

# Overview of Draft Guidelines under the Competition Ordinance – 2014

## Introduction

The Competition Ordinance (the “**Ordinance**”) contains certain prohibitions of anti-competitive conduct in Hong Kong and sets out how these prohibitions may be investigated, enforced and adjudicated.

The Competition Commission (the “**Commission**”), together with the Communications Authority, is publishing six draft guidelines (“**Guidelines**”) under the Ordinance which offer guidance on:

- the manner in which the Commission expects to interpret and give effect to the:
  - First Conduct Rule (“**Guideline on the First Conduct Rule**”)
  - Second Conduct Rule (“**Guideline on the Second Conduct Rule**”)
  - Merger Rule (“**Guideline on the Merger Rule**”);
- the manner and form in which complaints are to be made (“**Guideline on Complaints**”);
- 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
- 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**”).

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.

This Overview summarises the Commission’s approach to preparing the draft Guidelines and the process for providing feedback on the Guidelines. The Guidelines will be finalised before the Ordinance comes into effect and therefore prior to any enforcement actions by the Commission or decisions of the Competition Tribunal (the “**Tribunal**”) or other courts interpreting the Ordinance. In drafting the Guidelines the Commission’s aim has been to assist businesses operating in the Hong Kong marketplace to become familiar with competition law and its underlying policies as embodied in the Ordinance.

The Guidelines are intended to provide general guidance on how the Commission will interpret and apply key provisions of the Ordinance. Where appropriate, the Guidelines use hypothetical examples chosen to reflect market situations likely to be found in Hong Kong to illustrate the general guidance. However, the application of competition legislation and the prohibitions contained in the competition rules is highly fact-specific. Moreover, the Tribunal and other courts are ultimately responsible for interpreting the Ordinance and the Commission's interpretation does not bind them.

**Attachment A** to this note provides an overview of:

- some of the key issues addressed in each of the draft Guidelines; and
- the process for commencing full operation of the Ordinance.

In addition to the Guidelines, the Commission intends to release later in 2014 and early 2015 other documents providing guidance on the Commission's proposed interpretation and application of the Ordinance. For example, the Commission intends to release:

- a pamphlet which addresses the concerns of small and medium-sized enterprises ("**SMEs**") about their rights and responsibilities under the Ordinance;
- its Leniency Agreement Policy; and
- its Enforcement Policy.

### **Initial engagement process – May to August 2014**

Following the release of the Commission's publication, *Getting prepared for the full implementation of the Competition Ordinance* in May, the Commission commenced an engagement process to:

- provide information about the Ordinance and give context to the development of the Guidelines;
- approach major stakeholder groups to inform them of our preliminary thinking and to understand their expectations for the Guidelines; and
- obtain feedback from other stakeholders and members of the public as regards their views on our work.

During this process Commission Members and staff met with many individuals and organisations, conducted three fully subscribed seminars for SMEs and received a number of enquiries and written submissions. The Commission is grateful to all those who participated in this engagement exercise. As set out below, their feedback has greatly assisted the Commission's development of the draft Guidelines.

## **Overarching approach to preparing the draft Guidelines**

### ***Assist Hong Kong businesses to comply with the Ordinance***

The Commission's recent engagement exercise sought to ascertain where Hong Kong businesses would most benefit from additional guidance in understanding and complying with the Ordinance. As a direct consequence of the feedback received, specific hypothetical examples have been given prominence in the draft Guidelines.

Every effort has been made to prepare draft Guidelines that avoid unnecessary jargon and contain appropriate examples to assist businesses understand and comply with the Ordinance. Nonetheless, these Guidelines are only one way to help businesses comply with the Ordinance. The Commission will develop additional guidance documents tailored to sectors or particular classes of business, such as SMEs, to enhance their understanding of the Ordinance.

### ***Industry and sector neutral***

The legal and economic tests to assess competition concerns look to the economic reality of the markets concerned. These tests have proven around the world to be flexible enough to be applied to:

- economies ranging from sophisticated, globally linked developed economies to developing economies with high barriers to trade; and
- industries ranging from high technology, fast moving industries with transnational supply chains to local relatively stable markets for basic goods or services.

With the exception of the draft Guideline on the Merger Rule, the draft Guidelines do not distinguish between particular sectors, business types or industries. However, some guidance may be more or less relevant to different business types or market participants. For example, only firms with substantial market power can contravene the Second Conduct Rule.

