

**Twenty-seventh Meeting of
the Business Facilitation Advisory Committee**

***Agenda Item 4 : Publication of draft Guidelines by
the Competition Commission***

Purpose

The purpose of this paper is to brief members on the draft Guidelines that are required by the Competition Ordinance (Cap. 619) (the Ordinance).

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 Commerce and Economic Development Bureau briefed members on the key elements of the Ordinance in July 2012.

3. The Competition Commission (the Commission) was set up in May 2013 to implement the Ordinance. The Commission, together with the Communications Authority, published six draft Guidelines on 9 October 2014 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 Commission has released these six Guidelines in draft for public comment prior to consulting the Legislative Council and other appropriate persons as required by the Ordinance.

5. While the Commission is the principal competition authority responsible for enforcing the Ordinance, it has concurrent jurisdiction with the Communications Authority in relation to the anti-competitive conduct of businesses operating in the broadcasting and telecommunications sector.

6. Where appropriate, the Commission has drawn on best practices from other competition law regimes when developing the draft Guidelines. They were drafted taking account of the views and feedback the Commission collected from a wide range of businesses and stakeholder groups during an engagement exercise conducted over recent months. The draft Guidelines include many examples to assist businesses to understand and comply with the Ordinance.

7. Along with the draft Guidelines, the Commission also published an Overview summarizing the Commission's approach to preparing the draft Guidelines and the process for providing comments on the drafts.

Details of the Guidelines

Draft Guideline on the First Conduct Rule

8. 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). The Guideline on the First Conduct Rule provides many examples including conduct such as information sharing and resale price maintenance.

Draft Guideline on the Second Conduct Rule

9. 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. The Commission takes an economic approach to defining substantial market power. The Guideline on the Second Conduct Rule notes that market share is only one indicator of substantial market power, and that ease of market entry and expansion and countervailing buyer power are also important. The Guideline provides guidance on what types of conduct would constitute an “abuse of substantial market power” which harms competition.

Draft Guideline on the Merger Rule

10. The Merger Rule prohibits mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong. Unlike the Conduct Rules which apply to all businesses in Hong Kong, the Merger Rule applies only to merger transactions that involve any business holding a carrier licence issued under the Telecommunications Ordinance. The Guideline on Merger Rule provides indicative “safe harbours” to allow parties to self-assess whether transactions may potentially raise competition concerns under the Merger Rule. It also outlines processes and procedures for formal examination of the merger by the Communications Authority or the Commission.

Draft Guideline on Complaints

11. The Guideline on Complaints notes that the Commission relies on complaints as an important means of identifying possible infringements of the Ordinance. No formal requirements are proposed for making complaints, but it is noted that complaints may not be able to proceed to formal assessment if the complainant does not provide sufficient information. The Guideline outlines the factors the Commission may take into account in exercising its discretion whether to pursue a complaint.

Draft Guideline on Investigations

12. The Guideline on Investigations outlines the two phases of the Commission’s investigative process. During the initial assessment phase the Commission will rely on public information or information provided voluntarily. During the investigation phase the Commission may use its compulsory evidence gathering powers. The Guideline does not deal with the Commission’s enforcement priorities which are to be released in a separate publication.

Draft Applications Guideline

13. The Applications Guideline deals with block exemption orders or decisions on the application of exemptions and exclusions to particular business circumstances. The Guideline outlines the circumstances in which the Commission will exercise its power to make a decision or issue a block exemption order and the process for dealing with applications. It is noted that the Commission will not be able to exercise this power or to accept applications until the Ordinance has come fully into force.

Next steps

14. The draft Guidelines are available on the Commission's website (www.compcomm.hk). Businesses, members of the public and other interested parties can provide feedback in writing. The deadlines at the time of writing this paper are 10 November 2104 for the Guidelines on Complaints, Investigations and Applications and 10 December 2014 for the other Guidelines.

Way forward

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

Competition Commission
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