



Competition Guidelines

issued under the Competition Ordinance

Telecommunications Users and Consumers Advisory Committee

8 October 2015

Competition Ordinance

- The Competition Ordinance (“CO”) was passed by the Legislative Council (“LegCo”) on 14 June 2012
 - cross-sectoral competition law
 - will be in full operation on 14 December 2015
- The Competition Commission (“Commission”) is the principal enforcement agency
- The Communications Authority (“CA”) is conferred concurrent jurisdiction to enforce the CO in respect of the conduct of telecommunications and broadcasting licensees



Competition Ordinance

- Prohibits the following anti-competitive conduct through establishment of **three competition rules**:
 - **the First Conduct Rule (“FCR”)** : prohibiting anti-competitive agreements, concerted practices or decisions
 - **the Second Conduct Rule (“SCR”)** : prohibiting the abuse of a substantial degree of market power
 - **the Merger Rule** : prohibiting mergers involving telecommunications carrier licensees which have, or are likely to have the effect of substantially lessening competition in Hong Kong
- The Commission/CA should issue guidelines on its interpretation of the competition rules, and the procedures for handling complaints, conducting investigations and handling applications for exclusions and exemptions
- If the Commission/CA, after investigating a case, considers that a contravention of the CO has occurred, it may take the case to the **Competition Tribunal** to rule on whether the parties involved have contravened the competition rules and decide on the penalty

Competition Guidelines

Guidelines	
(1) Guideline on First Conduct Rule	(1)-(3) are Substantive Guidelines : set out how the Commission/CA interprets and gives effect to the competition rules
(2) Guideline on Second Conduct Rule	
(3) Guideline on Merger Rule	
(4) Guideline on Complaints	(4)-(6) are Process Guidelines : set out the procedures for the Commission/CA's to handle complaints, conduct investigations and handle applications for exclusions and exemptions
(5) Guideline on Investigations	
(6) Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 (Block Exemption Orders) (“Applications Guideline”)	

Competition Guidelines

- October 2014
 - Draft competition guidelines issued for public consultation
 - held a briefing session for telecommunications and broadcasting sectors
 - 64 submissions received
- March 2015
 - Revised draft competition guidelines issued for public consultation
 - Consulted the LegCo
 - 10 submissions received
- **27 July 2015**
 - **Final Guidelines jointly issued by the Commission and CA**

Key Principles of the Competition Guidelines

- Describe the Commission/CA's interpretation of the CO
 - Not a substitute for the CO
 - No binding legal effect
 - the Competition Tribunal and other Hong Kong courts have the ultimate power for interpreting the CO
- Draw on international best practices but tailored to suit Hong Kong's context
- Use hypothetical examples to assist the public in understanding the Commission/CA's interpretation of the CO and assist the business sectors in understanding and complying with the CO

First Conduct Rule (FCR)

- Prohibits anti-competitive
 - Agreements
 - Concerted practices
 - Decisions of associations of undertakings (e.g. business chambers)
- Covers
 - Horizontal agreements
 - Vertical agreements
- Example
 - Mobile telecommunications operators agree to share a market and only provide services to the respective areas assigned (e.g. New Territories, Kowloon)

First Conduct Rule

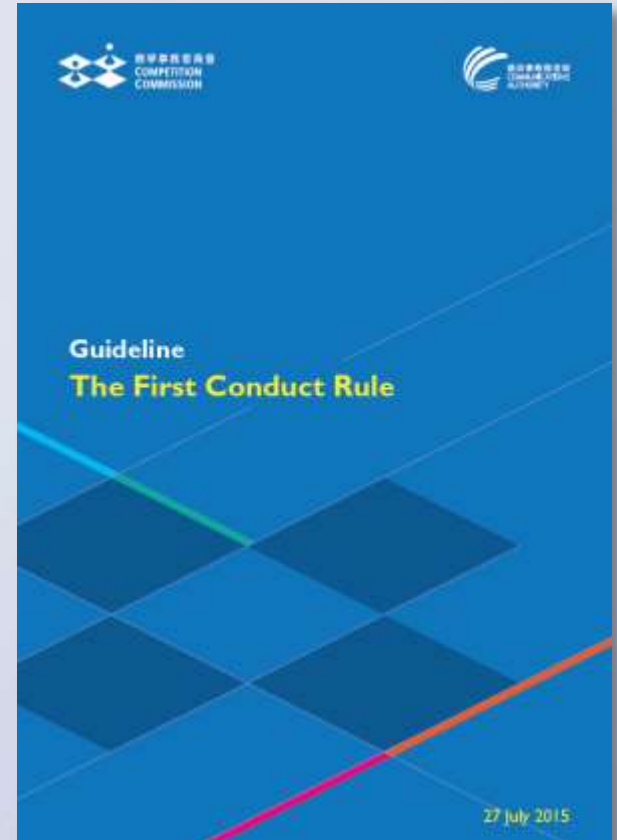
An undertaking must not

- (a) make or give effect to an agreement;*
- (b) engage in a concerted practice; or*
- (c) as a member of an association of undertakings, make or give effect to a decision of the association,*

