

9 October 2014

For Immediate Release

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

The Competition Commission (the Commission) and the Communications Authority* today (9 October) published drafts of the Guidelines (Draft Guidelines) that are required by the Competition Ordinance (Cap.619) (the Ordinance). The publication of the Draft Guidelines marks a significant milestone in the Commission's preparatory work towards the full implementation of the Ordinance.

Comments on the Draft Guidelines are now sought from all interested parties.

The Draft Guidelines outline how the Commission expects to interpret and give effect to the three competition rules in the Ordinance (the First and Second Conduct Rules and the Merger Rule), as well as the procedures for handling complaints, conducting investigations and considering applications for exclusions and exemptions.

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.

Anna Wu Hung-yuk, Chairperson of the Commission, said, "The release of the Draft Guidelines is a critical step towards the full implementation of the Competition Ordinance which serves to safeguard and enhance a competitive environment for consumers and businesses in Hong Kong. We are grateful to all those who participated in the engagement exercise and attended the Commission's seminars. The feedback and questions raised, both in meetings and in writing, have greatly assisted the Commission's development of the Draft Guidelines. We now look forward to receiving comments on these drafts."

**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.*

Stanley Wong, Chief Executive Officer of the Commission, said, “We recognise the importance of assisting businesses and the public to be ready, willing and able to comply with the Competition Ordinance. In addition to the consultation on the Draft Guidelines which we are launching today, we will prepare and release small business focused brochures and self-assessment tools. Additionally, we will be producing a number of other publications such as a leniency policy and a statement of our enforcement priorities.”

Along with the Draft Guidelines, the Commission also published an Overview summarising the Commission’s approach to preparing the Draft Guidelines and the process for providing comments on the drafts.

The Draft Guidelines are available on the Commission’s website www.compcomm.hk and the Communications Authority’s website www.coms-auth.hk. Businesses and members of the public are encouraged to submit comments on the drafts in writing by the following dates:

By 10 November 2014:	Draft Guideline on Complaints Draft Guideline on Investigations Draft Guideline on Applications (Exclusions and Exemptions)
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By 10 December 2014:	Draft Guideline on the First Conduct Rule Draft Guideline on the Second Conduct Rule Draft Guideline on the Merger Rule
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Submissions should, preferably, be sent by email to: submissions@compcomm.hk.

Submissions may also be sent by fax or post as follows:

By fax:	+852 2522 4997
By Post:	Submissions on Draft Guidelines Competition Commission 36/F, Room 3601 Wu Chung House 197-213 Queen’s Road East Wanchai, HONG KONG

All submissions received will be posted on the website of the Commission. If a submission contains confidential information, a non-confidential version of the submission should also be submitted.

Once submissions received have been considered, the Commission will refine and produce final draft Guidelines for consultation with the Legislative Council and other persons the Commission considers appropriate pursuant to the Ordinance. Once adopted, the Guidelines will provide clear guidance to businesses about how the Commission will enforce the Ordinance and pave the way for full implementation of the Ordinance at a date to be set by the Government.

To coincide with the release of the Draft Guidelines, the Commission will launch a comprehensive advocacy and promotion campaign. A series of TV / radio Announcement of Public Interests (API) broadcasts and an educational video have been produced to inform the general public and businesses about the Ordinance. The release of these materials will be supported by an extensive media and advertising campaign involving a mix of new and conventional media channels, including newspapers, bus TV, MTR, online and social media platforms. Publications helping small and medium sized enterprises understand their rights and obligations under the Ordinance will follow soon after.

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.

Draft Guidelines under the Competition Ordinance - 2014
Frequently Asked Questions

- 1 What has been the general response from businesses to the engagement exercise conducted in recent months? How has this exercise shaped the Draft Guidelines?

The Competition Commission (Commission) engaged with a significant number of stakeholders during the engagement exercise including small and medium sized enterprises (SMEs), business chambers, industry associations and professional advisers. The feedback received, both in meetings and in writing, was of great assistance in terms of helping the Commission understand stakeholders' expectations for Draft Guidelines and identifying areas where guidance might be particularly useful.

For example, as a direct consequence of the feedback we received from stakeholders, guidance on information sharing, joint ventures and the activities of trade associations has been given increased prominence in the Draft Guidelines. The Draft Guidelines, while they draw on international best practice, are very much tailored to the business environment of Hong Kong as a result of the engagement exercise.

However, the engagement exercise also confirmed the need for the Commission to publish other guidance material in addition to the Draft Guidelines particularly targeted at SMEs. We will release further material in that respect in the coming months and prior to the commencement of the Ordinance.

- 2 What is the relationship between the Guidelines and the Ordinance? What happens if the Guidelines are not complied with?

The Guidelines are not part of the Ordinance. They represent the Commission's interpretation of the Ordinance and provide guidance to businesses on how it will administer the Ordinance. The Guidelines will not change the law and it will be up to the Competition Tribunal and other courts to determine the position at law if businesses disagree with the approach adopted by the Commission.

- 3 Are there any industry-specific guidelines? What will the Commission do to help businesses understand and comply with the Ordinance?

With the exception of the Draft Merger Guideline, the Draft Guidelines apply to all sectors of the Hong Kong economy and do not distinguish between particular sectors or industries. The Commission will apply the laws in the same manner to all sectors.

