

30 March 2015

For Immediate Release

Competition Commission and Communications Authority Publish Revised Draft Guidelines under the Competition Ordinance

In an important step towards the full implementation of the Competition Ordinance, the Competition Commission (the Commission) and the Communications Authority* (CA) today (30 March) published revised versions of Draft Guidelines (Revised Draft Guidelines) under the Competition Ordinance (Cap. 619) (the Ordinance).

The publication of the Revised Draft Guidelines follows careful consideration by the Commission of the feedback received from stakeholders during the public consultation on the Draft Guidelines released in October 2014. Together with the Revised Draft Guidelines, the Commission has published a *Guide to the Revised Draft Guidelines Issued Under the Competition Ordinance* summarising its approach to preparing the Revised Draft Guidelines including how it addressed key issues raised in the submissions received from stakeholders.

The Revised Draft Guidelines will be presented to the Legislative Council for consultation in late April.

Following the release of the Draft Guidelines in October 2014, the Commission received 64 submissions from a range of stakeholders, including trade associations, Chambers of Commerce, political parties, public bodies, professional advisory bodies, private organisations and individuals. These submissions and feedback provided in meetings with a range of organisations assisted the Commission in identifying areas where amendment of the Draft Guidelines was merited to clarify particular points or provide additional guidance.

Anna Wu Hung-yuk, Chairperson of the Commission, said, “We were extremely pleased to receive so many useful comments on our draft Guidelines. We are grateful to all those who spent their time and effort preparing submissions and attending the Commission’s seminars and meetings. With the release of the Revised Draft Guidelines today, we are significantly closer to the full commencement of the Ordinance.”

**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 conduct of certain undertakings operating in the broadcasting and telecommunications sectors. Unless stated otherwise, so far as a matter relates to areas falling within this concurrent jurisdiction, references in this press release to the Commission are to be read as applying also to the Communications Authority.*

Dr. Stanley Wong, Chief Executive Officer of the Commission, said, “The 64 submissions on our Draft Guidelines were made by a wide range of entities, some representing thousands of businesses in Hong Kong. Each of these submissions was carefully considered by the Commission. In response to the submissions, the Commission has added clarifications and explanations in areas where more guidance is needed. We also refined the existing hypothetical examples and included additional ones where we thought they might help people understand the Commission’s approach.”

The Revised Draft Guidelines are available on the Commission’s website www.compcomm.hk and the Communications Authority’s website www.coms-auth.hk. Should businesses and members of the public have any comments, they are welcome to send them to the Commission by email (guidelines@compcomm.hk) by 20 April before the Revised Draft Guidelines are presented to the Legislative Council for consultation under the Ordinance. The Commission will consider any additional comments received when finalising the Guidelines.

Designed to be applicable across all sectors and industries, the Guidelines outline how the Commission expects to interpret and give effect to the three competition rules in the Ordinance (First Conduct Rule, Second Conduct Rule and Merger Rule), as well as the procedures for handling complaints, conducting investigations and considering applications for exclusions and exemptions. Once adopted, the Guidelines will provide guidance to businesses about how the Commission will enforce the Ordinance and pave the way for full implementation of the Ordinance.

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 operational documents such as a leniency policy and a statement of the Commission’s enforcement priorities, and short publications directed to specific sectors or entities such as trade associations. The Commission will also continue to reach out to the public through promotional campaigns in the mass media. Internally, enhancement of its enforcement and operational capability is underway so that the Commission will be ready to be an effective law enforcer once the Ordinance takes full effect.

NOTES FOR THE EDITOR

About the Commission

The Commission is an independent statutory body established to enforce the Competition Ordinance (Cap. 619), which was enacted in June 2012. The objective of the Ordinance is to prohibit conduct that prevents, restricts or distorts competition and mergers that substantially lessen competition in Hong Kong. At the present time, the Merger Rule applies only to a merger involving an undertaking that directly or indirectly holds a carrier licence issued under the Telecommunications Ordinance (Cap. 106).

