



競爭事務委員會  
COMPETITION  
COMMISSION

# Getting Prepared for the Full Implementation of the Competition Ordinance

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# Championing a Level Playing Field

Hong Kong has long been one of the freest economies in the world.

The competitive process ensures consumers have access to a variety of goods and services at competitive prices. Consumers have alternative choices if a business in a competitive market does not meet their expectations.

For businesses and entrepreneurs, a competitive market provides openings for existing and new business, especially the smaller ones, to expand and enter the market. Competition drives more efficient business practices and innovation, and directs businesses to meet consumer demands by providing the right products at the right price and quality.

Competition has deep roots in Hong Kong, but we should not assume that competition always comes naturally. In some circumstances it needs to be safeguarded, otherwise some businesses may build barriers which prevent or restrict competition. Such barriers can harm consumers, businesses (especially the smaller ones) and the Hong Kong economy by:

- Raising prices above what they would be in a competitive environment.
- Reducing innovation and quality and choices of products.
- Reducing incentives to increase production efficiency.
- Preventing the efficient allocation of resources.
- Discouraging investment, new entry and expansion in Hong Kong's economy.

- Allowing businesses to produce fewer products than they would in a competitive environment, leading to fewer consumer choices, reduced business opportunity and overall economic loss for Hong Kong.

The introduction of the Competition Ordinance (Ordinance) to Hong Kong is an important step in this regard to protect and nourish our shared value of competition. The role of the Competition Commission (Commission) is to see that the Ordinance achieves this outcome.

To introduce you to the Commission, this document takes you through:

- The key provisions of the Competition Ordinance
- The role of the Competition Commission
- The guidelines required by the Ordinance
- What people can expect from the Competition Commission in advocating and enforcing the Ordinance
- The steps leading to fully commencing the Ordinance

## **Competition Ordinance at a glance**

The Ordinance was passed by the Legislative Council in June 2012 but has not yet commenced full operation. The Ordinance prohibits undertakings in all sectors from undermining the positive role competition plays in the Hong Kong economy by introducing barriers to the competitive process which have the object or effect of preventing, restricting or distorting competition in Hong Kong.

### **The competition rules**

Once the Ordinance comes into full operation, it will address such restrictions on competition through three competition rules.

The **First Conduct Rule** targets all anti-competitive agreements which adversely impact on competition.

- All undertakings, big or small, are liable if they are involved in Serious Anti-Competitive Conduct of price-fixing, market allocation, output restriction and bid-rigging.
- For agreements among undertakings with a combined annual turnover<sup>1</sup> not exceeding HK\$200 million, the First Conduct Rule only applies to them in relation to Serious Anti-Competitive Conduct.
- The First Conduct Rule applies to agreements with a combined annual turnover exceeding HK\$200 million in relation to both serious and other anti-competitive conduct.
- Agreements are excluded from the rule if they satisfy the exclusion criteria in relation to enhancing overall economic efficiency, or if they are made to comply with a legal requirement, or if they are for services of general economic interest entrusted by government.
- Undertakings may apply for decisions from the Commission as to whether their agreements are excluded or exempted. The Commission may issue a block exemption order to exempt a particular category of agreements, if those agreements satisfy the exclusion criteria.

The **Second Conduct Rule** prohibits undertakings with a substantial degree of market power from abusing this power to prevent, restrict or distort competition.

- The Second Conduct Rule only applies to businesses with a substantial degree of market power. Undertakings with annual turnover not exceeding HK\$40 million are excluded from the rule.
- Where a firm acts alone rather than in concert with others, its actions can only contravene the Ordinance if they fall under the Second Conduct Rule (and it has substantial market power).

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<sup>1</sup> The Government will make regulations on how the turnover of an undertaking is to be determined.

- Conduct which is engaged for complying with a legal requirement, or if it is for services of general economic interest entrusted by government are excluded from the application of the Second Conduct Rule. Undertakings may apply for decisions from the Commission as to whether their conduct is excluded or exempted.

The **Merger Rule** prohibits mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong.

