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Panel on Economic Development
Meeting on 26 May 2014

**Background brief on the engagement and consultation plan of the
Competition Commission for the regulatory guidelines required under
the Competition Ordinance**

Purpose

This paper provides background information on the engagement and consultation plan of the Competition Commission ("the Commission") for the regulatory guidelines required under the Competition Ordinance (Cap. 619) ("the Ordinance"), and summarizes the views and concerns expressed by Members on the matter.

Background

The Competition Ordinance

2. The Ordinance was passed by the Legislative Council ("LegCo") on 14 June 2012 and published in the Gazette on 22 June 2012. The Ordinance seeks to prohibit undertakings from adopting conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. It provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule¹, the second conduct rule² and the

¹ The first conduct rule, as described in section 6, prohibits undertakings from making or giving effect to agreements or decisions or engaging in concerted practices that have as their object or effect the prevention, restriction or distortion of competition in Hong Kong.

² The second conduct rule under section 21 prohibits undertakings that have a substantial degree of market power in a market from engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

merger rule³, which are collectively known as the "competition rules" in the Ordinance) as well as the institutional arrangements and penalty provisions for their enforcement.

3. The Ordinance provides for a judicial enforcement model through the establishment of the Commission and the Competition Tribunal ("the Tribunal"). The Commission is an independent statutory body to investigate into competition-related complaints and to bring public enforcement action before the Tribunal in respect of anti-competition conduct. The Tribunal is set up within the Judiciary as a superior court of record that has primary jurisdiction to hear and adjudicate on competition cases brought by the Commission, on follow-on private actions, on alleged contravention of a conduct rule as a defence raised in proceedings before the Court of First Instance, as well as on applications for the review of certain determinations of the Commission, etc.

Implementation of the Ordinance

4. LegCo passed in January 2013 the Competition Ordinance (Commencement) Notice 2012. The provisions of the Ordinance relating to the establishment of the Commission, the short title and commencement, interpretation, and the issue of guidelines by the Commission came into operation on 18 January 2013. The provisions relating to establishment of the Tribunal and part of the provisions relating to its operation commenced on 1 August 2013. The Chief Executive appointed the Chairperson and members of the Commission in April 2013, while the Judiciary appointed the President and Deputy President of the Tribunal in July 2013, to take charge of the enforcement of the legislation.

5. The rest of the Ordinance relating to the prohibitions and the relevant penalty provisions will come into force only when all relevant preparatory work is completed. The preparatory work by the Commission includes its preparation of guidelines regarding the competition rules, block exemption orders, lodging of complaints, as well as investigations and the merger rule.

Engagement and consultation for the regulatory guidelines made by the Commission under the Ordinance

6. Under the Ordinance, the Commission is required to issue guidelines to elaborate on the key elements of the general prohibitions to provide practical and detailed guidance on how the principle-based competition law would be

³ The merger rule in Schedule 7 prohibits mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong. This rule only applies to carrier licences under the Telecommunications Ordinance (Cap. 106).

interpreted and applied. For example, under section 35(1) of the Ordinance, the Commission is required to issue or amend guidelines indicating the manner in which it expects to interpret and give effect to the conduct rules, or guidelines regarding the manner and form in which it will receive applications for a decision or block exemption order. The section also prescribes that the Commission is required to issue guidelines indicating how the Commission expects to exercise its power to make a decision or grant block exemptions. Section 38 of the Ordinance requires the Commission to issue guidelines indicating the manner and form in which complaints are to be made.

7. The Ordinance also requires the Commission to carry out consultation and conduct publicity programmes to promote public understanding of the Ordinance. Under the Ordinance (for example, section 35(4) and section 58(3)), the Commission must consult LegCo and any persons it considers appropriate before issuing any guidelines or amendments to them.

8. At the meeting of the Panel on Economic Development held on 27 January 2014, the Administration informed members that the Commission had initiated work on the drafting of guidelines, and planned to reach out to members of the public in 2014 to discuss the guidelines and other work relating to the implementation of the Ordinance.

9. In reply to a written question from a Member raised at the Council meeting on 9 April 2014, the Administration indicated that Commission's priority in 2014 was to conduct consultation on various documents required under the Ordinance. These documents included guidelines on the competition rules, complaint handling and investigations. The Commission had initiated the preparation of the related documents, and had engaged legal consultants to advise on such preparatory work.

10. The Administration has further mentioned in the reply that the Commission planned to conduct promotion of the Ordinance, and discuss with members of the public and various sectors on matters that the Commission should take into account when formulating the guidelines. According to the Administration, the Commission expected that such promotion and discussions would enhance public understanding of the Ordinance, enable small and medium enterprises ("SMEs") and other sectors to have a better grasp of the provisions of the Ordinance and their implementation details, as well as facilitate their making of the necessary preparation for the full implementation of the Ordinance. The Commission also planned to discuss with the business community on how to develop risk management systems, good practices and internal control tools to achieve compliance with the Ordinance and the guidelines.

11. The Administration had indicated that the Commission planned to start the relevant promotion and discussions with various sectors in the first half of 2014 and, depending on the work progress, consult LegCo on the relevant documents before end of the year.

Members' relevant views and concerns

12. During the scrutiny of the Competition Bill, the Bills Committee deliberated the sample Guidelines on the First Conduct Rule, the Second Conduct Rule and Market Definition drawn up by the Administration. Some members considered that the guidelines were general in nature and were not clear enough to address the concerns of SMEs in specific trades. The Administration assured members that the Commission would consult relevant stakeholders and would prepare the actual guidelines with more details and illustrative examples. Some members had requested the Administration to make the guidelines on the proposed conduct rules subsidiary legislation subject to scrutiny by LegCo. The Administration disagreed and emphasized the importance to allow flexibility for the Commission to issue and amend the guidelines as and when necessary in order to respond swiftly to the rapid changes in the market, and that it is in line with practices in overseas jurisdictions.

13. As regards the guidelines on making complaints, while some members opined that the guidelines could facilitate complaint-handling, some other members were concerned that when such guidelines were promulgated, complaints that were not made in the specified format would not be handled. The Administration had explained that the guidelines were not meant to be mandatory requirements for compliance, but were aimed at indicating, for the complainants' reference, the types and details of information that the Commission could base on in considering whether an investigation should be initiated on receipt of a complaint.

Latest development

14. The Commission will brief the Panel at the meeting on 26 May 2014 regarding its engagement and consultation plan for the regulatory guidelines required under the Ordinance.

References

15. The relevant papers are available at the following links –

The Legislative Council Brief on the Competition Bill issued on 2 July 2010

http://www.legco.gov.hk/yr09-10/english/bills/brief/b35_brf.pdf

Background Brief for Bills Committee on Competition Bill

<http://www.legco.gov.hk/yr09-10/english/bc/bc12/papers/bc121109cb1-320-5-e.pdf>

Report of the Bills Committee on Competition Bill

<http://www.legco.gov.hk/yr09-10/english/bc/bc12/reports/bc120530cb1-1919-e.pdf>

2014 Policy Address Policy Initiatives of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau

<http://www.legco.gov.hk/yr13-14/english/panels/eDEV/papers/eDEV0127cb1-751-3-e.pdf>

Written reply by the Secretary for Commerce and Economic Development to a question by the Hon Charles Peter MOK in the Legislative Council on 9 April 2014

<http://www.info.gov.hk/gia/general/201404/09/P201404090254.htm>

Background brief for the Subcommittee on Competition Ordinance (Commencement) Notice 2012

http://www.legco.gov.hk/yr12-13/english/hc/sub_leg/sc02/papers/sc021211cb1-272-1-e.pdf

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