

For information

Legislative Council Panel on Economic Development

Competition Commission's preparation for full commencement of the Competition Ordinance

Purpose

The Government has gazetted 14 December 2015 as the commencement date for the coming into full effect of the Competition Ordinance (Ordinance). The Competition Ordinance (Commencement) (No.2) Notice 2015 was tabled in the Legislative Council on 14 October 2015 and the period for negative vetting ended on 11 November 2015. This paper outlines the preparations undertaken by the Competition Commission and the Communications Authority to be ready for the full implementation of the Ordinance on 14 December 2015.

Guidelines required by the Competition Ordinance

2. The Ordinance provides that the Commission, together with the Communications Authority (CA) which has 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 sector,¹ must issue guidelines on:

- the manner in which the Commission² expects to interpret and give effect to:
 - the First Conduct Rule (Guideline on the First Conduct Rule)
 - the Second Conduct Rule (Guideline on the Second Conduct Rule)
 - the Merger Rule (Guideline on the Merger Rule);
- the manner and form in which complaints are to be made (Guideline

¹ The relevant undertakings are specified in section 159(1) of the Ordinance. These are licensees under the Telecommunications Ordinance (Cap 106) ("TO") or the Broadcasting Ordinance (Cap 562) ("BO"), other persons whose activities required them to be licensed under the TO or the BO or persons who have been exempted from the TO or from specified provisions of the TO pursuant to section 39 of the TO.

² References to the Commission in this paper includes the CA so far as the Guidelines are concerned.

- on Complaints);
- the procedures it will follow in deciding whether or not to conduct an investigation and the procedures it will follow in conducting an investigation (Guideline on Investigations); and
- the manner and form in which it will receive applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders (Applications Guideline).

3. In April 2015 the Commission informed the Panel that it had published six Draft Guidelines on 9 October 2014. During the public consultation between October and December 2014 the Commission received 64 submissions on the Draft Guidelines covering a total of 640 pages. Submissions were made by 49 separate parties including parties representing thousands of businesses in Hong Kong.

4. Following careful consideration of the feedback provided, the Commission published six Revised Draft Guidelines on 30 March 2015. At the meeting of the Panel on 27 April 2015 the Commission updated panel members on the results of the consultation and provided revised drafts of the documents.

5. After consideration of the issues raised by panel members, consideration of further comments from stakeholders and a close review of the text of the documents the Commission published the final versions of the guidelines on 27 July 2015. The guidelines are available on the Commission and the CA's websites in both English and Chinese.

Memorandum of Understanding between the Competition Commission and the Communications Authority

6. Section 161(1) of the Ordinance provides that as soon as is reasonably practicable after the coming into operation of the section, the Commission and the CA (Authorities) must prepare and sign a MOU for the purpose of co-ordinating the performance of their functions under the Ordinance. A list of matters that must be provided for in the MOU is contained in Schedule 6 to the Ordinance.

7. Before signing any MOU under section 161, or any amendment to it, the Authorities must consult the Legislative Council. The Authorities

consulted with panel members on 27 April 2015 providing information about the underlying principles of the MOU and how it would operate.

8. Following this consultation, the Authorities have finalised the text of the MOU and it was formally adopted by the Commission in October and the CA in November. It is anticipated the MOU will be signed soon after the commencement of the substantive provisions of the Ordinance on 14 December 2015.

Guidance on Fees Payable for Applications

9. The Competition (Fees) Regulation was gazetted on 17 July and tabled before the Legislative Council on 14 October 2015. It was considered at LegCo subcommittee on 22 October 2015. The period for negative vetting finished on 11 November 2015.

10. In order to provide guidance on the relevant applicable fees, and the basis on which the Commission will exercise its discretion to waive, reduce or refund fees, on 12 November 2015 the Commission published a guidance note entitled “Fees Payable for Making an Application to the Competition Commission”. The guidance note is available on the Commission’s website.

Guidance on How to Assess “Turnover”

11. The Competition (Turnover) Regulation came into effect on 17 April 2015. The Regulation outlines how turnover is to be calculated for the purposes of determining whether turnover based thresholds for exclusion in the Ordinance apply. During consideration of the Regulation by the LegCo subcommittee, the Administration informed the subcommittee members that the Commission would provide further guidance on turnover assessment in order to assist Small and Medium Enterprises (SMEs).

12. On 5 November 2015, the Commission published a guidance note entitled “How to assess turnover for the Exclusions from the Competition Ordinance Conduct Rules”. The note uses generally accepted accounting practices and provides practical examples to assist SMEs in calculating their turnover to determine the application of the Ordinance to their particular circumstances.

