, 7M or 7N” and substituting “7M or 7Q”.

#### **20. Matters to be taken into account by Authority**

Schedule 2 is repealed.

#### **21. Specified amount**

Schedule 3 is repealed.

## **PART 5**

### **AMENDMENTS TO TELECOMMUNICATIONS REGULATIONS**

#### **22. Form of Licences**

Schedule 3 to the Telecommunications Regulations (Cap. 106 sub. leg. A) is amended, in the form for the Fixed Telecommunications Network Services Licence –

- (a) in General Condition 4(2), by repealing “described in General Condition 16(2)” and substituting “of section 7Q(2) of the Telecommunications Ordinance (Cap. 106)”;
- (b) in General Condition 18(1), by repealing “including but not limited to his functions under General Conditions 15, 16 and 20(4)”;
- (c) by repealing General Condition 20(4) and (6);
- (d) by repealing the subheading "**Tariffs revisions**" before General Condition 21;
- (e) by repealing General Condition 21;
- (f) by repealing the subheading "**Tariffs for new services**" before General Condition 22;
- (g) by repealing General Condition 22;
- (h) by repealing the subheading "**Trials**" before General Condition 23;
- (i) by repealing General Condition 23;
- (j) in General Condition 41(1)(a), by repealing “described in General Condition 16(2)” and substituting “of section 7Q(2) of the Telecommunications Ordinance (Cap. 106)”;
- (k) in General Condition 44, by repealing “General Condition 16(2)” and substituting “section 7Q(2) of the Telecommunications Ordinance (Cap. 106)”;
- (l) in General Condition 44, by repealing “either one or any combination of General Conditions 17, 20, 21, 22 and 23” and substituting “General Condition 17”.

## PART 6

### AMENDMENTS TO PREVENTION OF BRIBERY ORDINANCE

#### 23. **Public bodies**

Schedule 1 to the Prevention of Bribery Ordinance (Cap. 201) is amended by adding –

“115. Competition Commission.”.

## PART 7

### AMENDMENTS TO BROADCASTING AUTHORITY ORDINANCE

#### 24. **Interpretation**

(1) Section 2 of the Broadcasting Authority Ordinance (Cap. 391) is amended, in the Chinese text, in the definition of “廣播”, in paragraph (b), by repealing the full stop and substitution a semicolon.

(2) Section 2 is amended by adding –

““Commission” (競委會) means the Competition Commission established by section 128 of the Competition Ordinance ( of 2010);”.

#### 25. **Consideration of complaints by the Complaints Committee**

Section 11(2)(a) is repealed and the following substituted –

“(a) any matter in respect of which the Authority may, under Part 11 of the Competition Ordinance ( of 2010), perform concurrently with the Commission the functions of the Commission under that Ordinance; or”.

#### 26. **Consideration of complaint that a licensee has contravened section 13(1) or 14(1) of Broadcasting Ordinance**

Section 11A is repealed.

## PART 8

### AMENDMENTS TO THE OMBUDSMAN ORDINANCE

27. **Organizations to which this Ordinance applies**

Part I of Schedule 1 to The Ombudsman Ordinance (Cap. 397) is amended by adding –

“Competition Commission.”.

## PART 9

### AMENDMENTS TO BROADCASTING ORDINANCE

28. **Interpretation**

Section 2(1) of the Broadcasting Ordinance (Cap. 562) is amended by repealing the definition of “dominant position”.

29. **Guidelines**

Section 4(2)(c) and (3) is repealed.

30. **Prohibition on anti-competitive conduct**

Section 13 is repealed.

31. **Prohibition on abuse of dominance**

Section 14 is repealed.

32. **Provisions supplementary to sections 13 and 14**

Section 15 is repealed.

33. **Notice to licensee to cease certain conduct**

Section 16 is repealed.

34. **Confidential matter to be safeguarded**

(1) Section 27(1) is amended by repealing “subsection (2)” and substituting “subsections (1A) and (2)”.

(2) Section 27 is amended by adding –

“(1A) Subsection (1) does not apply to any information that is furnished, or any data, book, document or record that is produced, to the Broadcasting Authority under the Competition Ordinance ( of 2010).”.

**35. Licensee to pay financial penalty**

Section 28(4) is repealed.

**36. Suspension of licence**

Section 31(2)(a)(ii)(A) is repealed.

**37. Revocation of licence**

Section 32(4)(a)(ii)(A) is repealed.

**38. Regulations**

Section 42(4) is repealed.

