

**Business Facilitation Advisory Committee
Wholesale and Retail Taskforce**

Progress towards implementation of the Competition Ordinance (Cap 619)

Purpose

This paper briefs members on the guidelines and other recent activities of the Competition Commission (the Commission) in preparation for the implementation of the Competition Ordinance (Cap. 619) (the Ordinance), including issues of particular relevance to the wholesale and retail sectors.

Background

2. The Ordinance, passed by the Legislative Council on 14 June 2012, contains certain prohibitions of anti-competitive conduct in Hong Kong and sets out how these prohibitions may be investigated, enforced and adjudicated. The Commission was set up in May 2013 to implement the Ordinance.

3. The Commission published six Revised Draft Guidelines on 30 March 2015 to offer guidance on –

- (a) the manner in which the Commission expects to interpret and give effect to
 - the First Conduct Rule (Guideline on the First Conduct Rule)
 - the Second Conduct Rule (Guideline on the Second Conduct Rule)
 - the Merger Rule (Guideline on the Merger Rule);
- (b) the manner and form in which complaints are to be made (Guideline on Complaints);
- (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 (Guideline on Investigations); and
- (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 Block Exemption Orders (Applications Guideline).

4. The publication of the Revised Draft Guidelines (http://www.compcomm.hk/en/draft_guidelines_2015.html) in March 2015 followed a public consultation between October 2014 and December 2014 on a previous draft. Sixty-four submissions were received and are available on the Commission's website. The Revised Draft Guidelines were considered by the Economic Development Panel of the Legislative Council on 27 April 2015.

Issues of relevance to the wholesale and retail sectors

5. For the wholesale and retail sectors, the most relevant guideline is the Guideline on the First Conduct Rule (FCR Guideline). For larger businesses, the Guideline on the Second Conduct Rule (SCR Guideline) may also be relevant. These guidelines outline how the Commission expects to interpret and give effect to these two competition rules. They are designed to be of general application across all sectors, including the wholesale and retail sectors. The Commission has made extensive use of hypothetical examples in the guidelines to assist readers to understand the Commission's approach.

Guideline on the First Conduct Rule

6. The First Conduct Rule prohibits agreements between separate businesses which have the object or effect of harming competition in Hong Kong. The Commission considers that the First Conduct Rule captures both horizontal agreements (arrangements between competitors) and vertical agreements (arrangements between businesses at different levels of the supply chain).

7. In relation to horizontal agreements, the FCR Guideline notes that agreements between competitors to fix prices, share markets, limit output or rig bids are considered the most likely to contravene the Ordinance. For example, an agreement amongst retailers in a particular sector that they will all charge the same price (or provide the same discount) would be price fixing for the purposes of the First Conduct Rule.

8. The FCR Guideline also outlines the types of agreements between competitors that would be unlikely to harm competition. For example, joint buying or group buying agreements frequently allow small and medium enterprises (SMEs) to achieve purchasing efficiencies similar to their larger competitors and seldom give rise to competition concerns.

9. The FCR Guideline notes that vertical agreements (for example between wholesalers and retailers) are generally less likely to be harmful to competition than horizontal agreements. However, some vertical agreements may nonetheless cause harm to competition. For example, resale price maintenance (when a supplier establishes a fixed or minimum resale price to be observed by a distributor) can restrict competition. If resale price maintenance is implemented by a supplier in response to pressure from a distributor seeking to limit competition from their retail competitors, this would be of particular concern.

10. This guideline also provides guidance in respect of those activities of trade associations that may raise competition concerns. Separately the Commission is publishing a specific brochure on Competition Law and Trade Associations to assist trade associations to ensure that their activities are in compliance with the Ordinance.

Guideline on the Second Conduct Rule

11. The Second Conduct Rule prohibits businesses with a substantial degree of market power from abusing that power by engaging in conduct which harms competition in Hong Kong. Smaller undertakings are unlikely to have a substantial degree of market power. Thus the commercial conduct of SMEs would be unlikely to contravene the Second Conduct Rule. They may, however, be victims of abusive conduct under the Second Conduct Rule.

12. The SCR Guideline outlines the factors the Commission will take into account in determining whether a business has a substantial degree of market power. Undertakings are more likely to have a substantial degree of market power where they have high market shares. However, a high market share does not always imply a substantial degree of market power. For example, a particular retail outlet may have a large share of the customers in an area. However, if barriers to entry are low so that other retail outlets could easily set up in the area, the retailer would not have market power. If it tried to raise its prices above the competitive level, it would face competition from new entrants.

13. The SCR Guideline provides some examples of conduct that may amount to abuse of market power. It is important to note that this conduct is of concern only if engaged in by a business with substantial market power, and even then it will generally be necessary to show that the actual conduct in the particular circumstances has had the actual or likely effect of harming

competition. The types of conduct that may, in appropriate circumstance, be considered an abuse of a substantial degree of market power include predatory pricing, tying and bundling, refusals to deal and exclusive dealing.

14. This guideline also provides examples of conduct that would be unlikely to cause concerns under the Ordinance. For example, a retailer offering a bundling arrangement of short duration, such as a short term offer of a discounted price when two separate products are bought together, is unlikely to limit its competitors' ability to compete.

Next steps

15. The Revised draft Guidelines are available on the Commission's website (www.compcomm.hk). In the lead-up to the full implementation of the Ordinance, the Commission will continue to develop and release policies and publications to assist businesses to comply with the new law. These will include short publications directed to specific sectors or entities, such as the trade associations brochure mentioned above and easy to use self-assessment toolkits. The Commission will also continue to reach out to businesses and the public through promotional campaigns in the mass media, roving exhibitions and participation in trade shows.

16. The Commission aims to complete all its preparation work including the finalization of the Guidelines by mid-2015 paving the way for the full implementation of the Ordinance later this year at a date to be set by the Government.

Way forward

17. Members are invited to note and offer comments on the contents of this paper.