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong

Guideline on First Conduct Rule

- Explaining concepts of:
 - Undertakings
 - Agreements, concerted practices, decisions of associations of undertakings
 - Object or effect of harming competition
 - Serious anti-competitive conduct
- Highlighting examples of conduct that may contravene the FCR
 - Price fixing
 - Market sharing
 - Information exchange
 - Resale price maintenance
- Illustrating with hypothetical examples



Second Conduct Rule

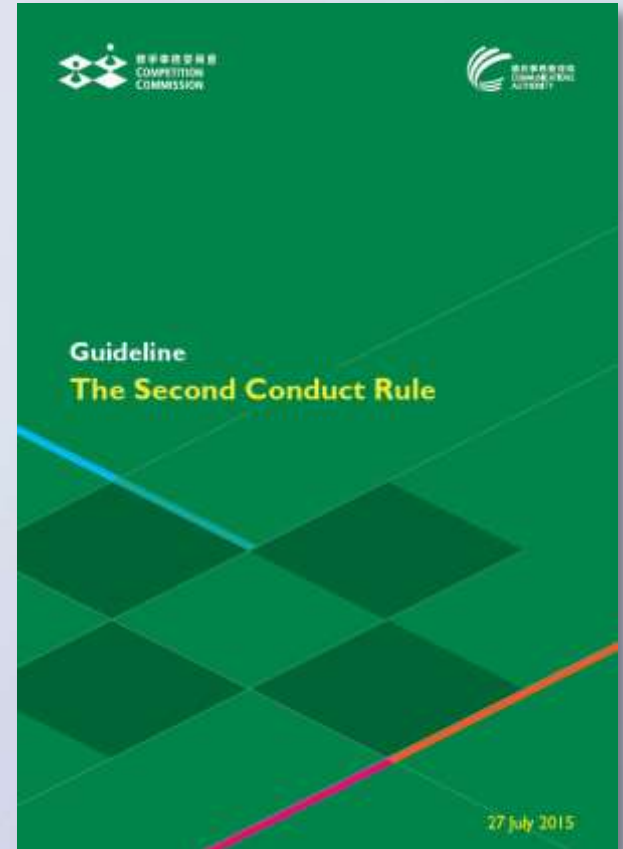
- Targets the conduct where:
 - an undertaking has substantial market power (“SMP”) in a market
 - it abuses the SMP
 - by engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong
- Example
 - A company with 80% market share provides its services at prices below cost in an attempt to force other competitors out of the market

Second Conduct Rule

An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong

Guideline on Second Conduct Rule

- Explaining:
 - The concept of market definition
 - How SMP is assessed
 - What would constitute an abuse of SMP
- Giving examples of conduct that may constitute an abuse of SMP
 - Predatory pricing
 - Tying and bundling
 - Margin squeeze
 - Refusals to deal
 - Exclusive dealing
- Illustrating with hypothetical examples



Merger Rule

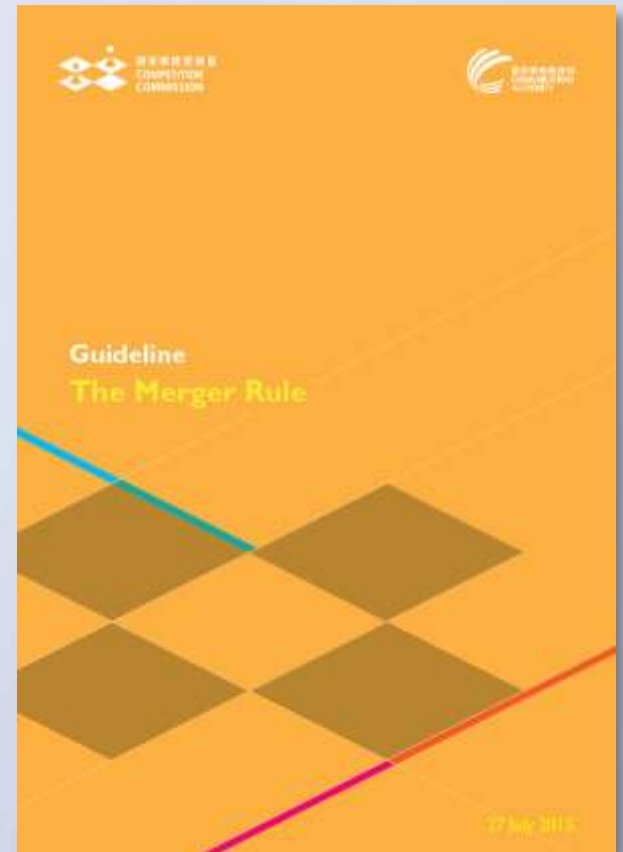
- What constitutes a “merger”?
 - undertakings merge and cease to be independent of each other
 - acquisition of control of an undertaking
 - including the creation of a joint venture
 - acquisition of the assets of an undertaking
- The Merger Rule only applies to mergers involving telecommunications carrier licensees