SCHEDULE 9

[s. 176]

TRANSITIONAL AND SAVINGS PROVISIONS

**1. Interpretation**

In this Schedule –

“commencement date” (生效日期) means the date on which Part 11 comes into operation;

“pre-amended Broadcasting Authority Ordinance” (原有《廣播事務管理局條例》) means the Broadcasting Authority Ordinance (Cap. 391) in force immediately before the commencement date;

“pre-amended Broadcasting Ordinance” (原有《廣播條例》) means the Broadcasting Ordinance (Cap. 562) in force immediately before the commencement date;

“pre-amended Telecommunications Ordinance” (原有《電訊條例》) means the Telecommunications Ordinance (Cap. 106) in force immediately before the commencement date.

## 2. **General provisions**

Subject to sections 3 and 4 of this Schedule, anything that was done under the pre-amended Telecommunications Ordinance, the pre-amended Broadcasting Authority Ordinance or the pre-amended Broadcasting Ordinance and was in effect immediately before the commencement date is, in so far as it may be done under this Ordinance, to continue to have effect as if it were done under this Ordinance.

## 3. **Transitional provisions relating to pre-amended Telecommunications Ordinance**

(1) In this section –

“Appeal Board” (上訴委員會) has the meaning given by section 32L of the pre-amended Telecommunications Ordinance;

“appeal subject matter” (標的事項) has the meaning given by section 32L of the pre-amended Telecommunications Ordinance;

“licensee” (持牌人) has the meaning given by section 2(1) of the pre-amended Telecommunications Ordinance.

(2) Any conduct in relation to a licensee that –

(a) has taken place, or has in part taken place, before the commencement date; and

(b) but for the enactment of this Ordinance, would be regulated by section 7K, 7L, 7N or 7P of the pre-amended Telecommunications Ordinance,

may be investigated under that Ordinance on or after the commencement date, and the provisions of that Ordinance apply in relation to that investigation, as if this Ordinance had not been enacted.

(3) Any investigation initiated under the pre-amended Telecommunications Ordinance, before the commencement date, of any conduct in relation to a licensee that –

(a) has taken place, or has in part taken place, before the commencement date; and

(b) but for the enactment of this Ordinance, would be regulated by section 7K, 7L, 7N or 7P of that Ordinance,

may be continued under that Ordinance on or after the commencement date, and the provisions of that Ordinance continue to apply in relation to that investigation, as if this Ordinance had not been enacted.

(4) If –

(a) but for the enactment of this Ordinance, a person may make an appeal to the Appeal Board under section 32N of the pre-amended Telecommunications Ordinance; and

(b) the appeal subject matter relates to section 7K, 7L, 7N or 7P(14) of that Ordinance,

the appeal may be made to and disposed of by the Appeal Board under that Ordinance on or after the commencement date, and the provisions of that Ordinance apply in relation to that appeal, as if this Ordinance had not been enacted.

(5) If –

(a) an appeal made to the Appeal Board under section 32N of the pre-amended Telecommunications Ordinance has not been finally determined before the commencement date; and

(b) the appeal subject matter relates to section 7K, 7L, 7N or 7P(14) of that Ordinance,

the appeal may be continued and disposed of by the Appeal Board under that Ordinance on or after the commencement date, and the provisions of that Ordinance continue to apply in relation to that appeal, as if this Ordinance had not been enacted.

- (6) If –
- (a) but for the enactment of this Ordinance, a person may bring an action under the pre-amended Telecommunications Ordinance; and
  - (b) the action relates to –
    - (i) a breach of section 7K, 7L or 7N of that Ordinance; or
    - (ii) a breach of a licence condition, determination or direction relating to section 7K, 7L or 7N of that Ordinance,

the action may be brought under that Ordinance on or after the commencement date, as if this Ordinance had not been enacted.

- (7) If –
- (a) an action brought under the pre-amended Telecommunications Ordinance has not been finally determined before the commencement date; and
  - (b) the action relates to –
    - (i) a breach of section 7K, 7L or 7N of that Ordinance; or
    - (ii) a breach of a licence condition, determination or direction relating to section 7K, 7L or 7N of that Ordinance,

the action may be continued under that Ordinance on or after the commencement date, as if this Ordinance had not been enacted.



