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Panel on Economic Development
Meeting on 26 March 2018

Updated 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") which came into full effect on 14 December 2015. 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;

¹ The Commission currently consists of 14 members including the Chairperson, who are all appointed by the Chief Executive of the Hong Kong Special Administrative Region.

- (d) advise the Government on competition matters within and outside Hong Kong;
- (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 Ordinance provides for a cross-sectoral competitive law prohibiting anti-competitive conducts in all sectors. Under the Ordinance, the Communications Authority ("CA") is conferred jurisdiction concurrent with the Commission to enforce the Ordinance in respect of the conduct of certain undertakings operating in the telecommunications and broadcasting sectors.

The Competition Ordinance

4. The Ordinance was passed by the Legislative Council ("LegCo") in June 2012. 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

5. To help businesses comply with the new competition rules, the Commission and CA issued the following six Guidelines under the Ordinance on 27 July 2015 –

- (a) Guideline on the First Conduct Rule ("FCR")²;
- (b) Guideline on the Second Conduct Rule ("SCR")³;
- (c) Guideline on the Merger Rule⁴;
- (d) Guideline on Complaints;

² 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.

³ Under SCR, businesses with a substantial degree of market power are prohibited from abusing that power to harm competition.

⁴ 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).

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

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 ("the Tribunal") in interpreting the Ordinance.

Enforcement Policy and Leniency Policy

6. 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.

7. 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

8. 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, SCR and on the Applications for Decisions under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders ("BEOs") provide detailed guidance on the Commission's interpretation of these exclusions. Undertakings may self-assess their conduct against the exclusions in Schedule 1 to the Ordinance to determine if the relevant exclusion applies.

9. 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 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

10. In the last term of LegCo, the Panel was briefed by the Commission on its preparation work for the full commencement of the Ordinance. At the meetings on 27 March and 22 May 2017, the Panel was respectively briefed by the Commission on its work since the full implementation of the Ordinance and its study on the auto-fuel market. The Panel also touched on the related subjects at the policy briefing held on 30 October 2017. The major views and concerns expressed by members in the three meetings are summarized in the ensuing paragraphs.

Efforts made by the Commission in combating anti-competition conduct

11. The Panel noted that as at end-September 2017, the Commission processed about 2 500 complaints and enquires. Among them, around 160 cases were being assessed further, and more than 10% of which had proceeded to in-depth investigation stage. In 2017, the Commission had brought two cases before the Tribunal. In March 2017, the Commission commenced its first case in the Tribunal against five information technology companies for suspected bid-rigging arrangement in relation to a tender issued by a social service organization. In August 2017, the Commission brought the second case before the Tribunal against 10 engineering and construction companies for suspected market sharing and price fixing in relation to the provision of renovation services in a public housing estate.

12. Members in general welcomed the efforts made by the Commission in combating anti-competition conduct in Hong Kong. The Panel was particularly concerned about the suspected anti-competitive conduct in certain sectors, namely the monopolistic situation in the public markets managed by the Link Real Estate Investment Trust, the local auto-fuel market, and the residential building renovation and maintenance market in Hong Kong. The Panel urged the Commission to take proactive actions to review the competitive conditions in selected sectors of the economy which were of wide public concern, and make recommendations on how to enhance competition in these sectors through market study and policy advice.

13. Regarding the Commission's study on the auto-fuel market, the Panel in general supported the recommendations of the study, in particular the re-introduction of 95 RON petrol and review of tendering system for petrol filling station ("PFS") sites. The Panel would continue to follow up on the Government's review of the tendering system for PFS sites and its exploration of various structural options to further competition in the auto-fuel market in its future meetings.

Financial provision allocated to the Commission

14. Some members were concerned about the adequacy of the financial provision allocated to the Commission for taking enforcement actions, conducting market studies and handling litigation. The Panel also suggested that the Administration should consider enhancing the Ordinance by introducing a mechanism of initiating private actions, which would give the public an additional channel to seek justice, as well as safeguard the interests of small and medium enterprises ("SMEs") and consumers. A motion to these effects was passed by the Panel.

15. As announced in the 2017 Policy Address, the Government will increase the annual subvention to the Commission in order to provide enhanced financial support to its planned activities in the coming years. According to the Estimates of Expenditure 2018-2019, the Government has earmarked \$127.5 million as subvention to the Commission, which is 59% higher than the revised estimate for 2017-2018. This is mainly due to the increased provision to support the operations and litigation work of the Commission.

