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Panel on Economic Development
Meeting on 29 April 2019

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") on relevant matters in previous discussions.

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;
- (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 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;
- (e) Guideline on Investigations; and

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).

- (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 2017 and 26 March 2018, the Commission briefed the Panel on its work in implementing the Ordinance. At the meetings on 22 May 2017 and 17 July 2018, the Panel was respectively briefed by the Commission and the Administration on the Commission's study into the auto-fuel market and the Environment Bureau's responses to the study. The major views and concerns expressed by members at the meetings are summarized in the ensuing paragraphs.

Efforts made by the Commission in combating anti-competition conduct

11. At the Panel meeting on 26 March 2018, members noted that since the full implementation of the Ordinance in December 2015, the Commission had received and processed over 2 800 complaints and enquiries. Among them, around 180 cases were being assessed further, of which 13% had proceeded to in-depth investigation stage. In 2017, the Commission had brought two cases before the Tribunal. In addition to the two cases filed, a number of investigations were being pursued which might result in various enforcement outcomes.

12. Members in general welcomed the efforts made by the Commission in combating anti-competition conduct in Hong Kong. Some members were 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. Members in general supported the recommendations made by the Commission in its study on the auto-fuel market⁵, and were disappointed with the Environment Bureau's responses to these recommendations. A motion urging the Environment Bureau to proactively take forward these recommendations was passed at the meeting on 17 July 2018. The Environment Bureau's response to the motion is in LC Paper No. CB(4)1489/17-18(01).

⁵ The study sets out five recommendations on enhancing competition in Hong Kong's auto-fuel market: (i) increase of petrol filling station ("PFS") sites; (ii) review of tendering system for PFS sites; (iii) prominent display of pump prices and walk-in discounts; (iv) re-introduction of 95 RON petrol; and (v) reduction of entry and expansion barriers.

Financial provision allocated to the Commission

14. Members were in general concerned about the adequacy of the financial provision allocated to the Commission for taking enforcement actions, conducting market studies and handling litigation. Motions were passed by the Panel on 27 March 2017 and 26 March 2018 urging the Administration to provide adequate resources to the Commission for taking law enforcement actions and carrying out the related case investigations.

15. In response, the Administration advised that it had substantially increased the annual subvention to the Commission from \$80 million in 2017-2018, to about \$102 million in 2018-2019 and gradually to \$115 million in 2022-2023 and beyond. In addition, in view of the rising number of litigation cases, starting from 2018-2019, there was a dedicated funding of about \$200 million to support the Commission's litigation work in the coming years.

Review of the Ordinance

16. Some members 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 at its meeting on 27 March 2017.

17. 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 Administration 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.

18. In view that the Administration had undertaken to review the Ordinance after its full implementation, some members called on the Administration to conduct and complete the review as early as practicable. Some members also suggested that certain aspects of the Ordinance including the current exemption of public/statutory bodies and the exclusion of private enforcement right from the Ordinance should be reviewed.

Council questions

19. At the Council meetings of 2 March 2016, 12 April, 24 May, 12 July 2017, and 10 January 2018, Hon Kenneth LEUNG, Hon Holden CHOW, Hon Starry LEE, Hon Paul TSE and Hon KWOK Wai-keung raised questions on expanding the ambit of the Ordinance, 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 29 April 2019.

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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List of relevant papers

Issued by	Meeting Date/ Issue Date	Paper
Panel on Economic Development	27 March 2017 (Item V)	Administration's paper Background brief Motions passed and the Administration's response Minutes
	22 May 2017 (Item V)	Administration's paper Administration's response to joint letter from Hon James TO, Hon WU Chi-wai and Hon Andrew WAN Administration's response to Hon Jeremy TAM's letter Background brief Minutes
	26 March 2018 (Item V)	Administration's paper Motion passed and the Administration's response Background brief Minutes
	17 July 2018 (Item II)	Administration's paper Administration's follow-up paper Motion passed and the Administration's response Background brief Minutes
Council Meeting	2 March 2016	Council question on "Expanding the ambit of the Competition Ordinance" raised by Hon Kenneth LEUNG

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>