(8) The Commission may not take any action under this Ordinance in respect of a proposed change referred to in section 7P(6) of the pre-amended Telecommunications Ordinance if –

- (a) the Telecommunications Authority has given consent to the proposed change under section 7P(7)(a) or (b)(ii) or (iii) of that Ordinance, and the proposed change has not taken effect; or
- (b) the proposed change takes effect on or after the commencement date –
  - (i) pursuant to the consent given by the Telecommunications Authority under section 7P(7)(a) or (b)(iii) of that Ordinance; or
  - (ii) pursuant to the consent given, and in compliance with the direction issued, by the Telecommunications Authority under section 7P(7)(b)(ii) of that Ordinance.

(9) The amendments effected by section 22 of Schedule 8 to the General Conditions in the form for the Fixed Telecommunications Network Services Licence in Schedule 3 to the Telecommunications Ordinance (Cap. 106) are deemed to have been made to the General Conditions in any fixed telecommunications network services licence that has been issued under the pre-amended Telecommunications Ordinance.

#### 4. **Transitional provisions relating to pre-amended Broadcasting Authority Ordinance and pre-amended Broadcasting Ordinance**

(1) In this section –

“licensee” (持牌人) has the meaning given by section 2(1) of the pre-amended Broadcasting Ordinance;

“pre-amended Ordinance” (《原有條例》) means –

- (a) the pre-amended Broadcasting Authority Ordinance; or

(b) the pre-amended Broadcasting Ordinance.

(2) Any conduct in relation to a licensee that –

(a) has taken place, or has in part taken place, before the commencement date; and

(b) but for the enactment of this Ordinance, would be regulated by section 13 or 14 of the pre-amended Broadcasting Ordinance,

may be investigated under the pre-amended Ordinance on or after the commencement date, and the provisions of that pre-amended Ordinance apply in relation to that investigation, as if this Ordinance had not been enacted.

(3) Any investigation initiated under the pre-amended Ordinance, before the commencement date, of any conduct in relation to a licensee that –

(a) has taken place, or has in part taken place, before the commencement date; and

(b) but for the enactment of this Ordinance, would be regulated by section 13 or 14 of the pre-amended Broadcasting Ordinance,

may be continued under the pre-amended Ordinance on or after the commencement date, and the provisions of that pre-amended Ordinance continue to apply in relation to that investigation, as if this Ordinance had not been enacted.

(4) If –

(a) but for the enactment of this Ordinance, a licensee may make an appeal to the Chief Executive in Council under section 34 of the pre-amended Broadcasting Ordinance; and

(b) the appeal relates to section 13 or 14 of that Ordinance,

the appeal may be made to and disposed of by the Chief Executive in Council under that Ordinance on or after the commencement date, and the provisions of

that Ordinance apply in relation to that appeal, as if this Ordinance had not been enacted.

(5) If –

(a) an appeal made to the Chief Executive in Council under section 34 of the pre-amended Broadcasting Ordinance has not been finally determined before the commencement date; and

(b) the appeal relates to section 13 or 14 of that Ordinance,

the appeal may be continued and disposed of by the Chief Executive in Council under that Ordinance on or after the commencement date, and the provisions of that Ordinance continue to apply in relation to that appeal, as if this Ordinance had not been enacted.

(6) If –

(a) but for the enactment of this Ordinance, a person may bring an action under the pre-amended Broadcasting Ordinance; and

(b) the action relates to –

(i) a breach of section 13 or 14 of that Ordinance; or

(ii) a breach of a licence condition, determination or direction relating to section 13 or 14 of that Ordinance,

the action may be brought under that Ordinance on or after the commencement date, as if this Ordinance had not been enacted.

(7) If –

(a) an action brought under the pre-amended Broadcasting Ordinance has not been finally determined before the commencement date; and

(b) the action relates to –

(i) a breach of section 13 or 14 of that Ordinance; or

- (ii) a breach of a licence condition, determination or direction relating to section 13 or 14 of that Ordinance,

the action may be continued under that Ordinance on or after the commencement date, as if this Ordinance had not been enacted.

### **Explanatory Memorandum**

The object of this Bill is to prohibit conduct that prevents, restricts or distorts competition in Hong Kong. The Bill also prohibits mergers that have the effect of substantially lessening competition in Hong Kong, but the merger rule applies only in relation to carrier licences issued under the Telecommunications Ordinance (Cap. 106).

2. The Bill also establishes a Competition Commission (“Commission”) to investigate and enforce the prohibitions against anti-competitive conduct and a Competition Tribunal (“Tribunal”) in which proceedings may be brought in relation to such conduct.

