

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE COMPETITION COMMISSION
AND
THE COMMUNICATIONS AUTHORITY

Effective: 14 December 2015

PREAMBLE

The Competition Commission (“Commission”), an independent statutory body established under the Competition Ordinance (Cap. 619) (“Ordinance”), administers and enforces the Ordinance across all sectors of the economy.

The Communications Authority (“CA”), an independent statutory body established under the Communications Authority Ordinance (Cap. 616) (“CAO”), regulates the broadcasting and telecommunications sectors in Hong Kong.

Under section 159 of the Ordinance, the CA may, pursuant to its concurrent jurisdiction with the Commission, perform the functions of the Commission under the Ordinance in so far as those functions relate to the conduct of certain undertakings operating in the telecommunications and broadcasting sectors. These undertakings are: licensees under the Telecommunications Ordinance (Cap. 106) (“TO”) or the Broadcasting Ordinance (Cap. 562) (“BO”); persons who, although not such licensees, are persons whose activities require them to be licensed under the TO or the BO; or persons who have been exempted from the TO or from specified provisions of the TO pursuant to section 39 of the TO. The Office of the Communications Authority (“OFCA”), headed by the Director-General of Communications (“DG Com”), is the executive arm and secretariat of the CA. OFCA administers and enforces the Ordinance in the telecommunications and broadcasting sectors in accordance with the CAO and the delegation of authority of the CA.

Section 161 of the Ordinance provides that the Commission and the CA must prepare and sign a memorandum of understanding for the purpose of co-ordinating the performance of their functions under the Ordinance. Pursuant to section 161(2) and Schedule 6 of the Ordinance, the memorandum of understanding must provide for the following matters: the manner in which the Commission and the CA will perform the functions over which they have concurrent jurisdiction under the Ordinance; the manner in which the Commission and the CA will resolve any dispute between themselves; the provision of assistance by one party to the other; the allocation between the parties of responsibility for particular matters or classes of matters; arrangements for the supply of information relating to a competition matter from one party to the other; arrangements for keeping the other party informed about progress when one party is performing functions which may be performed concurrently under the Ordinance; and the joint authorship of educational material or guidelines on competition matters.

By entering into this Memorandum of Understanding (“MoU”), the Commission and the CA affirm their commitment to exercising the functions which can be performed concurrently under the Ordinance in such manner as will ensure a consistent interpretation and application of the provisions of the Ordinance, promote co-operation and coordination between the Commission and the CA in dealing with matters which are subject to concurrent jurisdiction and facilitate the efficient and effective handling of such matters while avoiding duplication, where possible.

This MoU is to be read in light of and subject to the Ordinance which sets out the functions and powers of the Commission including the functions and powers of the Commission which may be exercised concurrently by the CA. Nothing in this MoU applies in relation to the CA’s functions and powers under other legislation, or the Commission’s functions and powers outside the concurrent jurisdiction under the Ordinance unless the context otherwise requires.

The use of the term “Authority” in this MoU refers to the Commission or the CA. The use of the term “Authorities” refers collectively to the Commission and the CA.

By concluding this MoU, the Commission and the CA affirm that they have reached the following understanding for the purpose of co-ordinating the functions that they have jurisdiction to perform concurrently under the Ordinance:

1 DELINEATION OF RESPONSIBILITIES FOR PARTICULAR MATTERS OR CLASSES OF MATTERS

- 1.1 Where a matter¹ concerning the application of the Ordinance falls within the concurrent jurisdiction established by section 159 of the Ordinance and that matter comes before the Commission or the CA (or OFCA in support of the CA), the Commission or OFCA (as the case may be) will inform the other side and will discuss the matter with a view to agreeing, as appropriate, which Authority will be the Lead Authority with respect to the matter.
- 1.2 Given the CA's specific function of regulating the broadcasting and telecommunications sectors, and the restricted application of the Merger Rule² under section 4 of Schedule 7 to the Ordinance which generally only concerns cases involving undertakings that directly or indirectly hold a carrier licence under the TO, the CA will ordinarily take the role of Lead Authority on matters which fall within the concurrent jurisdiction of the Authorities. Where a matter involves issues that are partly within the concurrent jurisdiction and issues that are partly outside the concurrent jurisdiction, the Commission and OFCA in support of the CA will discuss and agree how best to progress the matter case by case.
- 1.3 The Lead Authority in a matter assumes responsibility under the Ordinance for the matter which shall be conducted in accordance with this MoU. If, at any point it is not appropriate for the Lead Authority to continue considering a matter, the Commission or OFCA in support of the CA may refer the matter to the other side in accordance with clause 3 below.