### ***Commission's interpretation of the Ordinance***

The Ordinance is new, untested legislation. The draft Guidelines reflect the Commission's interpretation of the Ordinance and provide guidance on how the Commission will undertake its functions under the Ordinance. The Guidelines do not represent legal determinations of the meaning of the Ordinance. This has four key consequences:

**1. *The Guidelines do not introduce additional exclusions or exemptions***

The possibility that the Commission might grant specific exemptions in the Guidelines was raised during the engagement process.

Policy decisions about what is included and excluded from the Ordinance, and the procedures required to be followed by the Commission to exclude any further conduct from the Ordinance, were made by the legislature when the Ordinance was enacted.

The Commission is not at liberty to adopt an interpretation of the Ordinance which would exclude from scope of the Ordinance conduct having an anti-competitive effect in Hong Kong. It is appropriate that decisions by the Commission confirming that specific conduct falls within one of the pre-existing exclusions and/or exemptions in the Ordinance are made in the context of the reviewable exclusion/exemption processes set out in the Ordinance and outlined in the draft Applications Guideline.

Additionally, unlike many other jurisdictions, the exclusions and exemptions in the Ordinance apply to undertakings and relevant conduct without the need for a prior Commission decision or block exemption order. Thus, if undertakings are entitled to the benefit of an exclusion or exemption, that exclusion or exemption will automatically apply when the Ordinance comes into full effect.

**2. *The Guidelines do not change the law***

The Tribunal and other courts will decide on the meaning of the Ordinance's provisions, and the approach to be taken as regards proving a contravention of the competition rules in a specific case.

If businesses disagree with the interpretation of the Ordinance adopted by the Commission in the context of a given case, this may (and likely will) be a matter to be pursued before the Tribunal with a view to determining the position at law.

**3. *The Guidelines draw on best practice but are governed by the text of Ordinance***

There are over one hundred jurisdictions in the world with competition law. Understandably, the Ordinance draws upon the legislation and enforcement experience of various overseas jurisdictions. For businesses that trade internationally, consistency with other countries'

competition law regimes is desirable. Having regard to the terms of the Ordinance, the Commission has drawn upon international best practices wherever appropriate in preparing the draft Guidelines.

While overseas influences on the Ordinance are apparent, the Ordinance is tailored to Hong Kong and does not precisely mirror competition laws existing elsewhere. The text of the legislation must be the starting point for any interpretation of the law, and the Commission's draft Guidelines represent its interpretation of the text of the Ordinance.

#### **4. *The Guidelines set out the Commission's current view, and may be revisited***

The Commission will conduct itself in a manner consistent with its Guidelines while they remain current. As it develops its experience in enforcing the Ordinance in specific cases it may, however, become appropriate to revisit the Guidelines. In this context, the Commission will take into account decisions of the Tribunal and other courts and developments in international best practice.

### **Consultation on the draft Guidelines**

The Commission has published the Guidelines in draft for comment from stakeholders. While the Commission has endeavoured to make the draft Guidelines easy to follow, they are nonetheless technical documents representing the Commission's interpretation of the Ordinance.

To ensure feedback is clear, directed to the draft Guidelines and open to scrutiny by other stakeholders, the Commission:

- requests that comments on the draft Guidelines be made in writing; and
- proposes to make all comments received publicly available on its website.

The Commission does not foresee there being any need to rely on business secrets or other confidential information in providing comments on the draft Guidelines. To the extent that parties might nonetheless wish to include confidential information in a submission, they are requested to provide also a non-confidential version of their comments for publication.

After considering the comments received, 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 requests that comments be provided in the following manner:

- with respect to the draft Procedural Guidelines (the Guideline on Complaints, Guideline on Investigations and Applications Guideline), comments should be sent by email to [submissions@compcomm.hk](mailto:submissions@compcomm.hk) by **5pm on 10 November 2014**; and
- with respect to the draft Competition Rule Guidelines (the Guidelines on the First Conduct Rule, Second Conduct Rule and Merger Rule), comments should be sent by email to [submissions@compcomm.hk](mailto:submissions@compcomm.hk) by **5pm on 10 December 2014**.

Any late submissions received after these dates may be considered by the Commission, but only if it is practicable for the Commission to do so. Late submissions received by the Commission may also be made public.

### **Other publications**

The Commission recognises that in addition to the Guidelines prescribed by the Ordinance, there are a number of other publications that advisers and specific sectors may find helpful. Separately to the formal consultation on the draft Guidelines, the Commission will continue to prepare and release policies (such as a Leniency Agreement Policy and an Enforcement Policy) and publications (such as easy to follow leaflets and booklets for SMEs) to assist businesses and their advisers in understanding how to comply with the Ordinance.