16. As regards the suggestion to provide for stand-alone private actions under the Ordinance, the Administration advised that the Competition Bill introduced by the Government into LegCo in 2010 contained provisions which allowed stand-alone private actions, to the effect that any person who had suffered loss or damage as a result of a contravention of a conduct rule might bring legal action in the Tribunal. However, during the scrutiny of the Bill, SMEs expressed concern that stand-alone private actions might be abused by large enterprises to oppress SMEs. In view of such concern, the Government removed the relevant provisions. Nevertheless, the Administration undertook to review the Ordinance, including the need to provide for stand-alone private actions taking into account the experience gained and problems encountered, after the Ordinance had been in operation for a number of years.

Concerns raised by professional bodies and the trade

17. Noting that some professional associations had raised concern over the dilemma that they were required to comply with both the law and the codes of conduct of these professional associations under conflicting circumstances, the Panel also passed a motion urging the Commission to enhance liaison with professional bodies and professionals, and develop practice notes to assist them in changing their traditions of operation and codes of conduct. The Administration's response to the two motions mentioned in paragraphs 14 and 17 has been issued to members vide LC Paper No. CB(4)942/16-17(01).

18. Some members expressed concern about the application made by the Hong Kong Liner Shipping Association for a BEO covering both vessel sharing agreements ("VSAs")⁵ and voluntary discussion agreements ("VDAs")⁶. They considered it beneficial for Hong Kong's shipping industry if a BEO covering both VSAs and VDAs could be issued. On 8 August 2017, the Commission issued a BEO for VSAs between liner shipping companies. However, it had decided not to issue a BEO for VDAs on the basis that it was not demonstrated that the relevant VDA activities met the terms of efficiency exclusion.

Council questions

19. At the Council meetings on 27 January, 2 March, 4 May 2016, 22 February, 12 April, 24 May, 12 July 2017, and 10 January 2018, Hon CHAN Hak-kan, Hon Kenneth LEUNG, Hon Frankie YICK, Hon Holden CHOW, Hon Starry LEE, Hon Paul TSE and Hon KWOK Wai-keung raised questions on the implementation of the Ordinance, expanding the ambit of the Ordinance, competition conditions of the auto-fuel market in Hong Kong, legal actions against acts in contravention of conduct rules, and the Commission's work in relation to the anti-competitive practices in certain industries. Hyperlinks to the relevant written replies from the Administration are provided in the **Appendix**.

Latest development

20. The Commission will brief the Panel on its progress in implementing the Ordinance at the meeting on 26 March 2018.

Relevant papers

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

Council Business Division 4
Legislative Council Secretariat
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⁵ VSAs, which include consortia, slot exchange agreements, joint service agreements and alliances, are agreements between shipping lines on certain operational arrangements.

⁶ VDAs are agreements pursuant to which shipping lines discuss certain commercial matters relating to particular shipping routes.

List of relevant papers

Issued by	Meeting Date/ Issue Date	Paper
Panel on Economic Development	27 March 2017 (Item V)	Administration's paper Minutes Motion passed (1) Motion passed (2) Administration's response to the motions passed Background brief
	22 May 2017 (Item V)	Administration's paper Minutes Background brief
	30 October 2017 (Item I)	Administration's paper Minutes
Council Meeting	27 January 2016	Council question on "Prices of auto-fuels and domestic liquefied petroleum gas" raised by Hon CHAN Hak-kan
	2 March 2016	Council question on "Expanding the ambit of the Competition Ordinance" raised by Hon Kenneth LEUNG
	4 May 2016	Council question on "Fuel prices" raised by Hon Frankie YICK
	22 February 2017	Council question on "Competition conditions of auto-fuels market in Hong Kong" raised by Hon Holden CHOW

Issued by	Meeting Date/ Issue Date	Paper
	12 April 2017	<u>Council question on "Bringing legal actions against acts in contravention of conduct rules" raised by Hon Holden CHOW</u>
	24 May 2017	<u>Council question on "Competition Commission's report on Hong Kong's auto-fuel market" raised by Hon Starry LEE</u>
	12 July 2017	<u>Council question on "Anti-competitive practices of some Internet search-engine service providers" raised by Hon Paul TSE</u>
	10 January 2018	<u>Council question on "Selecting by ballot of decoration contractors who will be permitted to do business in new housing estates and courts ready for intake" raised by Hon KWOK Wai-keung</u>