### **Part 1 – Preliminary**

3. Clause 1 provides that the Secretary for Commerce and Economic Development may appoint a day for the Bill, when enacted (“the Ordinance”), to come into operation, by notice published in the Gazette. By virtue of section 20 of the Interpretation and General Clauses Ordinance (Cap. 1) this provision enables different days to be appointed for different provisions.

4. Clauses 3 to 5 provide for the application of the Ordinance to statutory bodies, to specified persons and to persons engaged in specified activities.

## **Part 2 – The conduct rules**

5. Part 2 specifies the conduct that is prohibited by the Ordinance. There are 2 conduct rules.
6. Clause 6 sets out the first conduct rule. The first conduct rule 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. Clause 6 also lists several examples of the sort of agreements to which the rule would apply.
7. Clause 21 sets out the second conduct rule. The second conduct rule prohibits undertakings that have a substantial degree of market power from engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. Clause 21 also gives 2 examples of the sort of conduct to which the rule would apply.
8. Clauses 9 to 14 provide for a procedure under which undertakings may obtain a decision from the Commission as to whether or not an agreement, concerted practice or decision is excluded or exempt from the application of the first conduct rule or Part 2. If the Commission decides that the agreement, practice or decision is excluded or exempt, the undertakings concerned are immune from any action under the Ordinance with regard to that agreement, practice or decision. Clauses 24 to 29 provide for a similar procedure with respect to the application of the second conduct rule.
9. Clauses 15 to 20 empower the Commission to grant block exemptions from the first conduct rule with regard to categories of agreements, concerted practices and decisions.
10. Clause 30 excludes the cases listed in Schedule 1 from the application of the conduct rules. The exclusions provided in Schedule 1 are for agreements that contribute to improving production or distribution or to promoting technical or economic progress, for agreements or conduct that is necessary in order to comply with a legal requirement, and for undertakings that are entrusted by the

Government with the operation of services of general economic interest. Clause 36 authorizes the Chief Executive in Council to amend Schedule 1 by order. Such orders are subject to positive vetting by the Legislative Council.

11. Clauses 31 to 33 authorize the Chief Executive in Council to grant exemptions from the conduct rules on public policy grounds or in order to avoid a conflict with international obligations. Such exemptions are to be made by order published in the Gazette and the orders must be laid on the table of the Legislative Council.

### **Part 3 – Complaints and investigations**

12. Clause 37 provides that any person may lodge a complaint with the Commission against any undertaking that person considers has contravened, is contravening or is about to contravene a competition rule. Clause 38 provides for a procedure for doing this. The expression “competition rule” embraces both the conduct rules and the merger rule (See Schedule 7).

13. Clauses 39 to 50 give the Commission wide powers to carry out investigations in respect of contraventions of the competition rules. However the Commission may only exercise those powers if it has reasonable cause to suspect that a contravention has taken place, is taking place or is about to take place. These powers include the power to require the production of documents and information (clause 41), power to require a person to attend before it and give evidence (clause 42) and power to enter and search premises under a warrant issued by a judge of the Court of First Instance (clauses 48 and 50).

14. Clauses 51 to 55 create offences in relation to investigations, for the purpose of ensuring that an investigation may be carried out properly without hindrance.

### **Part 4 – Enforcement powers of Commission**

15. Clauses 59 to 64 authorize the Commission to accept commitments from a person to take any action or to refrain from taking any action that the

Commission considers will address its competition concerns about a possible contravention of a competition rule. If it accepts a commitment, the Commission must refrain from investigating or continuing to investigate the alleged contravention of a competition rule.

16. Clauses 65 to 77 provide for an infringement notice procedure as an alternative to bringing proceedings in the Tribunal for a contravention of a conduct rule. Under this procedure the Commission may issue an infringement notice to a person whom it has reasonable cause to believe has contravened a conduct rule. The notice will contain an offer not to bring proceedings in the Tribunal against that person in return for the person making a commitment to comply with certain specified requirements. These requirements may include paying a sum of up to \$10,000,000, refraining from certain conduct, taking certain actions, and admitting to a contravention of the conduct rule in question. A person is not obliged to make a commitment to comply with the requirements of an infringement notice but if a commitment is made, the Commission may not bring proceedings in the Tribunal against the person, in relation to the alleged contravention.

