

**立法會**  
**Legislative Council**

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**Panel on Economic Development**  
**Meeting on 24 November 2014**

**Background brief on the draft guidelines made under**  
**the Competition Ordinance**

**Purpose**

This paper summarizes the views and concerns expressed by Members on issues related to the draft guidelines required to be made by the Competition Commission ("the Commission") under the Competition Ordinance (Cap. 619) ("the Ordinance").

**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 rule<sup>1</sup>, the second conduct rule<sup>2</sup> and the merger rule<sup>3</sup>, which are collectively known as the "competition rules" in the

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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).

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.

4. By the Competition Ordinance (Commencement) Notice 2012, which was gazetted on 23 November 2012, the provisions relating to, inter alia, guidelines to be issued by the Commission, and establishment and operation of the Commission were brought into operation on 18 January 2013.

#### Establishment of the Commission

5. The Chairperson and Members of the Commission were appointed on 1 May 2013. By May 2014, a total of 27 staff member have reported duty and the Commission will continue to recruit the remaining staff including the top executive leadership, operations experts, legal and economic professionals, as well as a secretariat that supports the functioning of the Commission and the committees established under it. The Commission has moved from its initial establishment work to the preparation of various documents foreseen under the Ordinance.

#### Engagement and consultation for the guidelines to be 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 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 59(3),

the Commission must consult LegCo and any persons it considers appropriate before issuing any guidelines or amendments to them.

8. In the second quarter of 2014, the Commission has approached major stakeholders and members of the public to hear their expectation and views on the guidelines. Meanwhile, the Commission has provided information about the Ordinance and given context to the development of the guidelines through the Commission website and publication.

#### Issuance of the six draft guidelines

9. On 9 October 2014, the Commission and the Communications Authority jointly issued for public comment the following six draft guidelines ("the Draft Guidelines") under the Ordinance:

- (a) Draft Guideline on Complaints;
- (b) Draft Guideline on Investigations;
- (c) Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders;
- (d) Draft Guideline on the First Conduct Rule;
- (e) Draft Guideline on the Second Conduct Rule; and
- (f) Draft Guideline on the Merger Rule.

Hyperlinks of an "Overview of Draft Guidelines under the Competition Ordinance - 2014" ("the Overview") and the Draft Guidelines are set out in the **Appendix**.

10. The Overview summarizes the Commission's approach to preparing the Draft Guidelines and highlights some of the key issues addressed in each of the Draft Guidelines.

11. The Draft Guidelines will be finalized before the Ordinance comes into effect and prior to any enforcement actions by the Commission or decisions of the Tribunal or other courts interpreting the Ordinance. In addition, the Draft Guidelines aim to assist businesses operating in the Hong Kong marketplace to become familiar with the competition law and its underlying policies as embedded in the Ordinance. While reflecting the Commission's interpretation of the Ordinance and providing guidance on how the Commission will undertake its functions under the Ordinance, the Draft Guidelines do not represent legal determinations of the meaning of the Ordinance.

## **Previous discussions**

### Deliberations of the Bills Committee

12. A Bills Committee was formed to scrutinize the Competition Bill ("the Bill") in October 2010. During the scrutiny of the 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 sample guidelines were general in nature and were not clear enough to address the concerns of small and medium enterprises ("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 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 was 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 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.

14. On investigations initiated by the Commission, members noted that the Commission would need to strike a balance between transparency of its work and the need to safeguard confidentiality of an investigation, having regard to the interests of the undertakings under investigation and the risks of subjecting the evidence to destruction or interference. The Commission would need more enforcement powers such as entry of premises for search on warrant to ensure effective investigation into suspected anti-competitive conduct of undertakings in all sectors.

15. Some members expressed concern that the threshold of "reasonable grounds to suspect" was too low for the issue of warrant to enter and search premises. The Administration advised that this threshold was appropriate to enable the Commission to gather the necessary evidence. The threshold was the standard for the issue of warrant in a number of legislation in Hong Kong such

as the Copyright Ordinance and the Securities and Futures Ordinance, and was on par with that in the competition laws in the United Kingdom and Singapore.

