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Panel on Economic Development
Meeting on 23 November 2015

**Background brief on the preparations made by the Competition
Commission for the full commencement of the Competition Ordinance**

Purpose

This paper provides background information on issues related to the preparations made by the Competition Commission for the full commencement of the Competition Ordinance (Cap. 619), and summarizes the views and concerns expressed by Members during previous discussions on the subject.

Background

The Competition Ordinance

2. Cap. 619 was passed by the Legislative Council ("LegCo") on 14 June 2012 and published in the Gazette on 22 June 2012. The objective of Cap. 619 is to prohibit and deter undertakings¹ from adopting abusive or other anti-competitive conduct which has the object or effect of preventing, restricting and distorting competition in Hong Kong. Cap. 619 provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule², the second conduct rule³ and the merger rule⁴, which are

¹ "Undertaking" is defined under section 2(1) of Cap. 619 to mean "any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity".

² 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.

³ 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.

⁴ 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).

collectively known as the "Competition Rules" in Cap. 619) as well as the institutional arrangements and penalty provisions for their enforcement.

3. The Administration implements Cap. 619 in phases after its enactment to allow the establishment of the Competition Commission ("the Commission") and the Competition Tribunal ("the Tribunal")⁵ before the Competition Rules come into force. The provisions relating to the establishment, functions and powers of the Commission (including the issue of the guidelines ("the Guidelines")) and the establishment and constitution, jurisdiction and powers, and practice and procedure of the Tribunal came into operation on 18 January and 1 August 2013 respectively. According to the Administration, such arrangements would enable the public and the business sector to familiarize themselves with the new legal requirements during the transitional period and make the necessary adjustments to their business practices.

Preparations made by the Commission for the full commencement of Cap. 619

4. Cap. 619 provides that the Commission, together with the Communications Authority ("CA") which has concurrent jurisdiction with the Commission to enforce Cap. 619 in relation to the anti-competitive conduct of certain businesses operating in the broadcasting and telecommunications sector⁶, must issue Guidelines on –

- (a) the manner in which the Commission⁷ expects to interpret and give effect to –
 - (i) the first conduct rule;
 - (ii) the second conduct rule;
 - (iii) the merger rule;
- (b) the manner and form in which complaints are to be made;
- (c) the procedures it will follow in deciding whether or not to conduct an investigation and the procedures it will follow in conducting an investigation; and

⁵ The Tribunal is a superior court of record established under Cap. 619 having primary jurisdiction to hear and adjudicate on cases brought by the Commission, follow-on private actions, alleged contravention of a conduct rule as a defence raised in proceedings before the Court of First Instance, as well as reviews of certain determinations of the Commission/Communications Authority.

⁶ The relevant undertakings are specified in section 159(1) of Cap. 619. 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 TO or BO or persons who have been exempted from TO or from specified provisions of TO pursuant to section 39 of Cap. 619.

⁷ References to the Commission in the background in this paper include CA so far as the Guidelines are concerned.

- (d) the manner and form in which it will receive applications for a decision under sections 9 and 24 (Exclusions and Exemptions) and section 15 on block exemption orders ("BEOs").

5. Cap. 619 also requires the Commission to carry out consultation and conduct publicity programmes to promote public understanding of Cap. 619. Under sections 35(4) and 59(3) of and section 17(4) of Schedule 7 to Cap. 619, before issuing any guidelines or amendments to them, the Commission must consult LegCo and any persons the Commission considers appropriate.

6. Since May 2014, the Commission has held meetings with and participated in seminars/conferences/forums for major stakeholders⁸ and members of the public to hear their expectations and views on the Guidelines. Meanwhile, the Commission has provided information about Cap. 619 and given context to the development of the Guidelines through the Commission's website and publications, such as the booklet entitled "Getting prepared for the Full Implementation of the Competition Ordinance".