- The scope of application of the merger rule is limited to mergers relating to undertakings directly or indirectly holding carrier licences issued under the Telecommunications Ordinance (Cap. 106).
- The Merger Rule does not apply if the economic efficiencies from the merger outweigh the adverse effect. Undertakings may apply for decisions from the Commission as to whether their mergers are excluded.

To encourage compliance with the competition rules, the Ordinance provides for a range of **remedies** which the Commission could seek. The Commission may :

- Issue warning notices, infringement notices and seek Commitments in response to conduct it considers may contravene the Ordinance.
- Commence proceedings in the Competition Tribunal (Tribunal) seeking remedies including fines of up to 10% of an undertaking's annual local turnover per contravention for a maximum period of three years, orders disqualifying people from serving as director of a company, and prohibition, damages or other orders to address the contravention, as well as orders issued to firms merged or to be merged to bring the contravention to an end.

## The Competition Commission

The Ordinance established the Commission to implement the competition rules.

The Commission's role is to promote compliance with the Ordinance through advocacy, investigation and enforcement. The Commission however does not have power to adjudicate whether the Ordinance has been contravened. If it wishes to seek remedies such as penalties or disqualification orders, it must commence proceedings in the Tribunal.

In relation to the application of the Ordinance to the conduct of firms possessing licences under the Telecommunications Ordinance and the Broadcasting Ordinance, the Communications Authority ("CA") will have concurrent jurisdiction with the Commission to enforce the Ordinance.<sup>2</sup>

## Preparing the draft guidelines

The Commission is required under the Ordinance to develop a set of guidelines. The guidelines will –

- Indicate how the Commission will interpret and give effect to the First and Second Conduct Rules.
- Set out how applications for a decision or block exemption order are to be made and handled by the Commission.
- Indicate how complaints may be made.
- Outline procedures for deciding whether or not and how to conduct an investigation.
- Indicate how the Commission may interpret and give effect to the Merger Rule.

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<sup>2</sup> Draft Memorandum of Understanding to manage operational matters where the Commission and the CA each have jurisdiction will be released for consultation with the Legislative Council in end 2014.

The guidelines will inform businesses and the general public how the Commission expects to enforce the Ordinance and its processes for considering applications. The guidelines however are not part of the legislation and they will not bind the Tribunal and Courts of Hong Kong in interpreting the Ordinance.

It is common practice for competition authorities around the world to supplement their competition laws with guidelines which assist businesses and the general public understand how the regulator intends to interpret the laws. There are many overseas references from which the Commission can draw, especially the experience from those jurisdictions whose competition laws contain legal concepts similar to those in our Ordinance. Despite the wealth of overseas references on guidelines, the Commission is mindful that –

- Under the Ordinance, it is for the Tribunal rather than the Commission to adjudicate and award penalties, as compared to many of the other jurisdictions where both powers are exercised by the competition authority.
- The Ordinance was developed having regard to the local circumstances of Hong Kong.

Against this background, and drawing from overseas references, the Commission believes the guidelines would be most useful for businesses and the general public if we –

- Illustrate by way of examples how certain agreements and conduct may be problematic and risk being anti-competitive.
- Set out the thinking processes and analytical steps the Commission will take in applying the Conduct Rules and Merger Rule, especially those concepts which are fundamental to assessing if the Rules are contravened.
- Provide procedural details on how applications, complaints, investigation and related processes are conducted such that they are transparent and clear.



The guidelines will not and cannot limit the application of the Ordinance or exempt certain conduct from the Ordinance. The Commission is empowered to make decisions about exemption applications on a case by case basis once the law comes into full effect.

## **What you can expect from the Competition Commission**

The Commission has already started work on various fronts to prepare for the forthcoming full implementation of the Ordinance. While the guidelines are being prepared, the Commission wishes to provide an outline of how it intends to approach its advocacy and enforcement role.

### **Advocacy and community engagement**

The phased implementation of the Ordinance is to allow time for businesses to review their trade practices and make adjustments so that they will be better prepared when the Ordinance is in full effect. The Commission wants businesses trading in Hong Kong to be **ready, willing** and **able to** comply with the Ordinance.

To this end, the Commission has an ongoing role to inform the Hong Kong public about the benefits of the Ordinance and the need to comply with the Ordinance. It will engage with stakeholders on its work both before and after the Ordinance comes into full effect.

