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Panel on Economic Development
Meeting on 27 April 2015

Updated 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 guidelines and document 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 rule¹, the second conduct rule² and the merger rule³, which are collectively known as the "competition rules" in 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.

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).

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. The Commission members are drawn from different fields, including those who have relevant expertise and experience in industry, commerce, economics, law, small and medium enterprises ("SMEs"), accounting, finance and consumer protection. The Commission has moved from its initial establishment work to the preparation of various documents foreseen under the Ordinance.

Document to be made by the Commission

6. The Communications Authority ("CA") has a concurrent jurisdiction with the Commission to enforce the Ordinance in relation to the anti-competitive conduct of certain businesses operating in the broadcasting and telecommunications sectors. According to section 161 of the Ordinance, the Commission and CA must prepare and sign a Memorandum of Understanding ("MOU") for the purpose of co-ordinating the performance of their functions under the Ordinance. Before signing any MOU or any amendment to it, the Commission and CA must consult LegCo.

Engagement and consultation for the guidelines to be made by the Commission under the Ordinance

7. 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.

8. 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.

9. Since May 2014, the Commission has held meetings with and participated in seminars/conferences/forums for major stakeholders⁴ and members of the public to hear their expectations 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 publications, such as the booklet entitled "Getting prepared for the Full Implementation of the Competition Ordinance".

Issuance of the six draft guidelines

10. On 9 October 2014, the Commission and CA 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 the Draft Guidelines, an "Overview of Draft Guidelines under the Competition Ordinance - 2014" ("the Overview") and some frequently asked questions ("FAQ") are set out in the **Appendix**.

11. The Overview summarizes the Commission's approach on preparing the Draft Guidelines and the process for providing comments on their drafts. It also highlights some of the key issues addressed in each of the Draft Guidelines.

⁴ Major stakeholders include major chambers, a large range of industry associations, representatives of SMEs and a wide variety of professional bodies.

12. The Commission will issue the finalized guidelines to be adopted before the Ordinance comes into force and prior to any enforcement actions by the Commission or decisions of the Tribunal or other courts interpreting the Ordinance. In addition, the 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 guidelines do not represent legal determinations of the meaning of the Ordinance. The Tribunal and other courts are responsible ultimately for interpreting the Ordinance. The Commission's interpretation of the Ordinance does not bind the Tribunal and other courts.

13. Since October 2014, the Commission also publicized the Draft Guidelines and the Ordinance among the public through, amongst others, Announcements of Public Interest on TV and radio, a two-minute video on the Commission's website and YouTube, social media platforms and seminars/conferences/meetings etc.

14. On 30 March 2015, the Commission and CA, after careful consideration of the feedback in the 64 submissions received during the public consultation on the Draft Guidelines, published revised versions of the Draft Guidelines ("Revised Draft Guidelines") for consultation by 20 April 2015. According to the Commission, the submissions and feedback received assisted it in identifying areas where amendment of the Draft Guidelines was merited to clarify particular points or provide additional guidance. Hyperlinks to the Revised Draft Guidelines, its FAQ and a relevant Guide are set out in the **Appendix**.

Previous discussions

Deliberations of the Bills Committee

15. 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 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.

16. As regards the guidelines on making complaints, the Administration advised 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.

17. 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.

18. In response to some members' concern, the Administration advised that the threshold of "reasonable grounds to suspect" 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 (Cap. 528) and the Securities and Futures Ordinance (Cap. 571), and was on par with that in the competition laws in the United Kingdom and Singapore.

Deliberations of the Panel on Economic Development

19. At the meeting of the Panel on Economic Development ("the Panel") on 26 May 2014, some members commented that as the guidelines would not be part of the statute and 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.

20. 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 their promulgation. The Commission would step up public education and publicity efforts and disseminate relevant information to facilitate understanding and compliance of the legislation by SMEs.

21. As regards the user-friendliness of the evaluation e-tools to help the commercial sector, the Commission advised that the tool kit would contain practical examples of problems that SMEs faced daily, and it 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.

22. The Commission briefed the Panel on the Draft Guidelines at its meeting on 24 November 2014. In addressing members' concerns whether labour issues such as minimum wages and collective bargaining were activities distorting competition, the Commission advised that competition policy focused on the behaviour of undertakings competing for customers rather than on labour issues and industrial relations matters.