## Overview of Draft Guidelines – Attachment A

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### Draft Guideline on the First Conduct Rule

#### ***Horizontal and vertical arrangements***

The First Conduct Rule (“**FCR**”) is concerned with anti-competitive arrangements between two or more different market participants.

Deals made between firms or “undertakings” are the lifeblood of commerce and competition. The vast majority of deals entered into every day enhance competition. This is particularly the case for deals struck between buyers and sellers, known in economic terms as *vertical arrangements*. Arrangements between competitors, known as *horizontal arrangements*, are more likely, however, to raise competition concerns.

There is nothing in the FCR which expressly or impliedly limits the rule to either horizontal or vertical arrangements. In line with a plain reading of the FCR and international best practice, the Commission’s view is that the FCR captures both horizontal and vertical arrangements where they have an anti-competitive object or effect.

#### ***Object or effect***

Some forms of conduct are regarded by many jurisdictions with competition laws as being, by their very nature, so harmful to the proper functioning of normal competition in the market that there is no need to examine their anti-competitive effects. Such arrangements are considered as having the **object** of preventing, restricting or distorting competition and will be prohibited unless there is a compelling efficiency justification.

Cartel agreements, which are arrangements between competitors to fix prices, share markets, restrict output or rig bids, are examples of conduct universally considered by their very nature to be harmful to competition without having to examine their effects. The Commission will apply the same approach in Hong Kong. If competitors agree not to compete on price, to share markets, restrict output or rig bids, the Commission will consider that such arrangements have the object of preventing, restricting or distorting competition.

However, most arrangements between undertakings are unlikely to have the object of harming competition and therefore their actual or likely effects on competition must be considered. That is, a careful assessment must be made of the impact or likely impact of the arrangement on the market. This is because arrangements that appear similar may have very different competitive outcomes, depending on market conditions and the market power of the parties concerned.

Therefore, most arrangements subject to the FCR are assessed by reference to whether they have or are likely to have the **effect** of preventing, restricting or distorting competition in Hong Kong.

### ***Serious Anti-competitive Conduct***

Once it has been determined that an arrangement has the object or effect of harming competition, it may become necessary to consider whether the conduct amounts to Serious Anti-competitive Conduct ("**SAC**") as defined in the Ordinance.

If conduct is SAC, this has certain implications:

- the Commission may commence proceedings before the Tribunal in respect of the conduct without issuing a Warning Notice to the parties; and
- the exclusion for agreements of lesser significance does not apply (agreements between undertakings whose combined turnover does not exceed HK\$200 million are not subject to the FCR except in cases of SAC).

The Commission considers that arrangements between competitors to fix prices, share markets, restrict output or rig bids are clear examples of conduct which is SAC. These types of arrangements are often called cartels as noted above.

Conversely, vertical arrangements are generally not considered to be SAC. As noted above, vertical arrangements are, as a general matter, likely to be less harmful to competition than horizontal arrangements. Moreover, vertical arrangements may frequently generate efficiencies.

However, the Commission considers that what constitutes SAC is open.



Whether an arrangement amounts to SAC is also a separate determination from whether it has the object or effect of preventing, restricting or distorting competition.

### **Resale Price Maintenance**

Resale Price Maintenance (“**RPM**”) is a type of vertical arrangement where a supplier requires a retailer (or distributor) not to sell its products below a certain price or fixes the price at which the retailer may sell. In a competitive market, firms normally set their own price and supply terms. RPM undermines this process.

A supplier who restricts its retailers from giving discounts reduces the opportunity for retailers to win customers by competing on price. Where RPM is routinely applied across a market, it can also facilitate anti-competitive arrangements between competitors. RPM reduces the drive for retailers to increase their efficiency in order to provide products at better prices. This is one reason why existing retailers may seek to force their suppliers to enforce RPM against other retailers who have recently entered the market.

As a general rule, the Commission will consider that RPM arrangements are by their nature harmful to competition. Undertakings engaging in this conduct which cannot defend their RPM practices on efficiency grounds will be taken to have contravened the Ordinance without consideration of the effect of the arrangement on competition.