Much of the Commission's current focus is understandably on the preparation of the guidelines required by the Ordinance. However, these will not be the only publication released by the Commission to assist consumers and businesses understand the Ordinance. Other publications will come in stages to provide information and tools specifically tailored to groups such as the small and medium sized enterprises and industry associations to help them understand how the Ordinance is likely to impact them and how they may help themselves to comply.

The Commission will also explain how it will go about its business of enforcing the Ordinance where firms have failed to comply. As an introduction to this approach<sup>3</sup> the following principles provide an overview of how the Commission will enforce the Ordinance.

### **Enforcing the Ordinance**

The Ordinance provides that the Commission may conduct an investigation 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. With that, the Commission will decide independently over:

- What conduct it will investigate; and
- If it considers a contravention is involved, what action to take.

In exercising this authority, the Commission will conduct professional investigations and seek to take action that is proportionate to the conduct and the resulting harm. The Commission would consider the severity factors and remedial goals when considering whether and how to intervene in individual cases, though the considerations outlined below are not meant to be exhaustive as the Commission would consider the specific circumstances on a case by case basis.

### **Whether to intervene – severity factors**

In determining whether to intervene in a particular case, the Commission will accord priority to deal with those cases which incorporate the following severity factors:

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<sup>3</sup> Noting it will be supplemented by guidelines in relation to the specific conduct rules and enforcement processes.

1. The conduct has resulted or is likely to result in substantial harm to consumers or businesses and/or have a substantial impact on the Hong Kong economy
2. The conduct involves concentrated markets in Hong Kong and restricts the capacity for new entry or expansion in those markets
3. The conduct demonstrates a blatant disregard for the law
4. Where the person, business or industry has a history of previous contraventions of the Ordinance

These severity factors will affect whether and how the Commission will exercise its authority to take action. They are not an exhaustive list, and they may not be identical to the factors the Commission considers relevant to the level of penalty should the Commission proceed to the Tribunal seeking that remedy.

#### **Identifying the remedy – remedial goals**

When considering what remedy to seek, the Commission favours remedies which would allow it to say “yes” to the following questions (remedial goals):

1. Would the remedy stop the unlawful conduct speedily?
2. Will the remedy undo the harm caused by the contravening conduct (in cases where this goal can be efficiently achieved)?
3. Will the remedy encourage the effective use of compliance systems?
4. Will the remedy deter unlawful conduct in contravention of the Ordinance, both by the specific firms in that instance and more generally among Hong Kong traders?
5. Is the remedy:
  - a) consistent with previous decisions;
  - b) proportionate across parties to the conduct (allowing for any cooperation provided);
  - c) an appropriate standard for future similar cases?

Achieving sufficient deterrence may involve taking action in the Tribunal seeking orders which punish the wrongdoer through sanctions such as fines or orders banning a person from serving as director of a company.

### **Leniency and Cooperation Policies**

An additional factor which can impact what remedies are pursued by the Commission is whether parties cooperate with the Commission.

When conducted in secret, arrangements between competitors to collude rather than to compete (known as “cartels”) are notoriously hard to detect. One of the key tools used by competition authorities around the world to detect cartels is a policy providing protection from prosecution for the first party to notify the competition authority of the cartel conduct (sometimes known as Leniency policies). As it is a major concession to not to seek fines against someone who admits to a contravention of the law, these policies are usually limited to cases of cartel conduct.

Parties who are not entitled to immunity from action under a Leniency policy may still wish to cooperate in cartel or other Commission investigations, and the Commission may take this factor into account when considering the severity of the remedy.

The Commission will release a Leniency Policy and Cooperation Policy at the same time it releases the guidelines required by the Ordinance.

### **Core principles in conducting and resolving investigations**

In relation to all investigations, the Commission:

- Will not comment on matters it may or may not be investigating, except in exceptional circumstances or to correct the public record where investigations are made public by third parties.
- Will conduct investigations as efficiently as possible to avoid costly delays and business uncertainty.

- Will consider in good faith offers from parties under investigation to resolve the Commission's concerns, having regard to the severity factors and remedial goals.
- Will inform complainants on the outcome of investigations into their complaint.
- Will make outcomes of investigations public according to the Ordinance.