23. According to the FAQ to the Revised Draft Guidelines, employee is an integral part of his employer undertaking and the agreements between a group of employees and their employer, say with respect to salaries and conditions of work, are outside the scope of the first conduct rule.

24. There were concerns whether "tips" for tour escorts and tourist guides, fee schedules/scales set by professional bodies, daily gold prices released by gold business associations were regarded as price fixing under the first conduct rule. The Commission undertook to look into the present arrangements, draw experience from similar cases and assist the trades to understand this part of the Ordinance. On exchange of information on statistics of claims among insurance companies, the Commission remarked that competition laws around the world were able to accommodate information exchanges of this kind.

25. The Revised Draft Guidelines provide additional guidance to enable businesses to distinguish between legitimate commercial negotiations and anti-competitive exchanges of information, particularly with regard to commercially sensitive information.

26. As regards types and criteria of complaints that would be handled and investigated, the Commission advised that to prevent abuse of the complaint mechanism, it would carry out initial assessment before deciding whether to proceed to formal investigation, and decisions for complaints not warrant further investigation might be subject to review. Nevertheless, the Commission would accord higher priority to dealing with complaints relating to matters of wide public interest and major policy issues in competition. The enforcement priorities would be released prior to the full implementation of the Ordinance.

Discussions at the Subcommittee on Four Subsidiary Legislation Related to Competition Ordinance Gazetted on 18 February 2015

27. In response to members' concerns on the Competition (Turnover) Regulation ("C(T)R"), the Administration advised that when making the C(T)R, it had communicated with the Commission which intended to publish, among others, guidance notes to facilitate enforcement of the Ordinance, including guidance notes on turnover assessment with practical examples of how turnover could be determined by reference to typical audited accounts of undertakings.

Council questions

28. At the Council meetings on 23 October 2013 and 9 April 2014, Hon CHUNG Kwok-pan and Hon Charles Peter MOK raised questions respectively 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

29. At the policy briefing held on 2 February 2015, the Administration indicated that it would bring the Ordinance into full operation by the end of 2015 when all relevant preparatory work, including the publication of guidelines by the Commission, the formulation of relevant rules for the Tribunal, etc, were completed. By then, the Commission would be vested with investigation and enforcement power to implement the Ordinance.

30. The Commission and CA will brief the Panel at its meeting on 27 April 2015 on the Revised Draft Guideline and the MOU made by the Commission under the Ordinance.

Relevant papers

31. A list of the relevant papers, including those available on the LegCo Website (<http://www.legco.gov.hk>), is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
21 April 2015

List of relevant papers

Issued by	Meeting Date/ Issue Date	Paper
Panel on Economic Development	27 January 2014	Agenda Minutes 2014 Policy Address – Policy Initiatives of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau
	26 May 2014	Agenda Minutes Background brief Information paper issued by the Administration
	24 November 2014	Agenda Minutes Background brief Information paper issued by the Administration
	2 February 2015	Agenda Minutes 2015 Policy Address – Policy Initiatives of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau
Council Meeting	23 October 2013	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

Issued by	Meeting Date/ Issue Date	Paper
	9 April 2014	<u>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</u>
Legislative Council Brief on Competition Bill	2 July 2010	<u>Legislative Council Brief</u>
Bills Committee on Competition Bill	23 May 2012	<u>Background brief Report</u>
Subcommittee on Competition Ordinance (Commencement) Notice 2012	10 December 2012	<u>Background brief Report</u>
Subcommittee on Four Subsidiary Legislation Related to Competition Ordinance Gazetted on 18 February 2015	24 March 2015	<u>Administration's responses to follow-up questions arising from the meeting on 16 March 2015 Report</u>
Competition Commission	26 May 2014	<u>Getting Prepared for the Full Implementation of the Competition Ordinance</u>
	9 October 2014	<u>Overview of Draft Guidelines under the Competition Ordinance 2014 Six Draft Guidelines Frequently asked questions</u>
	30 March 2015	<u>Guide to the Revised Draft Guidelines Issued under the Competition Ordinance Six Revised Draft Guidelines Frequently asked questions</u>