Merger Rule

An undertaking must not, directly or indirectly, carry out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong

Guideline on Merger Rule

- Describing:
 - Scope of the Merger Rule
 - Approach of competition assessment
 - indicative “safe harbours” provided
 - Procedures and enforcement
 - seeking of informal advice
 - applications for exclusions and exemptions
 - acceptance of commitments



Guideline on Complaints

- Describing how members of the public may lodge complaints
- How a complaint will be handled by the Commission/CA
 - The Commission/CA has discretion on whether or not to investigate a complaint
 - not required to investigate a complaint if it does not consider it reasonable to do so
 - may investigate a complaint even if the complainant no longer wishes to cooperate with the Commission/CA



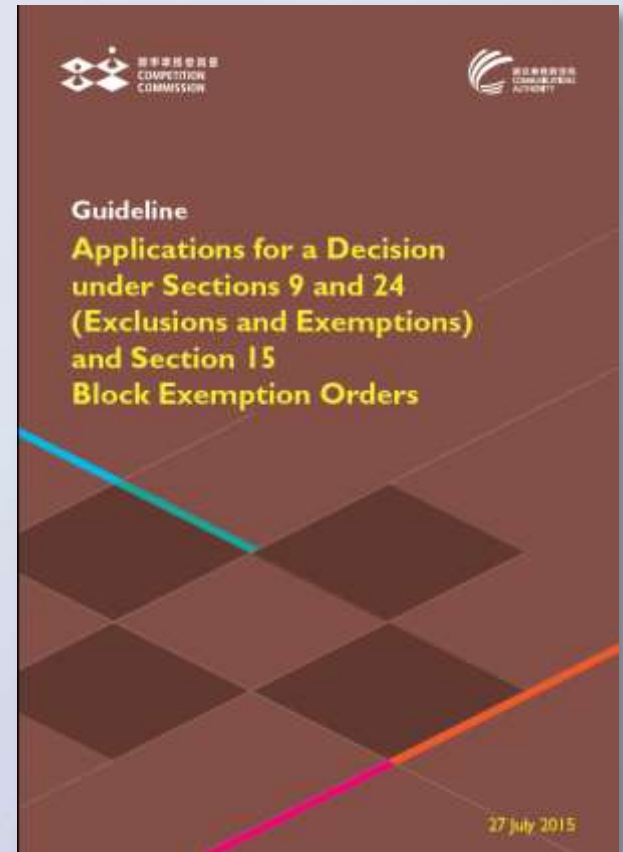
Guideline on Investigations

- Two-stage approach:
 - **Initial Assessment Phase**
 - A view has not yet been formed on whether there is reasonable cause to suspect a contravention of the competition rules
 - Will seek information from relevant parties on a voluntary basis
 - **Investigation Phase**
 - A view has been formed that there is reasonable cause to suspect a contravention of the competition rules
 - May use investigation powers to request for documents and information
- Explaining the use of various investigation powers by the Commission/CA



Applications Guideline

- Various exclusions or exemptions from the competition rules are provided for in the CO
- No requirement for undertakings to apply for exclusions or exemptions in advance
 - undertakings may elect to apply for decisions by the Commission/CA for exemptions or exclusions
- Setting out the procedures to be followed by applicants in making applications and the process that the Commission/CA will follow in handling the applications



Way Forward

- The CO will commence full operation on 14 December 2015
 - The existing competition provisions under the Broadcasting Ordinance and the Telecommunications Ordinance will be repealed subject to transitional arrangements
- CA is working closely with the Commission to complete the remaining preparatory work, including the preparation of a Memorandum of Understanding (MoU) to coordinate the performance of their functions under the concurrent jurisdiction arrangement set out in the CO

Further Information

- Competition Guidelines are available on
 - the CA's website (www.coms-auth.hk)
 - the Commission's website (www.compcomm.hk)