

立法會
Legislative Council

LC Paper No. CB(4)1153/20-21(03)

Ref : CB4/PL/EDEV

Panel on Economic Development
Meeting on 28 June 2021

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 Commission 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;
- (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")¹;
- (b) Guideline on the Second Conduct Rule ("SCR")²;
- (c) Guideline on the Merger Rule³;
- (d) Guideline on Complaints;
- (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.

¹ 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.

² Under SCR, businesses with a substantial degree of market power are prohibited from abusing that power to harm competition.

³ 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 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. In April 2020, the Commission published a revised leniency programme for cartel conduct.

8. The Commission also published a policy on recommended pecuniary penalties for anti-competitive conduct in June 2020 which outlines the general principles and methodology the Commission adopts when making recommendations to the Tribunal on the level of fines for businesses that have contravened, or have been involved in the contravention of FCR or SCR of the Ordinance.

Exemptions and exclusions

9. 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 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. 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 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. Since the full commencement of the Ordinance in December 2015, the Commission has briefed the Panel regularly on its work in implementing the Ordinance, with the last briefing being held on 27 April 2020. The major views and concerns expressed by members in previous discussions in the previous Panel meetings are summarized in the ensuing paragraphs.

Work of and financial provision allocated to the Commission

11. On 27 April 2020, the Commission informed the Panel that it had received and processed nearly 4 300 complaints and enquiries since the full commencement of the Ordinance in December 2015. Among them, over 210 complaints were assessed further, of which 20% had processed to in-depth investigation stage. Members noted that in May 2019, the Tribunal handed down the judgements of Hong Kong's first two competition cases involving bid-rigging, market-sharing and price-fixing and the outcomes of which were largely in favour of the Commission. During the period from July 2019 to March 2020, the Commission commenced proceedings in the Tribunal against companies and individuals for anti-competition conducts in the provision of renovation services in a public housing estate, in relation to a bidding exercise for the procurement of IT services and the sale of textbooks. The Commission also commenced a consultation on commitments offered by some major online travel agents.

12. Members in general were 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.

13. 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

14. During the discussion on 27 April 2020, concerns over the competition condition of auto-fuel market in Hong Kong were raised. The Commission pointed out that the feature of high and similar pump prices across the oil companies on its own could not be taken as hard evidence of anti-competitive

conduct or collusion. According to the oil companies, the high operating costs such as labour, land and transportation had contributed to the high retail prices of auto-fuel. The Commission would not hesitate to conduct investigation if it was provided with requisite information and evidence.

15. Some members were of the view that the Commission's power on information gathering should be strengthened with a view to effectively deterring any anti-competitive behaviour in Hong Kong. The Administration advised that as regards the investigative power of the Commission, there had been extensive public consultation and thorough discussions at LegCo prior to the enactment of the Ordinance. The provisions of the Ordinance were drawn up by the Government having balanced different considerations. According to the Ordinance, although the Commission had no power to obtain specified information or documents for conducting market studies, it might conduct an investigation if it had reasonable cause to suspect that a contravention of a competition rule had taken place, and require any person to produce specified information or documents, or to attend before the Commission, etc, in accordance with the Ordinance.

16. There was a view 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. 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.

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 after the Ordinance had been in operation for a number of years.

Council questions

18. At the Council meetings of 2 March 2016, 22 February, 12 April, 24 May, 12 July 2017, 10 January 2018 and 20 May 2020, Hon Kenneth LEUNG, Hon Holden CHOW, Hon Starry LEE, Hon Paul TSE, Hon KWOK

Wai-keung and Hon CHAN Hoi-yan 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

19. At the meeting on 28 June 2021, the Commission will brief the Panel on its work since the last report in April 2020 and provide an outlook for the following year.

Relevant papers

20. 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
23 June 2021

List of relevant papers

Issued by	Meeting Date/ Issue Date	Paper
Panel on Economic Development	27 April 2020 (Item IV)	Administration's paper Administration's follow-up paper Letter from Hon Holden CHOW (Chinese version only) Letter from Hon Andrew WAN (Chinese version only) Administration's consolidated response to Hon Holden CHOW and Hon Andrew WAN's letters Letter from Hon WU Chi-wai (Chinese version only) Administration's response to Hon WU Chi-wai's letter Background brief Minutes
Council Meeting	2 March 2016	Council question on "Expanding the ambit of the Competition Ordinance" raised by Hon Kenneth LEUNG
	22 February 2017	Council question on "Alleged anti-competitive conduct of oil companies" raised by Hon Holden CHOW
	12 April 2017	Council question on "Bringing legal actions against acts in contravention of conduct rules" raised by Hon Holden CHOW

Issued by	Meeting Date/ Issue Date	Paper
	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>
	20 May 2020	<u>Council question on "Promoting competition in the fuel market" raised by Hon CHAN Hoi-yan</u>