About the Communications Authority

The Communications Authority is an independent statutory body established under the Communications Authority Ordinance (Cap. 616) on 1 April 2012. It is a unified regulatory body overseeing the telecommunications and broadcasting sectors.

Revised Draft Guidelines under the Competition Ordinance – March 2015
Frequently Asked Questions

1. What has been the response from businesses and the public to the consultation on the Draft Guidelines? How has this exercise shaped the Revised Draft Guidelines?

The Competition Commission (Commission) received 64 submissions on the Draft Guidelines from a range of stakeholders including trade associations, Chambers of Commerce, political parties, public bodies, professional advisory bodies, private organisations as well as individuals. These submissions, together with the feedback from meetings with a range of parties, have assisted the Commission to identify areas where amendment of the Draft Guidelines was merited to clarify particular points or provide additional guidance.

In response to the submissions, the Commission has added further clarifications and explanations in the Revised Draft Guidelines. It has also refined existing hypothetical examples and included additional ones to provide additional guidance on the Commission's approach.

2. What particular areas did the feedback focus on? Are there any substantial changes to the Draft Guidelines as a result of the comments?

The Commission received feedback and requests for clarifications regarding a number of specific areas in the Draft Guidelines. Among the submissions received, the Draft Guideline on the First Conduct Rule (FCR) attracted the majority of comments. Further guidance was requested on a range of topics such as collective bargaining, exchange of information, resale price maintenance (RPM) and common types of joint ventures.

Further information has been provided on these areas. We have also refined a number of the existing hypothetical examples and added new ones.

3. Do the Revised Draft Guidelines address concerns relating to specific industries?

The formal Guidelines required under the Competition Ordinance (Ordinance) do not provide specific guidance for individual industry sectors in Hong Kong.

The legal and economic tests to assess competition concerns have proven around the world to be flexible enough to be applied to a range of economies and industries. With the exception of the Guideline on the Merger Rule, the Guidelines are designed to be applicable across all sectors of the Hong Kong economy.

However, the Commission is aware that there may be areas specific to a particular sector where guidance would be useful. The Commission welcomes queries from the public regarding matters which may be within the scope of the Ordinance including in relation

to sector-specific concerns. The Commission has already answered many sector-specific queries both in writing and in meetings and will continue to do so.

In addition, although the hypothetical examples in the Guidelines are drafted based on a purely hypothetical scenario in a particular industry, they may be applied by analogy to other industries.

The Commission will continue to meet with industry associations and chambers to offer assistance on particular issues and concerns, as well as assist them with the production of their own publications and compliance information.

4. What do the Revised Draft Guidelines say about collective bargaining by employees and their trade unions?

The Revised Draft Guideline on the First Conduct Rule (FCR) notes that the FCR prohibits separate “undertakings” from entering anti-competitive agreements. The Commission is of the view that an employee is an integral part of his or her employer undertaking and therefore an agreement between a group of employees and their employer is outside the scope of the FCR. Where a trade union acts on behalf of a number of employees in collective negotiations with an employer, arrangements agreed with respect to salaries and conditions of work would also fall outside the FCR.

5. What further guidance is provided in the Revised Draft Guidelines to help businesses identify anti-competitive exchanges of information?

The Revised Draft Guideline on the FCR provides additional guidance to enable businesses to distinguish between legitimate commercial negotiations and anti-competitive exchanges of information, particularly with regard to commercially sensitive information. Additional detail is also provided on the indirect exchange of commercially sensitive information.

6. Will resale price maintenance (RPM) be considered a contravention of the Ordinance?

The Commission maintains its view that RPM arrangements have an inherent potential to harm competition in Hong Kong. The Commission considers that RPM may have the object of harming competition and there may be circumstances when it amounts to Serious Anti-competitive Conduct. Additional examples have been provided in the Revised Draft Guideline on the FCR of situations where RPM arrangements will be assessed as having the object of harming competition and/or where they might amount to Serious Anti-competitive Conduct.