17. Clauses 78 to 80 provide for a leniency procedure with regard to contraventions of the conduct rules. Under this procedure the Commission may agree with any person not to bring or continue proceedings under Part 6 against that person for a pecuniary penalty in respect of an alleged contravention in exchange for that person's co-operation in an investigation or in proceedings under the Ordinance. The Commission may make a leniency agreement on any terms it considers appropriate.

### **Part 5 – Review by Tribunal**

18. Under clauses 81 to 87, a person or undertaking may apply to the Tribunal for a review of certain determinations (“reviewable determinations”) made by the Commission. On an application for review, the Tribunal may confirm or set aside the Commission's determination, in whole or in part. Where it sets aside a

determination it may refer the matter back to the Commission for reconsideration. The Tribunal may also refer any question of law arising in a review to the Court of Appeal, by way of case stated.

### **Part 6 – Enforcement before Tribunal**

19. Part 6 provides for the ways in which contraventions of the competition rules may be dealt with in the Tribunal. Clauses 90 and 91 provide that the Tribunal may, on the application of the Commission, impose a pecuniary penalty on a person who has contravened or been involved in a contravention of a competition rule. The persons who may be regarded as being “involved in a contravention” are defined in clause 89.

20. Clause 92 authorizes the Tribunal, either of its own motion or on application, to make orders, other than an order for a pecuniary penalty, against any person who has contravened or been involved in a contravention of a competition rule. On such an application, the Tribunal may make any order it considers appropriate, including any of the orders specified in Schedule 3. Clause 93 empowers the Tribunal to make interim orders pending its determination of an application made under clause 92.

21. Clauses 95 to 98 authorize the Tribunal, on the application of the Commission, to make orders in relation to mergers and in relation to arrangements that if carried into effect will result in a merger, if the merger contravenes or would contravene the merger rule. In relation to anticipated mergers, clause 96 authorizes the Tribunal to make interim orders to prevent any “pre-emptive action”. Orders made under these provisions may contain anything permitted by Schedule 4.

22. Clauses 99 to 103 make provision for the Tribunal to make a disqualification order prohibiting a person from being a director of a company or from otherwise participating in the affairs of a company. A disqualification order may be made against a person if that person has been a director of a



company that has contravened a competition rule and the Tribunal considers that the person is unfit to be concerned in the management of a company.

### **Part 7 – Private actions**

23. Part 7 provides for the private enforcement of the conduct rules. There are 2 options: a follow-on action (clauses 108 to 110), where conduct has been “determined” to be a contravention of a conduct rule, and a stand-alone action (clauses 111 to 113) in the absence of such a determination. What constitutes a “determination” for the purpose of a follow-on action is set out in clause 108(4).

24. Clauses 110 and 113 provide that the Tribunal may make any of the orders specified in Schedule 3.

25. Clauses 114 to 120 are procedural provisions relating to the hearing of private actions in the Tribunal. Clauses 119 and 120 authorize the Commission to intervene in private actions and participate in the proceedings.

### **Part 8 – Disclosure of information**

26. Clause 123 requires the Commission to establish and maintain safeguards to prevent the unauthorized disclosure of confidential information in its possession. Clause 124 imposes a duty on “specified persons” not to unlawfully disclose confidential information and clauses 125 and 126 set out how confidential information may be lawfully disclosed.

### **Part 9 – Competition Commission**

27. Part 9 establishes the Competition Commission and sets out its functions and powers and its status in relation to the Government. Schedule 5 contains constitutional, administrative and financial provisions relating to the Commission. Clause 132 provides personal immunity for anything done or omitted to be done in good faith by members of the Commission and others in the performance of functions under the Ordinance.

### **Part 10 – Competition Tribunal**

28. Clause 133 establishes the Competition Tribunal as a superior court of record, on a par with the Court of First Instance. The Tribunal consists of the judges of the Court of First Instance by virtue of their appointment as such judges.

29. Clauses 135 to 139 provide for the appointment of a President and Deputy President of the Tribunal and make provision for resignation, vacancies and acting appointments with regard to the office of President.

30. Clause 140 authorizes the Tribunal to appoint suitably qualified persons (assessors) and to dispose of proceedings before it with the assistance of such assessors.

31. Clauses 141 and 142 set out the jurisdiction and powers of the Tribunal.

32. Clauses 143 to 152 make provision for the practice and procedure of the Tribunal.

33. Clause 153 provides for an appeal to the Court of Appeal against decisions of the Tribunal, including decisions as to the amount of any compensatory sanction or pecuniary penalty.