RPM may in certain cases amount to SAC. In this context, the Commission notes that RPM is conduct falling within a literal reading of the definition of SAC as provided for in the Ordinance.<sup>1</sup>

Nonetheless, the Commission also recognises that RPM arrangements, unlike cartel agreements between competitors, may lead to efficiencies in certain cases. Where undertakings can defend a given RPM arrangement on efficiency grounds, there will be no infringement of the FCR and the question of whether the RPM is SAC will not arise.

### **Information exchange and price recommendations by associations**

The Commission received a number of enquiries during the engagement process about information exchange between undertakings and price recommendations by trade associations and fee scales set by professional bodies.

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<sup>1</sup> Paragraph (a) of the definition of Serious Anti-competitive Conduct in section 2(1) of the Ordinance provides that conduct which consists of “*fixing, maintaining, increasing or controlling the price for the supply of goods or services*” is Serious Anti-competitive Conduct. RPM involves the supplier fixing, maintaining or controlling the resale price of its products.

Trade associations and professional bodies have a key role to play in supporting their industries in advocacy, education, promoting safety and other standards and providing information on developments and trends of interest to their members. In this context information exchange is usually beneficial. Associations should not, however, facilitate coordinated conduct in the market among members who should be competing for business in their industry.

The draft Guideline on the First Conduct Rule provides a number of examples to illustrate where information exchange and trade association price recommendations and fee scales set by professional bodies are and are not likely to contravene the FCR.

### ***Criteria for exclusions and exemptions***

The draft Guideline on the First Conduct Rule outlines how the Commission intends to interpret the provisions of the Ordinance relating to exclusions and exemptions with a view to, in particular, enabling self-assessment by undertakings.

In line with international best practice, the Commission in general adopts a narrow construction of the Ordinance's provisions on exclusions and exemptions. That is, to take advantage of an exclusion or exemption, an undertaking or an undertaking's conduct must clearly fall within the terms of the relevant exclusion or exemption.

## **Draft Guideline on the Second Conduct Rule**

### ***Market definition***

When determining the impact of conduct on competition, it is usually necessary to consider what market or markets the conduct may have impacted. While the Commission's approach to market definition could have been included in the Guideline on the First Conduct Rule, the Guideline on the Second Conduct Rule or the Guideline on the Merger Rule or a separate document, the Commission has located it in the draft Guideline on the Second Conduct Rule with relevant cross-references made in the other Guidelines.

The Commission considers that its proposed approach to market definition, incorporating factors such as product and geographic market boundaries, follows international best practice and is consistent with the Ordinance.

### ***Geographic boundaries of markets***

A number of stakeholders expressed concern about how the geographic boundaries of markets would be defined given Hong Kong's trading relationships. This issue is addressed in the draft Guideline on the Second Conduct Rule. Global manufacturing and supply chains are common in many jurisdictions, and the process for defining markets to assess competition issues takes this into account. Depending on the specific facts of the conduct in question, markets may be global, regional or limited to or smaller than Hong Kong (common for many retail markets).

### ***An economic approach to defining substantial market power***

Throughout the policy debates on the Ordinance and the Commission's subsequent engagement process, there has been discussion of whether the Commission will identify either or both:

- a market share threshold below which a firm will be presumed not to have substantial market power;
- a market share threshold above which a firm will be presumed to have substantial market power.

The Commission does not include such thresholds in the Guideline on the Second Conduct Rule.

Market power depends on the features of the market under assessment. The internationally recognised test for ascertaining whether an undertaking has substantial market power looks to that undertaking's ability to act with minimal regard to competitive constraint. Market share is one factor in determining, but does not alone determine, whether an undertaking has substantial market power. Other factors include ease of entry and expansion and buyer power, which each have the capacity to prevent a firm with a high market share from having substantial market power.

For example, a firm may have a 100% share of a specialised market. However, if its customers are large firms with some measure of buyer power and barriers to entry are low, the firm will not likely be able to raise prices relevant to its costs without risking one of its customers sponsoring new entry into its market. If it cannot increase its profit without risking new entry, it will not have substantial market power even though it has 100% of the market.

The Ordinance excludes undertakings from the scope of the Second Conduct Rule ("**SCR**") if their turnover does not exceed HK\$40 million. Undertakings with turnover above this threshold will not necessarily have substantial market power. Thus, the threshold in this exclusion should not be interpreted as a measure of market power.

### ***Conduct may fall under both the FCR and SCR***

An agreement is more likely to raise competition concerns where one of the parties to the agreement has some measure of market power.