Leniency Policy

13. Section 80 of the Ordinance provides that the Commission may make a leniency agreement with a person that it will not bring or continue proceedings in the Competition Tribunal for a pecuniary penalty in respect of an alleged contravention of a conduct rule in exchange for a person's co-operation in an investigation or in proceedings under the Ordinance.

14. A Draft Leniency Policy for Undertakings Engaging in Cartel Conduct was issued by the Commission for consultation on 23 September 2015. By the close of the consultation period on 23 October 2015 a total of 20 submissions were received from a wide spectrum of stakeholders in Hong Kong and overseas, including law firms, professional advisory bodies, businesses and academics. All submissions have been published on the Commission's website.

15. The Commission has carefully considered the submissions received. Generally parties were in favour of the Commission adopting a leniency policy and supported the approach the Commission had taken in the draft document. A final version of the Leniency Policy for Undertakings Engaging in Cartel Conduct is anticipated to be published during the week commencing 16 November 2015. The Commission will be able to update panel members on the final contents of the policy at the panel meeting.

Enforcement Policy

16. The Commission proposes to issue an Enforcement Policy to provide guidance on how the Commission intends to exercise its enforcement function in investigating possible contraventions of the First Conduct Rule and Second Conduct Rule. The Enforcement Policy will outline how the Commission will prioritise the use of its operational resources to investigate conduct that may contravene the Conduct Rules in an efficient and timely manner. It will also describe how the Commission will identify an enforcement response that is suitable and proportionate where the Commission considers a contravention of the Ordinance has occurred.

17. The Enforcement Policy is anticipated to be published during the week commencing 16 November 2015. The Commission will be able to update panel members on the final contents at the meeting.

Handling Competition Matters before Commencement

18. In July 2015 the Commission announced that it would not accept applications for a decision under sections 9 and 24 of the Ordinance or for a block exemption order before the date of full commencement. However, if parties intend to apply for a decision or block exemption order after commencement, the Commission indicated that it is prepared, subject to available resources, to enter into preliminary discussions with the parties in respect of those applications in advance of the date of full commencement. Some parties have availed themselves of this opportunity.

19. The Commission has taken a broad educative approach to encourage and to assist businesses to be ready, willing and able to comply with the Ordinance when it comes into full effect. The response to this approach has been very positive, with many businesses and trade associations actively engaging with the Commission and making or considering changes to their practices and conduct to ensure compliance. As the date of full commencement approaches, the Commission will, in appropriate cases, contact businesses and other relevant parties directly if the Commission considers that their conduct or practice may be considered anti-competitive and, therefore, likely to contravene the Ordinance after full commencement.

Education and Assistance Activities of the Commission

20. The Commission continues to actively engage with businesses and the Hong Kong community to inform them about the Ordinance and to prepare for its full implementation.

21. Up to mid-November 2015 the Commission has conducted over 180 briefings and meetings with the major chambers, a large range of industry associations, representatives of SMEs and a wide variety of professional bodies. Nine over-subscribed seminars for SMEs, members of the public and trade associations were organized.

22. Since the last Panel Meeting in April 2015, the Commission has published a number of publications including a brochure for trade associations and a practical self-assessment toolkit for SMEs to encourage both trade associations and businesses to review their practices and establish

a compliance policy to minimise the risk of contravening the Ordinance.

23. To enhance the awareness and understanding of the Ordinance among businesses and the public, the Commission participated in the Entrepreneur Day 2015 organised by the Hong Kong Trade Development Council in May. A roving exhibition, featuring informative panels and especially designed interactive electronic games, was held at seven locations across Hong Kong Island, Kowloon and the New Territories between September and November.

24. To facilitate easy understanding of the competition rules, a ten-part series of one minute educational videos in which the major anti-competitive concepts are turned into real life scenarios was produced and broadcast on a local TV channel at prime time in July 2015. This was supplemented by a series of radio drama segments broadcast from September to November. The Commission received very positive feedback on both series.

25. In the months leading up to and soon after the full commencement of the Ordinance, the Commission will participate in events involving businesses, especially SMEs, organised by other public organisations, including the World SME Expo to be held in early December. A set of new TV and radio Announcement in Public Interest (APIs) will be broadcast starting end of November. These initiatives will be supported by an extensive media and advertising campaign with a mix of traditional, online and outdoor platforms to encourage compliance and further increase awareness of the full implementation of the Ordinance among the general public.

Next steps

26. The Commission is completing its internal preparations and will be fully prepared to commence full enforcement of the Ordinance on 14 December 2015.

Competition Commission November 2015