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Panel on Economic Development
Meeting on 27 March 2017

Background brief on the work of the Competition Commission

Purpose

This paper provides background information on the work of the Competition Commission ("the Commission") and summarizes the major views and concerns expressed by members of the Panel on Economic Development ("the Panel") in the past on the related subject.

Background

The Competition Commission

2. The Commission¹ is an independent statutory body established under the Competition Ordinance (Cap. 619) ("the Ordinance") in 2013. Its statutory functions are to -

- (a) investigate conduct that may contravene the competition rules of the Ordinance and enforce the provisions of the Ordinance;
- (b) promote public understanding of the value of competition and how the Ordinance promotes competition;
- (c) promote the adoption by undertakings carrying on business in Hong Kong of appropriate internal controls and risk management systems and to ensure their compliance with the Ordinance;
- (d) advise the Government on competition matters within and outside Hong Kong;

¹ The Commission currently consists of 15 members including the Chairperson, who are all appointed by the Chief Executive of the Hong Kong Special Administrative Region.

- (e) conduct market studies into matters affecting competition in markets in Hong Kong; and
- (f) promote research into and the development of skills in relation to the legal, economic and policy aspects of competition law in Hong Kong.

3. The Communications Authority ("CA") shares concurrent jurisdiction with the Commission in respect of anti-competitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors. In this connection, the Commission has entered into a Memorandum of Understanding with CA to coordinate the performance of their functions under the Ordinance.

4. According to the Estimates of Expenditure 2017-2018, the Government has earmarked \$78.7 million as subvention to the Commission. The Commission may deploy by itself the subvention for delivering its functions specified in the Ordinance including investigation and enforcement.

The Competition Ordinance

5. The Ordinance was passed by the Legislative Council ("LegCo") in June 2012 and was set to commence full operation on 14 December 2015. The objective of the Ordinance is to prohibit conduct that prevents, restricts or distorts competition, and to prohibit mergers that substantially lessen competition in Hong Kong.

The six Guidelines

6. To help businesses comply with the new competition rules, the Commission and CA issued the following six Guidelines² under the Ordinance on 27 July 2015 -

- (a) Guideline on the First Conduct Rule ("FCR");
- (b) Guideline on the Second Conduct Rule ("SCR");
- (c) Guideline on the Merger Rule;
- (d) Guideline on Complaints;
- (e) Guideline on Investigations; and

² The Guidelines provide guidance on how the Commission and CA intend to interpret and give effect to the provisions of the Ordinance. The Guidelines, however, are not part of the legislation and they will not bind the Competition Tribunal in interpreting the Ordinance.

- (f) Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders.

7. FCR prohibits undertakings from entering into, engaging in or giving effect to agreements, concerted practices and decisions of associations of undertakings that have the object or effect of harming competition in Hong Kong. Agreeing with competitors to cooperate rather than compete risks contravening FCR. The Guideline on FCR provides detailed guidance on a range of agreements and practices to enable businesses to self-assess their behaviour and relationships so as to avoid contravening FCR.

8. Under SCR, businesses with a substantial degree of market power are prohibited from abusing that power to harm competition. Certain conduct engaged in by businesses with substantial market power can have the object or effect of excluding competitors from the market, thereby limiting choices available to consumers. The Guideline on SCR provides detailed analysis of business practices that are commonly associated with SCR. These include, for example, below-cost pricing, tying and bundling, and refusals to deal. The Guideline also sets out the Commission's approach to defining the relevant market (which is also relevant to FCR and the Merger Rule).

9. Mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong are prohibited under the Ordinance. The scope of application of the Merger Rule is currently 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 harm caused to competition. Businesses may apply for a decision from CA as to whether their mergers are excluded from the Merger Rule. The Guideline on the Merger Rule provides an overview of the key concepts used by the Commission in relation to the Merger Rule, the different analytical tools used to assess mergers, and the different applicable exemptions.