### **A long term view of remedies**

The Commission expects that less serious contraventions of the Ordinance will be resolved by administrative measures<sup>4</sup> and warning notices.

More serious conduct may involve issuance of infringement notices and will at least require an enforceable Commitment<sup>5</sup> from the party/ parties involved, with a view to whether the Commitment addresses the remedy goals.

In the most serious cases, or where parties fail to provide or comply with a Commitment which addresses the Competition Commission's concerns and remedy goals, the Commission will proceed to the Tribunal seeking penalties and other redress.

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<sup>4</sup> Such as issuance of a letter which raises some of the concerns the Commission has with a certain conduct

<sup>5</sup> Commitments are arrangements offered by parties who are the subject of a Commission investigation to take steps to address the Commission's competition concerns in return for the commission agreeing to take no further action if the party meets its Commitment

## Steps leading to full implementation

The Commission's target is to complete all the preparatory work concerning the Commission by the first half of 2015. For this timeline to be achieved we need to develop and finalise the guidelines in consultation with the Legislative Council and other interested persons. To meet this target, we will:

### May to July 2014

- Provide information about the Ordinance and give context to the development of the guidelines.
- Approach major stakeholder groups to inform them of our preliminary thinking and hear their expectations on the guidelines.
- Hear from other stakeholders and members of the public if they have views on our work.

### From September on

- Publish draft guidelines
- Undertake consultation with the Legislative Council, stakeholders and the public.

### First half of 2015

- Finalise the guidelines after consultation
- Develop education and compliance tool kits for use by businesses.

As outlined above, the guidelines may not be able to cover all specific circumstances of individual industry or stakeholder. However, they will aim to provide assistance to those industries, stakeholders and their advisors in considering whether conduct may, in the Commission's view, contravene the Ordinance.

While some businesses may wish to await the guidelines to develop their compliance strategy, the Commission encourages them to get started now for the following reasons:

- The guidelines will be developed with reference to the Ordinance and businesses can refer to the Ordinance in developing their compliance policies.
- The process of identifying and if necessary stopping potentially contravening conduct may take some time. Businesses should plan ahead to be ready for the Ordinance's full commencement.

## **Your feedback**

The Commission will publish the guidelines later this year for consultation. You will have the opportunity then to give us more specific views. Meanwhile, we would invite you to:

- Get familiar with the Ordinance and the Commission's enforcement approach as summarized in this document, and let us know how we may engage with you and your industry to help you understand the provisions of the Ordinance and the process leading to its full commencement.
- Let us know your expectations on the Commission and views on the priority of our work.
- Let us know your expectations on the guidelines. What content would be most useful for you and your industry.

- Review your trade practices or others' practices with which you are familiar, and let us know if you have any concerns regarding the competition aspect. Your concerns and the information about the trade practices that you give us will help us provide more focused guidance in our forthcoming guidelines and other publications.

We will approach some of the stakeholders who have expressed specific concerns during the legislative stage of the Ordinance to gather their feedback on issues which may enrich our drafting work of the guidelines. We also welcome other people or organisations who have views on competition issues in Hong Kong and the preparation of guidelines to contact us.

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*The Commission may publish written views provided to us for public viewing on our website. If you do not want us to publish your information, please state so in your submission.*



## Discussion Note on Preparation of Guidelines

This note sets out in broad terms how the Competition Commission (Commission) will proceed to draft the regulatory guidelines required by the Competition Ordinance (Ordinance). The Commission also invites businesses to provide feedback especially information about some of the trade practices in Hong Kong which will help the Commission provide more focused guidance in the forthcoming draft guidelines and other publications.

The Ordinance contains major prohibitions of anti-competitive conduct similar to those in other jurisdictions. At the same time, the Ordinance is made in a way which suits the Hong Kong economy – which is free and open to trade with a high proportion of small and medium-sized enterprises (SMEs). On the other hand, our market is also relatively small and some sectors are characterized by having only a few major players, which may give rise to potential competition problems. We are not free of risk that market players may enter into arrangements which harm competition or use their market power abusively.