The Commission will develop additional publications tailored to sectors or particular classes of business, such as SMEs, and self-assessment tools to enhance their understanding of and compliance with the Ordinance. Additionally the Commission will produce other publications including policies on leniency and enforcement priorities.

4 When will the Competition Ordinance (the Ordinance) come into force?

Upon receipt of the submissions on the Draft Guidelines, the Commission will refine and produce final Draft Guidelines for consultation with the Legislative Council and other persons the Commission considers appropriate pursuant to the Ordinance. The Commission targets to finish all its preparation work by the first half of 2015, paving the way for the full implementation of the Ordinance at a date to be set by the Government.

5 What are the Commission's enforcement priorities? How will the Commission handle complaints and investigations?

When the Ordinance comes into full effect, the Commission will prioritise when to take action and what action to take depending on the following severity factors:

- whether there is substantial harm to consumers and/ or businesses or impact on the Hong Kong economy;
- whether the market is concentrated and conduct is restricting entry or expansion;
- whether there is evidence of blatant disregard for the law; and
- whether there is a history of previous contravention by the business.

The Commission will conduct evidence based independent investigations based on complaints, monitoring, whistleblowing and self-reporting. A policy on enforcement priorities will be released prior to the commencement of the competition rules.

The Commission will endeavor to keep its investigations confidential with an aim to protect both the complainants and subjects of investigations. Outcomes from its investigations, such as warning notices or commitments, will, however, be published.

6 What is the Commission's position on vertical agreements? Will resale price restrictions be considered a breach of the Ordinance?

As compared with cartel arrangements, only a small number of vertical arrangements result in harm to competition. While only a small number of vertical arrangements will harm competition, the harm they cause can be as serious as all other forms of anti-competitive conduct. As a general matter, vertical arrangements will be assessed by reference to their effects on competition in the market and will be analysed case by case.

The Commission considers that vertical agreements are only likely to harm competition where the parties to the arrangement have some measure of market power.

As regards resale price restrictions, generally speaking, fixed or minimum resale price arrangements – known as resale price maintenance (RPM) – are more likely to have an adverse impact and will be considered by the Commission as having the object of

harming competition. Companies which cannot justify these arrangements on efficiency grounds will infringe the Ordinance.

Recommended resale prices or maximum resale prices are however less likely to give rise to concerns.

- 7 It is noted that the Commission has not indicated any particular market share threshold for what constitutes "substantial market power" in the Draft Guidelines. What is the Commission's position on this?

Market power is assessed on a case by case basis and market share is only one factor in the assessment. The Commission needs to look at the particular circumstances of the market in question including whether barriers to entry are high or low. Moreover, there are many ways to assess market shares, economists can differ on market share calculations.

- 8 What types of information sharing would be considered to be anti-competitive?

There may be legitimate reasons for competitors to share certain types of data, e.g. for benchmarking, quality standards or facilitating best practices.

Competitors should not exchange, including indirectly, commercially sensitive information or information concerning their market strategies. Where they do, they run the risk of infringing the Ordinance.

Where competitors share information concerning their intentions as regards future pricing (for example, that they plan to raise their prices by a particular amount), the Commission will likely consider this to be a form of indirect price fixing.

- 9 Are there any indications on "likely" block exemptions in the Draft Guidelines?

The Commission can only make block exemptions based on evidence that economic efficiencies listed in Schedule 1 are satisfied, and it is also required to publish any drafts of such orders for public consultation. There is no legal basis for such a process to begin before the Ordinance is fully in force. However, the Draft Guidelines have provided general guidance on exemptions and exclusions processes.

Additionally, a block exemption order only confirms that conduct is excluded from the First Conduct Rule. Thus, if undertakings are entitled to the benefit of an exclusion from the First Conduct Rule, they will not be contravening the First Conduct Rule when the Ordinance comes into full effect.

- 10 What preparations can businesses make to comply with the requirements of the Ordinance? Can businesses seek advice from the Commission?

While businesses are encouraged to approach the Commission for general guidance, it is not the Commission's function to provide specific advice to companies about their business activities and practices and any resulting risks. Businesses should take proactive steps to understand the Ordinance, identify risk areas and set up self-compliance programmes in time. Companies may also wish to raise issues through representative bodies such as industry associations and chambers.

The Commission, in addition to the guidelines required by law, will be developing educational material and tool kits to assist businesses. It will also be working with industry associations so that they can assist their members in complying with the Ordinance.

- 11 Will the enforcement of the Ordinance mean that consumers will no longer be charged "excessive" prices?

While the Ordinance provides a legal framework to curb possible anti-competitive conduct so as to safeguard competition for the market, it is not a regime to regulate prices in the marketplace. However, the Commission believes the more competition there is in the market, the more consumers will be supplied with goods and services at the best possible price.

Nevertheless, prices are something that the Commission watches carefully to see if the totality of the evidence points to price fixing or other anti-competitive conduct which are forbidden under the Ordinance.

- 12 How will the Commission share concurrent jurisdiction with the Communications Authority (CA) on competition issues relating to the telecommunications and broadcasting sectors?

In publishing the six Guidelines, the Commission is already working cooperatively with the CA. The Commission and the CA are preparing a Memorandum of Understanding (MoU) on matters that cover the manner of how the two bodies will cooperate and pursue enforcement actions. The MoU will be released as a draft for public comment.

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