Market power is, however, is a matter of degree. The degree of market power for concerns to arise under the FCR is less than the degree of market power required for concerns to arise under the SCR, which applies only when an undertaking has a substantial degree of market power.

Where, however, an undertaking with substantial market power enters into an agreement, that agreement could give rise to concerns under either the FCR, the SCR or both conduct rules.

Therefore, where an undertaking with substantial market power abuses that power through an arrangement such as a vertical restraint, the Commission considers that it is possible for that conduct to contravene both the FCR and the SCR depending on the facts of the case.

### **Draft Guideline on the Merger Rule**

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 undertakings in all sectors, the Merger Rule only applies to mergers involving, directly or indirectly, holders of carrier licences under the Telecommunications Ordinance. In this sense, the Ordinance preserves the merger control regime that is currently provided for under the Telecommunications Ordinance.

The draft Guideline on the Merger Rule sets out the Commission's interpretation and approach in applying the Merger Rule and related provisions under the Ordinance. This includes a discussion of the scope of the Merger Rule and the approach that will be adopted for conducting a competition assessment, with indicative safe harbours given to facilitate parties to a merger to self-assess whether the transaction in contemplation may potentially raise competition concerns under the Merger Rule.

Although there is no mandatory obligation imposed under the Ordinance to notify a merger, the Commission is willing to provide informal advice on proposed merger transactions on a confidential basis to assist parties in planning their mergers. The draft Guideline on the Merger Rule sets out how such informal advice can be sought from the Commission. There are also formal processes provided for under the Ordinance by which the Commission may review merger transactions, such as where parties to a merger apply for a decision from the Commission to exclude a merger from the Merger Rule, and where parties to a merger engage in discussion with the Commission on the commitments that the parties may offer to the Commission in return for the Commission not taking enforcement action in respect of a merger. The Commission is also conferred with powers to formally investigate anticipated and completed mergers. All these processes and procedures are set out and explained in the draft Guideline on the Merger Rule.

## **Draft Guideline on Complaints**

The draft Guideline on Complaints is largely procedural. The Commission will encourage and welcome complaints about possible contraventions of the Ordinance, and will not require complaints to meet specific formal requirements to be considered.

The draft Guideline on Complaints makes it clear, however, that if a complainant does not provide sufficient information or promptly respond to Commission requests for information, it is unlikely that the complaint will proceed to further assessment.

### ***Discretion to pursue a complaint***

Complaints and tip-offs from the public are an important source of information that the Commission will rely on in deciding what conduct to investigate. However, under the Ordinance, the Commission is required to investigate matters to protect the public interest and not the interest of the complainant.

Violations of competition laws are rarely straightforward to identify and prove. Case selection is essential to ensure resources are directed towards those issues which are more likely to involve substantial harm and contravene the Ordinance. Additionally, to ensure the Commission's enforcement work is balanced and strategically encourages compliance in relation to different sectors and conduct, it will be necessary for the Commission to have regard to its existing case load and issues already before the courts for determination when considering whether to pursue a complaint.

The draft Guideline on Complaints makes it clear that the Commission considers it reasonable not to pursue all complaints that may potentially, if investigated further, uncover a contravention of the Ordinance. The Commission considers that maintaining this discretion, in the circumstances set out in the Guideline on Complaints, is essential to the effective and efficient administration of the Ordinance.

## **Draft Guideline on Investigations**

### ***General guidance on investigation process***

The draft Guideline on Investigations provides an outline of how the Commission will gather evidence to assess whether it has reasonable cause to suspect that conduct contravenes the Ordinance. In combination with the draft Guideline on Complaints, it proposes a three stage investigative process:

- receiving and assessing a complaint (set out in the draft Guideline on Complaints);
- an Initial Assessment Phase, where the Commission relies solely on public information or information provided on a voluntary basis;

- an Investigation Phase, where subject to the requirements and safeguards in the Ordinance, the Commission may elect to use one or more of its compulsory evidence gathering powers.

### ***Exercising compulsory evidence gathering powers***

The draft Guideline on Investigations sets out the process by which the Commission will determine whether it has reasonable cause to suspect a contravention of the Ordinance. Once the Commission has reasonable cause to suspect a contravention of the Ordinance, it may exercise its compulsory evidence gathering powers under the Ordinance.

The Ordinance provides a detailed outline of how such powers may be exercised. The draft Guideline on Investigations supplements this where necessary.

### ***Confidentiality of investigations, transparency of outcomes***

The draft Guideline on Investigations outlines how the Commission will endeavour to keep its investigations confidential, and will generally not speak publicly about an investigation. The Commission considers that this protects the interests of both complainants and the subjects of investigations.