Enforcement Policy and Leniency Policy

10. The Guidelines on Complaints and Investigations provide guidance on how the Commission will encourage and handle complaints and outline the procedural steps and protections in the investigation of a matter. Details on the Commission's core principles when investigating cases and when prioritizing enforcement are found in the Commission's Enforcement Policy which was published in November 2015.

11. According to the Commission, one of the key tools used by competition authorities around the world to deter and detect cartels is to have a policy that

provides an immunity from prosecution and/or penalty for the first business to inform the competition authority of their involvement in a cartel. On 19 November 2015, the Commission published its Leniency Policy for Undertakings Engaged in Cartel Conduct. The Policy provides an overview of the Commission's approach to leniency applications.

Exemptions and exclusions

12. The Ordinance provides for a number of exemptions and exclusions. Each of these exclusions applies automatically without the need for a prior determination by the Commission. The Commission's Guidelines on FCR and on the Applications for Decisions under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders provide detailed guidance on the Commission's interpretation of these exclusions. Undertakings are therefore encouraged to self-assess their conduct against the exclusions in Schedule 1 to the Ordinance to determine if the relevant exclusion applies.

13. However, for increased legal certainty, undertakings can apply to the Commission for a decision as to whether an agreement or conduct is exempt or excluded from the application of the competition rules. In addition, the Commission can issue block exemption orders ("BEOs") to exempt a category of agreements from FCR, either on the application of an undertaking or on the initiative of the Commission itself.

Previous discussions

14. The Commission is required under the Ordinance to develop various guidelines and to consult LegCo and any persons it considers appropriate before issuing such guidelines. The Panel was briefed by the Commission on its preparation work in this aspect at the meetings on 26 May 2014, 24 November 2014 and 27 April 2015. On 23 November 2015, the Commission briefed the Panel on its preparation for full commencement of the Ordinance. The major views and concerns expressed by members are summarized in the ensuing paragraphs.

Guidelines and Policies issued by the Commission

15. Members in general welcomed the efforts made by the Commission in consulting stakeholders when preparing the guidelines which should inform the business community and the general public how the Commission expected to enforce the Ordinance and the practices in dealing with complaints, investigation and related processes.

16. The Panel was particularly concerned about how the leniency policy would be applied and how the enforcement policy would be implemented. Members noted that the leniency policy was designed to provide a strong and clear incentive for a cartel member to stop the cartel conduct and to report it to the Commission. In exchange for a cartel member's cooperation, the Commission would agree not to commence proceedings for a pecuniary penalty against the first cartel member who reported the cartel conduct to the Commission and met all the requirements for receiving leniency under the policy. The Commission would use its best endeavours to appropriately protect any confidential information provided to the Commission by a leniency applicant.

17. On the standards being applied for decisions to enforce, the Panel noted that the Enforcement Policy promulgated by the Commission had outlined the factors which the Commission would consider whether to investigate and the actions the Commission would take when a contravention had taken place, including the range of remedies which might be used instead of bringing the case to the Competition Tribunal. Since the Commission would be enforcing the Ordinance through civil proceedings, it would have some discretion regarding which cases to take to the Competition Tribunal.

18. Some members relayed the concerns expressed by small and medium enterprises about the compliance with the Ordinance, which was a new piece of legislation to them, and suggested that the Commission should consider providing a tool to the trade for assessing whether their business operations would contravene any competition rules.

19. Members also urged the Commission to step up efforts in promoting understanding and compliance of the Ordinance by businesses and the public. Suggestions were made by members that information about the Commission and the Competition Tribunal should be clearly spelt out in the promotional materials produced by the Commission, and that district offices should be set up in the territory to facilitate public enquiries.

20. During the discussion, concern had been raised about the adequacy of financial provision allocated to the Commission for conducting investigations and handling litigation, and for settling the resultant litigation cost. The Commission advised that it would continue to discuss with the Administration the funding arrangements to sustain its operation.