34. Clause 154 provides that every Registrar and any other officer of the High Court holds the corresponding office in the Tribunal and clause 155 provides that the Tribunal is to have a seal approved by the Chief Justice.

35. Clause 156 authorizes the Chief Judge of the High Court, after consulting the President of the Tribunal, to make rules prescribing and regulating the practice and procedure of the Tribunal and incidental matters.

### **Part 11 – Concurrent jurisdiction relating to telecommunications and broadcasting**

36. Clause 158 provides that the Telecommunications Authority may perform the functions of the Commission under the Ordinance with respect to telecommunications licensees and similar persons specified in that clause.

Clause 159 makes similar provision for the Broadcasting Authority with respect to broadcasting licensees and similar persons specified in that clause.

37. The Commission, the Telecommunications Authority and the Broadcasting Authority are to prepare and sign a Memorandum of Understanding on how they are to co-ordinate the performance of their functions under the Ordinance (clause 161 and Schedule 6).

### **Part 12 – Miscellaneous**

38. Clause 162 provides that Schedule 7, which incorporates the merger rule, is to have effect. The merger rule has very limited application in that it only applies in relation to carrier licensees under the Telecommunications Ordinance (Cap. 106).

39. Clause 163 allows the Commission to charge fees. The Chief Executive is authorized to make regulations for this purpose.

40. Clause 164 provides personal immunity for anything done or omitted to be done in good faith by public officers in the performance of functions under the Ordinance.

41. Clauses 165 and 166 make provision relating to the service of notices and other documents.

42. Clauses 167 to 169 prohibit any person from providing certain indemnities to officers, employees or agents of undertakings.

43. Clauses 170 to 174 make provision for offences.

44. Clause 172 makes it an offence for an employer to punish an employee in any way because that employee has provided material to the Commission or given or agreed to give evidence in any proceedings in the Tribunal brought by the Commission.

45. Clause 173 makes it an offence for anyone to obstruct the performance of functions under the Ordinance.

46. Clause 174 provides for additional liability when an offence is committed by a body corporate or a partner in a partnership.

47. Clause 175 applies Schedule 8 which contains consequential and related amendments to other enactments.

48. Clause 176 applies Schedule 9 which contains transitional and savings provisions. Clause 176 also empowers the Chief Executive to make regulations containing transitional and savings provisions.

### **Schedules**

49. Schedule 1 provides the general exclusions from the conduct rules. These are for agreements that contribute to improving production or distribution or to promoting technical or economic progress, for agreements or conduct that must be made or engaged in to comply with a legal requirement, and for undertakings entrusted by the Government with the operation of services of general economic interest.

50. Schedule 2 sets out the procedural requirements relating to the acceptance, variation, withdrawal and release of commitments.

51. Schedule 3 sets out the orders that may be made by the Tribunal in relation to contraventions of the competition rules.

52. Schedule 4 sets out the provisions that may be contained in orders made by the Tribunal in relation to anticipated mergers and mergers.

53. Schedule 5 contains constitutional, administrative and financial provisions relating to the Commission. The Commission is to consist of not less than 5 members, appointed by the Chief Executive having regard to their expertise or experience in industry, commerce, economics, law, small and medium enterprises or public policy.

54. Schedule 6 lists matters that may be included in the Memorandum of Understanding to be prepared and signed by the Commission, the Telecommunications Authority and the Broadcasting Authority in relation to their concurrent jurisdiction.

55. Schedule 7 deals with mergers. Section 3 of that Schedule sets out the merger rule, which is that mergers that have, or are likely to have, the effect of

substantially lessening competition in Hong Kong are prohibited. Section 3 of that Schedule read with section 5 of that Schedule defines what constitutes a merger. Section 4 of that Schedule provides that the merger rule only applies in relation to carrier licences issued under the Telecommunications Ordinance (Cap. 106). Section 6 of that Schedule lists the factors to be considered in determining whether or not a merger has the effect of substantially lessening competition. Section 7 of that Schedule imposes a time limit for the commencement of an investigation of a merger. Sections 8 to 10 of that Schedule provide similar exclusions and exemptions from the merger rule to those provided in relation to the conduct rules. Sections 11 to 16 of that Schedule provide for decisions to be made by the Commission in relation to mergers and proposed mergers, similar to the procedure applicable to the conduct rules. Section 17 of that Schedule provides for the issuing of guidelines.

56. Schedule 8 makes consequential and related amendments to other enactments.

57. Schedule 9 contains transitional and savings provisions.

## **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.