The Commission also considers that there is a strong interest in the public understanding how competition issues have been resolved and when the Commission's intervention has led to a change in behaviour in the market.

This will clearly occur when the courts adjudicate on whether the Ordinance has been contravened. However, given that a number of matters may be resolved without proceedings before the Tribunal, the Commission considers it appropriate to publish generally the other ways it has resolved its concerns.

As such, the draft Guideline on Investigations sets out that the Commission will publish Warning Notices.

### ***Raising concerns not limited to formal Warning Notices***

When conducting an investigation and particularly where the Commission is considering taking action before the Tribunal, the Commission will often be in contact with the subjects of its investigation. The draft Guideline on Investigations makes it clear that the Commission will routinely inform undertakings of its concerns prior to commencing proceedings in the Tribunal, and will afford undertakings an opportunity to resolve these concerns. This contact will not be by way of a formal Warning Notice as provided for in the Ordinance.

### ***Investigation process – not enforcement priorities***

The draft Guideline on Investigations does not outline how the Commission will prioritise enforcement or, relatedly, select which enforcement tool is appropriate in a given circumstance to remedy and deter specific conduct. The Commission does not consider the Guideline on Investigations to be an appropriate place for it to outline how it will set its enforcement priorities. Such policies will be released separately.

## **Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders (Applications Guideline)**

### ***General guidance on exemptions and exclusion processes***

The Ordinance contains a number of exclusions and exemptions. Once the Ordinance is fully operational the Commission has the power to:

- issue Block Exemption Orders, either on application by undertakings or on the Commission's own initiative; and
- make decisions on the application of other statutory exclusions and exemptions to an undertaking's specific circumstances ("**Decisions**").

However, undertakings to whom exclusions and exemptions apply do not contravene the Ordinance. That is, there is no need for a prior Commission Decision or Block Exemption Order for undertakings to take advantage of the Ordinance's exclusions or exemptions. This differs from many jurisdictions in the world, where a competition authority must issue a block exemption or make some other decision before undertakings may rely on an exclusion or exemption.

Because of this, the Commission will only exercise these powers, particularly its block exemption powers, in limited circumstances. The draft Applications Guideline sets out how the Commission intends to:

- apply its discretion under the Ordinance on whether to accept an application for a Decision or Block Exemption Order; and
- exercise its power to issue Block Exemption Orders of its own volition.

### **Block exemptions**

Block exemptions are exemptions applying to categories of agreements, rather than specific arrangements.

Some respondents to the Engagement Paper argued that the Commission should indicate “likely” block exemptions it may make once the Ordinance has fully commenced, or that certain industries or types of agreements ought to receive a block exemption.

Without prejudging any of the issues raised in these submissions, there is no legal basis for providing a block exemption before the Ordinance is fully in force. Moreover, the Commission may only make Block Exemption Orders where the conditions of section 1 of Schedule 1 are satisfied.

As noted above, agreements enhancing overall economic efficiency do not require a Block Exemption Order to be excluded from the Ordinance – they are automatically excluded from the Ordinance. If such agreements do not enhance overall economic efficiency, then the Commission may not issue a Block Exemption Order in favour of those agreements even if an application for a block exemption is accepted for consideration.

### **Commencing Full Operation of the Ordinance**

The Ordinance was passed by the Legislative Council on 14 June 2012. The legislation is being implemented in phases. By the *Competition Ordinance (Commencement) Notice 2012*, which was gazetted on 23 November 2012, the provisions relating to, *inter alia*, the short title, commencement of the Ordinance, interpretation, guidelines to be issued by the Commission, and other provisions related to the establishment and operation of the Commission were brought into operation on 18 January 2013. The provisions relating to the Tribunal in Part 10 of the Ordinance came into force on 1 August 2013.

On 26 April 2013, the Chief Executive announced the appointment of the Chairperson of the Commission and 13 other members of the Commission, each for a term of 3 years beginning 1 May 2013.

It is expected that the remaining provisions of the Ordinance including those containing the competition rules dealing with anti-competitive agreements, abuse of substantial market power and mergers will be commenced after the Commission has issued the Guidelines.

Following the public consultation, the Commission expects to revise the present draft Guidelines and to consult the Legislative Council and other appropriate persons on the revised draft Guidelines. Following this consultation process, the Commission will adopt and issue the Guidelines.