7. The Commission subsequently launched an extensive engagement programme, and published six draft Guidelines ("Draft Guidelines") on 9 October 2014 and an Overview summarizing the Commission's approach to preparing the Draft Guidelines and the process for providing comments on the drafts and relevant information. The Draft Guidelines and additional materials were published on the Commission's website and emailed to over 1 000 interested parties. In addition, the Commission held meetings with a range of parties and presented at a number of seminars about the Draft Guidelines. Having regard that the Draft Guidelines are technical and detailed in nature, the Commission has provided alternative guidance particularly targeted at small and medium enterprises ("SMEs") including the publication of a brochure entitled "The Competition Ordinance and SMEs" in December 2014.

8. The Commission received 64 submissions over the above consultation from 49 separate parties including trade associations, chambers of commerce, political parties, public bodies, businesses, law firms and other professional advisory bodies, as well as private individuals. Many submissions welcomed the clear drafting and comprehensive nature of the Draft Guidelines, while raising specific issues for further consideration.

9. Having considered the feedback on the consultation, the Commission published the revised draft Guidelines ("Revised Draft Guidelines") on 30 March 2015 along with a Guide summarizing the Commission's approach to

⁸ Major stakeholders include major chambers, a large range of industry associations, representatives of small and medium enterprises and a wide variety of professional bodies.

preparing the Revised Draft Guidelines and how it addressed the key issues raised in the submissions received for another round of consultation. In the Revised Draft Guidelines, the Commission –

- (a) increased the number of hypothetical examples and included examples on topics for which request for further detail were made;
- (b) provided further guidance and detailed analysis on a range of specific topics that submissions had sought further detail on including joint selling, distribution and marketing agreements, joint tendering arrangements, and new sections on collective bargaining, franchising and selective distribution agreements; and
- (c) clarified a number of procedural topics on the Commission's approach to the handling and processing of complaints and applications for decisions and BEOs.

10. Following the successive rounds of consultation with a wide spectrum of stakeholders including LegCo, businesses, trade associations, chambers of commerce, professional bodies and general public, the Commission and CA issued the following six Guidelines on 27 July 2015 –

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

Hyperlinks to the Guidelines and some frequently asked questions are set out at the **Appendix**.

11. 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 Cap. 619. While setting out how the Commission intends to interpret and give effect to the Competition Rules and the procedural provisions of Cap. 619, the Guidelines are not, however, a substitute for Cap. 619 and do not have binding legal effect. The Tribunal and other courts are responsible ultimately for interpreting Cap. 619. The Commission's interpretation of Cap. 619 does not bind them.

12. Other preparatory work, such as preparation and release of policies, publications and self-assessment tools, and internal preparation including

finalizing staff recruitment and establishing operational policies and processes by the Commission and the making of necessary subsidiary legislation by the Administration have also been largely completed. With the above progress, the Administration has considered that Cap. 619 can fully commence operation on 14 December 2015 and arranged the gazettal of relevant items of subsidiary legislation on 17 July 2015.

Previous discussions

Bills Committee on Competition Bill

13. 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. 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.

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. 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.

Panel on Economic Development

16. At the Panel meeting 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 Cap. 619 notwithstanding the fact that it had duly complied with the Guidelines issued by

the Commission. 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.

17. 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 Cap. 619.

18. At the Panel meeting on 24 November 2014, 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 Cap. 619. 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.

19. As regards the 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 Cap. 619.

20. At the Panel meeting on 27 April 2015, members exchanged views with the Commission on matters of price-fixing, vertical agreements and BEO etc under the first conduct rule, market power under the second conduct rule, and the merger rule. They also discussed the application of Cap. 619 as well as education and assistance activities of the Commission.

21. In respect of possible price-fixing activities engaged by oil companies, the Commission advised that it had initiated a preliminary study on the local auto-fuel market. If an investigation was commenced, the Commission might, under section 41 of Cap. 619, obtain documents or specified information from the oil companies if it had reasonable cause to believe that the information could assist the Commission in the investigation.

22. As regards vertical agreements, the Commission remarked that certain types of them were inherently anti-competitive, such as resale price maintenance ("RPM") arrangements where indirect price-fixing activities might take place. For example, if retailers induced suppliers through a RPM agreement to impose the same price on its goods and services, the agreement might be considered as an indirect cartel arrangement and having the object of harming competition.