The Ordinance, through the deliberations and amendments during the legislative process, has reflected the needs of Hong Kong. The Commission is tasked with providing guidelines as guidance and reference under the legal framework of the Ordinance to users.

This note takes readers through the major elements of the competition rules<sup>1</sup> for which the Commission will develop guidelines, many of them have been thoroughly discussed and settled during the legislative process. The focus of the forthcoming guidelines will be to provide elaboration and examples for users to better understand those elements and how they will be put in practice.

We would like to draw the attention of our stakeholders to a number of trade practices which we think are common in Hong Kong and their risk of competition harm is not always self-evident. We invite stakeholders to provide practical experience and views on such trade practices so that we can develop more focused guidance to help businesses to review and adjust their practices. The highlighted

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<sup>1</sup> The competition rules are the First Conduct Rule, the Second Conduct Rule, and the Merger Rule in the Ordinance.

aspects are not intended to be exhaustive and we welcome suggestions of topics from stakeholders if they think we should consider elaborating on other practices in the draft guidelines.

## **First Conduct Rule**

The First Conduct Rule applies where undertakings enter into arrangements with others. It provides that an undertaking must not make or give effect to an agreement, engage in a concerted practice, or make or give effect to a decision of an association of undertaking if the object or effect of such is to prevent, restrict or distort competition in Hong Kong.

The First Conduct Rule is commonly found in other jurisdictions, so we can draw on plenty of existing overseas references and case law to illustrate its actual use. We will model on the overseas practices to elaborate on the key concepts of “agreement”, “concerted practice” and “association of undertaking”, and also set out in the guidelines the steps the Commission will take to conduct the tests on “object” and “effect”.

## **Serious Anti-competitive Conduct**

All undertakings, big and small, are liable if they are involved in serious anti-competitive conduct of price-fixing, market allocation, agreements to restrict output and bid-rigging. Serious anti-competitive conduct is harmful and its effect appreciable. Having tougher treatments for such serious anti-competitive conduct is consistent with international norm. We think the Ordinance has clarity on this and we will draw on overseas practices to explain the concepts in greater detail in the guidelines.

## **Other anti-competitive conduct**

There was concern that, other than the serious conduct, what may constitute anti-competitive conduct is less clear and undertakings may inadvertently violate the Ordinance despite the *de minimis* rule<sup>2</sup>. It is impossible to provide an exhaustive list and scenario of possible violations. However, it is proposed that the guidelines will help undertakings by providing examples of trade practices commonly found in Hong Kong which may run the risk of contravening the Ordinance. We will set out the relevant factors of consideration in the examples in assessing why they may or may not violate the Ordinance, so that undertakings can review their actual practices accordingly to assess their risk. Examples of trade practices we have in mind include –

- When a supplier specifies the resale prices of its product.
- When undertakings collaborate for joint purchase.

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<sup>2</sup> The First Conduct Rule does not apply if the combined annual turnover of the agreement among undertakings does not exceed HK\$200 million.

- When undertakings share price information amongst themselves.
- When undertakings share non-price information amongst themselves.
- When undertakings jointly refuse to do business with another undertaking.
- When an association of undertakings restricts advertising by its individual members.
- When an association of undertakings imposes restrictive standards on its members' products.
- When an association of undertakings agrees on a fee scale and recommends it to its members.

**Do you have in mind any other common trade practices in Hong Kong which you think may have anti-competitive risk, and for which you hope the Commission would provide more guidance?**

We would like to obtain from the stakeholders more information on how these trade practices take place in Hong Kong, how essential they are for efficiency and do the stakeholders see potential anti-competitive risk in such practices.

In particular, we note that it is not uncommon for market players to meet and exchange information in Hong Kong (and around the world). **Information sharing** can often be beneficial both for the undertakings and the economy, but it can also be used as a vehicle for expressly or tacitly entering into arrangements not to compete (such as to fix prices or share customers). What is your experience of information sharing in your trade and whether you see potential risk?

**Joint purchasing agreements** are often used by smaller undertakings to achieve greater purchasing efficiencies so as to compete with bigger competitors. However, such agreements may have anti-competitive risk if the undertakings involved have got significant buyer power to foreclose other competitors. Do you have views on how common joint purchasing agreements are in Hong Kong?