2 CONDUCT OF MATTERS

- 2.1 The Lead Authority assumes responsibility for exercising the relevant powers and functions conferred under the Ordinance in accordance with the terms of this MoU and the Guidelines³. This includes the assessment and investigation of a matter, the conduct of any proceedings before the Competition Tribunal ("Tribunal"), and the making of all decisions and taking of relevant actions with respect to a matter. The other Authority will play a supporting role in such manner as appropriate and as may be agreed by the Commission and OFCA including by providing staffing support to assist the other side to the extent that resourcing allows.

¹ Reference to a matter or matters in this MoU includes complaints or queries received by an Authority, matters which come to the attention of an Authority as a result of enquiries made by the Authority, and matters that are otherwise brought to the attention of an Authority, including matters relating to applications for a decision under sections 11 or 26 or Part 5 of Schedule 7 to the Ordinance or applications for a block exemption order under section 15 of the Ordinance.

² The Merger Rule has the meaning given by section 3 of Schedule 7 to the Ordinance.

3 REFERRAL AND TRANSFER OF MATTERS

- 3.1 Where OFCA in support of the CA becomes aware of a matter and that matter falls outside the concurrent jurisdiction established by the Ordinance but within the jurisdiction of the Commission, it shall refer the matter to the Commission.
- 3.2 The Commission (where it is the Lead Authority in a matter) or OFCA in support of the CA (where the CA is the Lead Authority in a matter) may, at any point transfer the matter to the other side if, in light of new facts or circumstances, the Commission and OFCA agree such a transfer would be appropriate.
- 3.3 Where the transfer of a matter has been agreed, the transferor shall promptly send to the transferee a brief description of the matter and immediately thereafter send any documents, articles, materials and information in relation to the matter in its possession or received after the transfer is effected, including any information provided by a complainant, witness statements, other information collected from market intelligence or other enquiries of the transferor, or such confidential information as defined in section 123 of the Ordinance pursuant to section 126(1)(h) of the Ordinance.
- 3.4 Where the Commission or OFCA in support of the CA accepts a transfer pursuant to clause 3.3, the Authority concerned will take over the matter as the new Lead Authority and conduct the matter consistent with the terms of this MoU. The transferor will continue to provide assistance where appropriate and as might be agreed by the Commission and OFCA.

4 COORDINATION AND COOPERATION

- 4.1 Unless otherwise stated, clauses 4.2 to 4.8 are only applicable to matters falling within the concurrent jurisdiction.
- 4.2 To the extent permitted by law and subject to resource and operational constraints, the Commission will provide general support to OFCA in relation to a matter where the CA is the Lead Authority, and OFCA will provide general support to the Commission in relation to a matter where the Commission is the Lead Authority.

³ The Guidelines are those prepared and published by the Commission and CA under sections 35, 38, 40 and section 17 of Schedule 7 to the Ordinance. The Guidelines are available on the website of the Commission at <http://www.compcomm.hk> and the website of the CA at <http://www.coms-auth.hk>.