23. On BEO, the Commission noted the concerns and requests of various industries, including shipping liners, on block exemptions but it could consider an application for BEO only after Cap. 619 became fully operational. If the Commission proceeded to consider the application, it would publish the application, review representations made by other parties, publish notice of proposed BEO for further consultation and consider further market inquiries before issuing the BEO the process of which would take quite some time. The Commission undertook to continue to communicate with different industries to understand their needs and concerns.

24. In response to a concern whether persons who had an unclear employment relationship but engaged in collective negotiation activities for employee benefits were subject to the first conduct rule, the Commission advised that self-employed persons were usually considered as separate undertakings under Cap. 619, but there were cases that self-employed persons were *de facto* employee hired by an undertaking which would be regarded as normal employer-employee relationship for the purpose of Cap. 619.

25. Responding to a concern about the assessment of substantial market power, the Commission explained that market share alone was not a sufficient indication of existence of substantial market power or otherwise, in particular when the market size was as small as Hong Kong. Factors such as ease of entry and expansion, availability of supply-side substitution and buyer power had the capacity to prevent a firm with a high market share from having a substantial degree of market power. It was necessary for the Commission to study the market structures in Hong Kong along with enforcement experience before it could decide whether a market share percentage should be introduced for measuring market power.

Subcommittee on Rules of the High Court (Amendment) Rules 2015 (Commencement) Notice and Five Items of Subsidiary Legislation Related to Competition Commission Gazetted on 17 July 2015

26. At the meeting of the House Committee held on 9 October 2015, members agreed that a subcommittee should be formed to study the Rules of the High Court (Amendment) Rules 2015 (Commencement) Notice and five items of subsidiary legislation related to Cap. 619 gazetted on 17 July 2015. During the examination of the Competition (Fees) Regulation ("C(F)R") at the

Subcommittee meeting on 22 October 2015, members enquired about the criteria to be taken by the Commission in exercising the discretion to reduce, waive or refund the fee in whole or in part in relation to certain applications made to it. The Commission advised that it would publish guidance outlining such criteria, and relevant factors to be considered would include the appropriateness of waivers or reductions for certain undertakings if the fees were too burdensome having regard to the financial position and scope of operation etc., the extent of general public interest or benefit arising from the application, for example, the fee might be waived if a case with wide benefits would become a precedent, and whether it would be possible for each of its members to contribute to the fee if the applicant was a trade association.

Council questions

27. 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 Cap. 619 covering, among others, the progress of work on drafting and conducting consultation on the Guidelines to be made by the Commission under Cap. 619. Hyperlinks to the relevant written replies from the Administration are provided at the **Appendix**.

Latest position

28. The Commission will brief the Panel at its meeting on 23 November 2015 on its final preparation for the full commencement of Cap. 619 scheduled for December 2015.

Relevant papers

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

Council Business Division 4
Legislative Council Secretariat
17 November 2015

List of relevant papers

Issued by	Meeting Date/ Issue Date	Paper
Panel on Economic Development	27 January 2014 (Item IV)	Minutes 2014 Policy Address – Policy Initiatives of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau
	26 May 2014 (Item V)	Minutes Background brief Information paper issued by the Competition Commission
	24 November 2014 (Item V)	Minutes Background brief Information paper issued by the Competition Commission
	2 February 2015 (Item V)	Minutes 2015 Policy Address – Policy Initiatives of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau
	27 April 2015 (Item IV)	Minutes Background brief Information paper issued by the Competition Commission
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>
Subcommittee on Rules of the High Court (Amendment) Rules 2015 (Commencement) Notice and Five Items of Subsidiary Legislation Related to Competition Ordinance Gazetted on 17 July 2015	30 October 2015	<u>Report</u>
Competition Commission	26 May 2014	<u>Getting Prepared for the Full Implementation of the Competition Ordinance</u>

Issued by	Meeting Date/ Issue Date	Paper
	9 October 2014	<u>Overview of Draft Guidelines under the Competition Ordinance 2014 Six Draft Guidelines</u>
	30 March 2015	<u>Guide to the Revised Draft Guidelines Issued under the Competition Ordinance</u>
	27 July 2015	<u>Guidelines under the Competition Ordinance</u> <u>Frequently asked questions</u>