## **Vertical agreements**

The First Conduct Rule governs both agreements between competitors and agreements concerning the relationship between undertakings at different stages of production and service provision ('vertical agreement'). There were views expressed during the legislative process that some vertical agreements generate positive effects on the distribution chain and enhance efficiency and therefore should be treated differently or exempted<sup>3</sup>. The Ordinance itself does not provide blanket exemption to vertical agreements because such agreements may still have anti-competitive risk.

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<sup>3</sup> Agreements may be exempted from the First Conduct Rule if they contribute to improving production or distribution, or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, on condition that they do not impose indispensable restrictions on the undertakings concerned and do not eliminate competition in respect of a substantial part of the goods or services in question.

## What is your experience with vertical agreements in Hong Kong, how do they enhance efficiency and do they also restrict competition? What types of vertical agreements you think may meet the criteria for exemptions?

We are particularly interested in **resale price maintenance**, which is a kind of vertical agreement whereby a supplier specifies the maximum or minimum resale prices of its product. Minimum resale price maintenance is often considered as a harmful conduct in overseas jurisdictions because it limits price competition. In many jurisdictions it is considered so routinely harmful that it is deemed to prevent, restrict or distort competition. However, many jurisdictions also acknowledge that even minimum resale price maintenance sometimes can enhance economic efficiency, such as by facilitating pre- and post-sale service quality and helping smaller players to venture into new markets. Some competition authorities therefore require that the actual adverse effect of the minimum resale price maintenance be assessed against the economic and market context, and some provide exemptions to smaller firms engaging in this conduct. Do you have views on the impact of resale price maintenance on competition in Hong Kong? Do you consider minimum resale price maintenance having the same adverse effect as serious anti-competitive conduct?

## Second Conduct Rule

The Second Conduct Rule applies where undertakings act alone and only applies where undertakings have substantial market power. It provides that an undertaking that has a substantial degree of market power 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. The Second Conduct Rule prohibits the abuse of market power, but does not prohibit undertakings from having a substantial degree of market power or achieving such market power through legitimate means.

A proportion of Hong Kong business, namely, those whose annual turnover is no more than HK\$40 million is not subject to this rule because of the *de minimis* threshold. The competition law of most overseas jurisdictions contains provisions to regulate abuse of market power. Therefore, there are many practices and precedents we can draw on in considering the application of the Second Conduct Rule. Our guidelines will draw on these international experiences.

## Market definition

During the legislative process, some stakeholders raised concern over the definition of the 'market', which is the fundamental step to assessing if an undertaking has a substantial degree of market power in the relevant market.

There is no simple way to define relevant markets because market definition is essentially an economic test and has to be dealt with specifically on a case-by-case basis. Even on a case by case basis, market definition is rarely black and white and the boundaries of a market are rarely drawn with absolute precision. It is likewise not always possible to calculate the market shares of firms in the defined market with complete precision. Investigations and proceedings often proceed with markets and market shares defined within a narrow and a broader range.

The international practice in applying economic tests to define the relevant market for competition laws is fairly standard and is done by analysing the relevant substitutable products and geographical boundary of the supply and demand of the goods or services in question. Overseas competition authorities have accumulated useful experience of and practical procedures for defining a relevant market. We will incorporate them in our guidelines.

### **Substantial degree of market power**

There was also discussion during the legislative process on the concept of “substantial degree of market power”, over which the Ordinance differs from other major competition jurisdictions in that we use “substantial degree” rather than “dominance” as the threshold for applying the rule.

The Government indicated during the resumption of second reading of the legislative proposal that, taking into account international practices and the actual circumstances of Hong Kong, a market share of 25% should be adopted as the “minimum” threshold. In other words, unless there is other relevant evidence sufficient to prove that a certain undertaking has a substantial degree of market power, an undertaking with a market share below 25% will be regarded as not having a substantial degree of market power, and will therefore, not be subject to the Second Conduct Rule.

In any event, market share does not on its own determine whether an undertaking has a substantial degree of market power. Essentially, an undertaking has such market power only when it can make pricing or production decisions without due regard to the reaction of customers and/or its competitors. Our guidelines will set out considerations involved in assessing market power and the procedures for conducting such an analysis.