Nonetheless, there may be some circumstances where a specific RPM arrangement does not have the object of harming competition because of its context and the purpose pursued by the arrangement. Where this is the case the Commission will assess whether the RPM causes harm to competition by way of its effects on the market. Again, the Revised Draft Guideline on the FCR provides hypothetical examples.

RPM does not ‘automatically’ contravene the FCR. Depending on the facts of the case, an RPM arrangement having the object or effect of harming competition might be excluded from the FCR by reference to efficiencies.

7. What additional guidance is given on joint ventures and vertical agreements in the Revised Draft Guidelines?

In response to a number of submissions, the Revised Draft Guideline on the FCR provides additional guidance on certain types of joint ventures, namely, joint selling, distribution and marketing agreements and joint tendering arrangements. The Commission notes that joint tendering, for example through consortia arrangements, is common in certain sectors in Hong Kong and is in many cases legitimate.

The Revised Draft Guideline on the FCR also includes new sections on franchising and selective distribution agreements, which are particularly prevalent in the retail sector.

8. Has the Commission changed its mind about not including a market share percentage to measure market power?

The Commission maintains its view that market share does not alone determine whether an undertaking has substantial market power. Factors such as ease of entry and expansion, availability of supply-side substitution and buyer power have the capacity to prevent a firm with a high market share from having a substantial degree of market power.

In addition, market structures in Hong Kong vary widely. There is a risk that applying a particular market share percentage across sectors would become the focal point of analysis of substantial market power, and could lead to an incorrect assessment regarding the existence or absence of substantial market power in a particular market.

9. Will the Commission begin considering applications for a Decision or Block Exemption Order or commence work on Commission initiated Block Exemption Orders prior to commencement of the Ordinance?

The Commission is focused on preparing for the full implementation of the Ordinance. It will consider whether any preparatory work can be done regarding block exemptions before the Competition Rules are in effect as part of this process.

10. When will the Ordinance come into force?

The Commission will present the Revised Draft Guidelines to the Legislative Council for consultation in late April and proceed to finalise the Guidelines after taking into consideration any additional comments.

The Commission will also continue to roll out advocacy and education programmes for businesses and the general public, and enhance its enforcement and operational capability internally.

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

11. Is the Commission doing anything now on existing alleged anti-competitive practices as the Ordinance has yet to come into full effect?

At the moment the Commission has not yet commenced operations but it is monitoring various situations and conducting studies and research on certain issues. Parties with concerns about potentially anti-competitive practices are welcome to contact the Commission. The Commission is keeping records of all information it receives with a view to its future operations under the Ordinance.

12. What specific help has the Commission offered to SMEs so far? What will the Commission do to help businesses understand and comply with the Ordinance in the lead up to the full commencement of the Ordinance?

The Commission has been actively reaching out to the public and businesses, in particular SMEs, to explain the key elements and benefits of the Ordinance. Since mid-2014 the Commission has conducted over 130 briefings and meetings with the major Chambers of Commerce, a large range of industry associations, representatives of SMEs and a wide variety of professional bodies.

The five seminars held for SMEs and the public were particularly well attended. A brochure “The Competition Ordinance and SMEs” was published in December 2014 to assist SMEs in understanding their rights and obligations under the Ordinance. An educational video on cartels was uploaded to YouTube and attracted over 51,000 views. The Commission has also been working with trade, industry and SME associations to enable them to assist their members to comply with the law.

The Commission will continue to prepare and release policies, publications and self-assessment tools to assist businesses, and in particular SMEs, to comply with the new law. These will include operational documents such as a leniency policy and a statement of the Commission’s enforcement priorities. It will also roll out educational programmes to engage with its stakeholders through meetings and seminars, participation in events targeting SMEs as well as liaison with trade and industry associations.

13. When will the leniency policy, enforcement priorities and Memorandum of Understanding with the Communications Authority be available?

The drafting of the Memorandum of Understanding between the Commission and the Communications Authority is well advanced.

The leniency policy and enforcement priorities are in preparation and will be released in the coming months prior to the full implementation of the Ordinance.

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