- 4.3 The Commission and OFCA in support of the CA will where necessary exchange information, including confidential information as defined in section 123 of the Ordinance pursuant to section 126(1)(h) of the Ordinance, with a view to adopting a harmonised approach under the Ordinance generally in light of their enforcement experiences, Tribunal or other court judgments and rulings and policy issues that may arise.
- 4.4 Any information or documents provided by the Commission or OFCA in support of the CA to each other under section 126(1)(h) of the Ordinance will be used by the recipient solely for the purposes of fulfilling the relevant functions under the Ordinance.
- 4.5 Where the Commission or OFCA in support of the CA receives a request to disclose confidential information (within the meaning of section 123 of the Ordinance) to a third party and such information relates to a matter within the concurrent jurisdiction, it will, where appropriate, liaise with the other side in advance of disclosing the information.
- 4.6 The Commission and OFCA will, where appropriate, liaise with each other in preparing responses to matters of media interest and as regards arrangements for the publication of information for and consultations with relevant stakeholders.
- 4.7 Subject to resource and other operational considerations of the requested side, the Commission and OFCA will provide each other with enforcement and technological support upon receipt of a request for assistance from the other side.
- 4.8 The Commission and OFCA may agree to arrange temporary secondments of staff to one another, on a case by case basis, for the purpose of promoting coordination and cooperation, subject to resource and other operational considerations.

5 APPOINTMENT OF LIAISON OFFICERS

- 5.1 The Commission and OFCA will each appoint one or more Liaison Officers to coordinate and to facilitate their activities in carrying out the terms of this MoU including for the purposes of referral or transfer of matters and exchange of information and the provision of assistance between them under this MoU.
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5.2 The Liaison Officer(s) will be the designated officer(s) for the Commission and OFCA respectively to receive information relating to a matter under this MoU. This includes, but is not limited to, receiving information on referrals or transfer of matters, information exchanged under section 126 of the Ordinance, and any notice required to be provided by one side to the other under this MoU.

5.3 Upon the execution of this MoU, the Commission and OFCA will advise each other of the name and contact details of their Liaison Officer(s). When the Commission or OFCA changes its Liaison Officer(s), it will promptly inform the other side. The existence of Liaison Officer(s) does not in any way preclude direct communication between other staff of the Commission and OFCA.

6 LIAISON MEETINGS

6.1 Regular liaison meetings between the Commission and OFCA will be held to discuss and co-ordinate matters under this MoU and to keep each other informed about progress when one Authority is performing functions which may be performed concurrently.

6.2 The liaison meetings will be in general conducted at two levels:

- (a) Meetings at the directorate level of the Commission and the relevant officer(s) at the Assistant Director level of OFCA on a quarterly basis, or at intervals as may otherwise be agreed between the Commission and OFCA; and
- (b) Meetings at the working level of the Commission and OFCA as needed.

7 GUIDELINES AND EDUCATIONAL MATERIAL

7.1 The Authorities will cooperate with each other in the preparation of Guidelines and, where relevant, other forms of guidance and educational materials relating to the Ordinance.

8 DISPUTES

- 8.1 Where there is a conflict or disagreement between the Commission and the CA (or OFCA in support of the CA) over any issues relating to or covered by this MoU, the Commission and OFCA will seek to resolve the issues through discussions between the Senior Executive Director of the Commission (or, in the absence of the Senior Executive Director, another officer of the Commission designated for the purposes of this clause 8) and the relevant officer at the Assistant Director level of OFCA designated for the purposes of this clause 8 (or, in the absence of the Assistant Director, another officer of OFCA designated by DG Com). The Commission and OFCA will promptly inform each other of the identity of the officers designated under this clause or if there is any change of the officer so designated.
- 8.2 If the issues cannot be resolved by agreement according to clause 8, the matter will be referred to Chief Executive Officer of the Commission and DG Com for resolution.

9 REVIEW AND AMENDMENT OF THIS MOU

- 9.1 The Authorities will keep the operation of this MoU under regular review and will, in light of experience, amend this MoU with a view to improving its operation and resolving any issues that may arise.

10 PUBLICATION

- 10.1 This MoU will be published within six weeks of its execution on the websites of the Authorities. Any amendments that may be made thereafter will also be published in the same manner.
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11 LEGAL EFFECT

11.1 This MoU does not have binding legal effect.

11.2 For the avoidance of doubt, nothing in this MoU fetters the powers or constitutes a waiver of the statutory functions of either Authority under the Ordinance.

Signed on the 14 of December 2015

[Signed]

Anna WU Hung-yuk

Chairperson

for and on behalf of the
Competition Commission

[Signed]

Ambrose HO

Chairman

for and on behalf of the
Communications Authority