**Other than indicative market share thresholds, what other aspects you would like to alert us to incorporate into our market power analysis?**

## Abuse

An undertaking having a substantial degree of market power may risk contravening the Ordinance only if it abuses its power to harm competition. Overseas competition authorities usually provide examples of possible abuse to illustrate what that may mean. The trade practices in question are often common commercial practices but they become problematic if the practices are used by an undertaking with substantial degree of market power because they may have the effect of eliminating or limiting the ability of competitors to compete. Our guidelines will follow the best practices of other competition authorities by providing examples to illustrate potential abuse. Possible scenarios involving the conduct of an undertaking having substantial market power are –

- When this undertaking set prices below costs in the short run to force its competitors out of the market;
- When this undertaking makes the sale of one product in the market in which it has substantial power conditional upon the purchase of another product in order to force out competition in the market of that other product;
- When this undertaking, which has both upstream and downstream businesses, uses its market power in the upstream market to increase production costs of other competitors in the downstream market in order to force out competition downstream;
- When this undertaking influences its upstream supplier to supply input at a higher cost to the competitors of that undertaking;
- When this undertaking, which controls an essential facility or input, refuses to deal with another undertaking without objective justification, because it wants to prevent another undertaking from becoming its potential competitor or continuing to compete with that undertaking;
- When this undertaking places exclusive purchasing obligation on its customers to purchase only from it rather than from other suppliers, or exclusive supply obligation to only supply it and not its competitors.

**Do you have in mind other trade practices in Hong Kong which you suspect may involve abuse of substantial market power to diminish competition and which you hope we could provide guidance?**

In particular, **Bundling**, or **Tying** under which the supply of specified products or services is conditioned on the purchase of other specified products or services has been highlighted as one potential area of concern. Bundling and tying are common commercial practices in Hong Kong and elsewhere. However, they may be problematic if an undertaking with substantial market power in one market uses such practices to foreclose competition in the bundled or tied markets. In some circumstances



they may also relate to the vertical agreement covered by the First Conduct Rule. What is your experience in bundling and tying trade practices? Do they usually facilitate trade and under what circumstances you think their potential harm to competition may outweigh consumer benefits?

## Merger rule

The merger rule prohibits mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong. Unlike the other two competition rules, the merger rule applies only to mergers which involve an undertaking which directly or indirectly holds a carrier licence under the Telecommunications Ordinance, i.e., most mergers taking place in other sectors are unlikely to come under the scope of the merger rule.

We will in our guidelines illustrate the general steps for assessing if a merger may be **substantially lessening competition**, a legal concept which has been used in many other major competition jurisdictions. We will follow the international best practices in putting the concept into use.

At the same time, since the merger rule will mainly affect undertakings related to the telecommunications market, we will provide guidance for the potential users from this sector. Currently the Telecommunications Ordinance contains merger control provisions and the Communications Authority<sup>4</sup> has provided guidelines for merger notifications and assessment. We will borrow experience from the existing practices and incorporate procedural elements which the industry has been familiar with if applicable.

**Do you have any concerns over the application of the merger rule which you would expect more guidance from us?**

## Applications, exemptions, complaints and investigations

Guidelines on applications, exemptions, complaints and investigations are procedural guidance and there are plenty of best practices from international competition bodies on which we can draw. Our guidelines will follow the principles of providing clarity, consistency and predictability to future users.

**Do you have any specific concerns or views over these procedural guidelines?**

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<sup>4</sup> The Commission and the Communications Authority have concurrent jurisdiction under the Ordinance over some of the competition cases. The two bodies will develop and consult the Legislative Council on a memorandum of understanding that sets out the relationship between the two.

## Your feedback

The Commission will publish the guidelines later this year for consultation. You will have the opportunity then to give us more specific views. Meanwhile, we will approach some of the stakeholders who have expressed specific concerns during the legislative stage of the Ordinance to gather their feedback on issues which may enrich our drafting work of the guidelines. We also welcome other people or organisations who have views on competition issues in Hong Kong and the preparation of guidelines to contact us.

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