Application for block exemption order

21. Noting the application by the Hong Kong Liner Shipping Association to the Commission for a BEO for liner shipping agreements covering both vessel

sharing agreements ("VSAs")³ and voluntary discussion agreements ("VDAs")⁴, some members were concerned that if a BEO was not granted, it might undermine the transshipment trade of Hong Kong since the shipping carriers might be discouraged to call at the Hong Kong ports and be driven away to neighbouring ports.

22. On 14 September 2016, the Commission published a proposed BEO for certain shipping agreements⁵. Under the proposed BEO, the Commission proposed to issue a BEO for VSAs but had reservations to issue a BEO for VDAs. The Commission also published a Statement of Preliminary Views outlining the Commission's reasons for its proposed decision on the application. A final decision on the application and on whether to issue a BEO will be made after the Commission has considered the representations received during the consultation.

Competition conditions of auto-fuels market

23. Some members raised concerns about possible price fixing activities engaged by oil companies and noted that the Commission had initiated a study on the local auto-fuels market. In this connection, the Administration advised recently⁶ that the Commission is finalizing the study and would release the results as soon as practicable.

Council questions

24. At the Council meetings on 23 October 2013, 9 April 2014, 27 January, 2 March, 4 May 2016, and 22 February 2017, Hon CHUNG Kwok-pan, Hon Charles Peter MOK, Hon CHAN Hak-kan, Hon Kenneth LEUNG, Hon Frankie YICK and Hon Holden CHOW raised questions on the implementation of the Ordinance, expanding the ambit of the Ordinance, and competition conditions of auto-fuels market in Hong Kong. Hyperlinks to the relevant written replies from the Administration are provided at the **Appendix**.

³ VSAs which include consortia, slot exchange agreements, joint service agreements and alliances are agreements between shipping lines on certain operational arrangements.

⁴ VDAs are agreements pursuant to which shipping lines discuss certain commercial matters relating to particular shipping routes.

⁵ Source: press release on "Competition Commission publishes proposed block exemption order for certain liner shipping agreements" issued by the Commission on 14 September 2016.

⁶ Source: written Council question raised by Hon Holden CHOW on competition conditions of auto-fuels market in Hong Kong at the Council meeting of 22 February 2017.

Latest development

25. The Commission will brief the Panel on its work since the full implementation of the Ordinance in December 2015 on 27 March 2017.

Relevant papers

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

Council Business Division 4
Legislative Council Secretariat
21 March 2017

List of relevant papers

Issued by	Meeting Date/ Issue Date	Paper
Panel on Economic Development	26 May 2014 (Item V)	Minutes Administration's paper
	24 November 2014 (Item V)	Minutes Competition Commission's paper
	27 April 2015 (Item IV)	Minutes Competition Commission's paper
	23 November 2015 (Item VII)	Minutes Background brief Information paper issued by the Competition Commission Administration's paper (Follow-up paper)
	26 January 2016 (Item IV)	Minutes 2016 Policy Address – Policy Initiatives of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau
Council Meeting	23 October 2013	Council question on "Implementation of the Competition Ordinance" raised by Hon CHUNG Kwok-pan
	9 April 2014	Council question on "Implementation of the Competition Ordinance" raised by Hon Charles Peter MOK

Issued by	Meeting Date/ Issue Date	Paper
	27 January 2016	<u>Council question on "Prices of auto-fuels and domestic liquefied petroleum gas" raised by Hon CHAN Hak-kan</u>
	2 March 2016	<u>Council question on "Expanding the ambit of the Competition Ordinance" raised by Hon Kenneth LEUNG</u>
	4 May 2016	<u>Council question on "Fuel prices" raised by Hon Frankie YICK</u>
	22 February 2017	<u>Council question on "Competition conditions of auto-fuels market in Hong Kong" raised by Hon Holden CHOW</u>