### Deliberations of the Panel on Economic Development

16. At the meeting of the Panel on Economic Development ("the Panel") on 26 May 2014, members deliberated on the engagement and consultation plan of the Commission for the guidelines required to be made by the Commission under the Ordinance. Some members commented that as the guidelines would not be part of the statute and would not bind the Tribunal, it might be possible that an SME was convicted of an offence under the Ordinance notwithstanding the fact that it had duly complied with the guidelines issued by the Commission.

17. In response, the Commission advised that the development of guidelines was an on-going and interactive process and a review might be conducted three years after the promulgation of the guidelines. The Commission would step up public education and publicity efforts and disseminate relevant information to facilitate understanding and compliance of the legislation by SMEs. In addition, the Commission intended to adopt a more lenient approach in the initial stage of enforcing the Ordinance with regard to unintended and non-serious breaches. It would be unlikely that the Commission would take legal action against an SME unless the SME had contravened the Ordinance and caused actual harm to the business of another party.

18. Noting that the Commission planned to release evaluation tools through the Internet to help the commercial sector to assess whether their practices conformed to the requirements under the Ordinance, members relayed SMEs' concerns about the user-friendliness of the tools and efforts in promoting their uses. The Commission advised that the tool kit would contain practical examples of problems that SMEs faced daily. The Commission would consult relevant chambers of commerce and SME associations in the development of the tool kit and might organize short courses and seminars on the key terms and concepts of the Ordinance.

19. Certain members were concerned whether the Commission had conducted surveys systematically to assess SMEs' awareness of the Ordinance and taken note of their concerns before conducting consultation on the guidelines. In reply, the Commission advised that it had drawn reference from the issues raised by Members in the LegCo as well as the submissions submitted by concerned organizations. The Commission would liaise with stakeholders in the lower half of 2014 to understand their modes of operation and practices and the grey areas that they were concerned about. They would be consulted again on the guidelines subsequently.

### **Council questions**

20. At the Council meetings on 23 October 2013 and 9 April 2014, Hon CHUNG Kwok-pan and Hon Charles Peter MOK raised questions on the implementation of the Ordinance covering, among others, the progress of work on drafting and conducting consultation on the guidelines to be made by the Commission under the Ordinance. Hyperlinks to the relevant written replies from the Administration are provided in the **Appendix**.

### **Latest position**

21. The Commission will brief the Panel at its meeting on 24 November 2014 on its work of seeking public comments on the issued Draft Guidelines made by the Commission under the Ordinance.

### **Relevant papers**

22. A list of the relevant papers which are available on the LegCo Website (<http://www.legco.gov.hk>) is in the **Appendix**.

Council Business Division 4  
Legislative Council Secretariat  
18 November 2014

## List of relevant papers

Issued by	Meeting Date/ Issue Date	Paper
Panel on Economic Development	26 May 2014	<a href="#">Agenda</a> <a href="#">Minutes</a> <a href="#">Background brief</a> <a href="#">Information paper issued by the Administration</a>
Council Meeting	23 October 2013	<a href="#">Written reply by the Secretary for Commerce and Economic Development to a question on "Implementation of Competition Ordinance" raised by the Hon CHUNG Kwok-pan</a>
	9 April 2014	<a href="#">Written reply by the Secretary for Commerce and Economic Development to a question on "Implementation of Competition Ordinance" raised by the Hon Charles Peter MOK</a>
Legislative Council Brief on Competition Bill	2 July 2010	<a href="#">Legislative Council Brief</a>
Bills Committee on Competition Bill	23 May 2012	<a href="#">Background brief</a> <a href="#">Report</a>
Subcommittee on Competition Ordinance (Commencement) Notice 2012	10 December 2012	<a href="#">Background brief</a> <a href="#">Report</a>
2014 Policy Address Policy Initiatives of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau	27 January 2014	<a href="#">2014 Policy Address Policy Initiatives</a>

<b>Issued by</b>	<b>Meeting Date/ Issue Date</b>	<b>Paper</b>
Competition Commission	26 May 2014	<a href="#"><u>Getting Prepared for the Full Implementation of the Competition Ordinance</u></a>
	9 October 2014	<a href="#"><u>Overview of Draft Guidelines under the Competition Ordinance 2014</u></a>