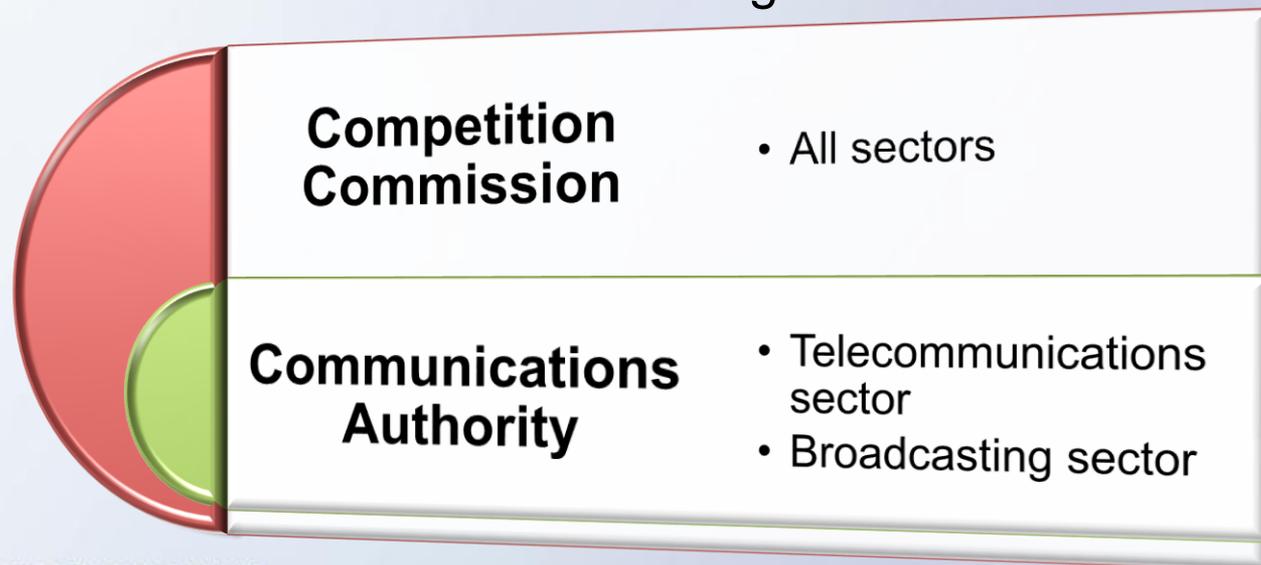


# **Competition Guidelines Issued under the Competition Ordinance**

Telecommunications Regulatory Affairs Advisory Committee  
17 September 2015

# Competition Ordinance

- The Competition Ordinance (“CO”)
  - passed by the Legislative Council (“LegCo”) on 14 June 2012
  - will be in full operation on 14 December 2015
- Concurrent Jurisdiction
  - The CA is conferred concurrent jurisdiction with the Competition Commission (“Commission”) in relation to conduct of telecommunications and broadcasting licensees



# Competition Ordinance

- Targets three types of anti-competitive conduct through **three competition rules**:
  - **the First Conduct Rule (“FCR”)**: prohibiting anti-competitive agreements, decisions and concerted practices
  - **the Second Conduct Rule (“SCR”)**: prohibiting the abuse of a substantial degree of market power in a market
  - **the Merger Rule**: prohibiting mergers which have, or are likely to have the effect of substantially lessening competition in Hong Kong
- The CO requires that the Commission/CA should issue guidelines on its interpretation of the competition rules, the procedures for complaints and investigations, and applications for exclusions and exemptions

# Competition Guidelines

Guidelines	
<b>Guideline on First Conduct Rule</b>	<b>Substantive Guidelines:</b> set out how the Commission/CA intends to interpret and give effect to the competition rules
<b>Guideline on Second Conduct Rule</b>	
<b>Guideline on Merger Rule</b>	
<b>Guideline on Complaints</b>	<b>Process Guidelines:</b> set out the procedures for handling complaints, conducting investigations and handling applications for exclusions and exemptions
<b>Guideline on Investigations</b>	
<b>Guideline on Applications for Decisions on Exclusions/Exemptions and Block Exemption Orders (“Applications Guideline”)</b>	

# Competition Guidelines

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

# Overarching Approach of the Competition Guidelines

- Reflects the Commission/CA's interpretation of the CO
  - ▣ Not a substitute for the CO
  - ▣ No binding legal effect (i.e. do not bind the Competition Tribunal and other Hong Kong courts)
- Draws on international best practices but tailored to suit Hong Kong's context
- Aimed at assisting the business sectors to understand the competition rules with a view to complying with the CO

# First Conduct Rule (FCR)

- Catches anti-competitive
  - Agreements
  - Concerted practices
  - Decisions of associations of undertakings
- Captures both horizontal and vertical agreements, concerted practices etc

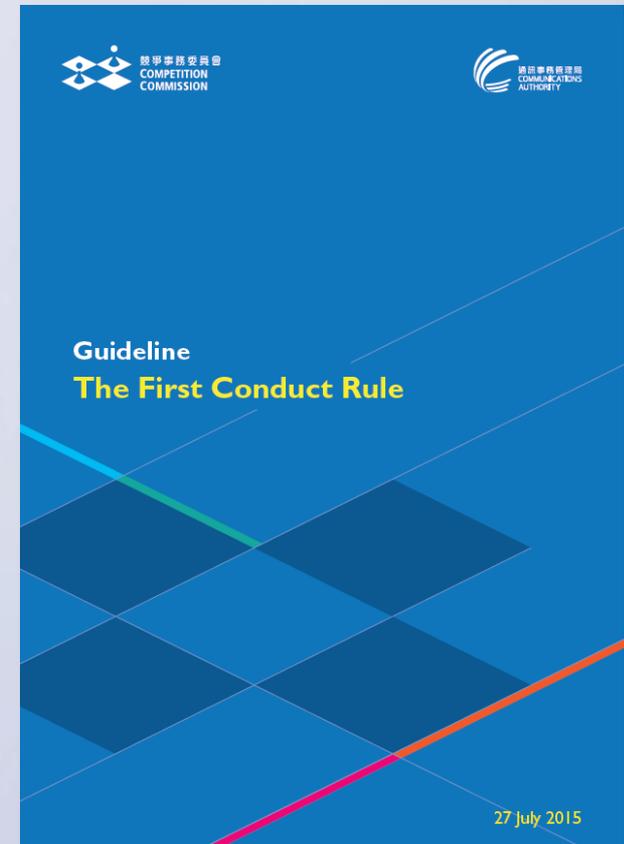
## First Conduct Rule

*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
  - Object or effect
  - Serious anti-competitive conduct
- Highlighting major forms of conduct that may contravene the FCR
  - Price fixing
  - Market sharing
  - Information exchange
  - Resale price maintenance, etc.
- Use of hypothetical examples
- Discussion on exclusions and exemptions applicable to FCR



# Second Conduct Rule

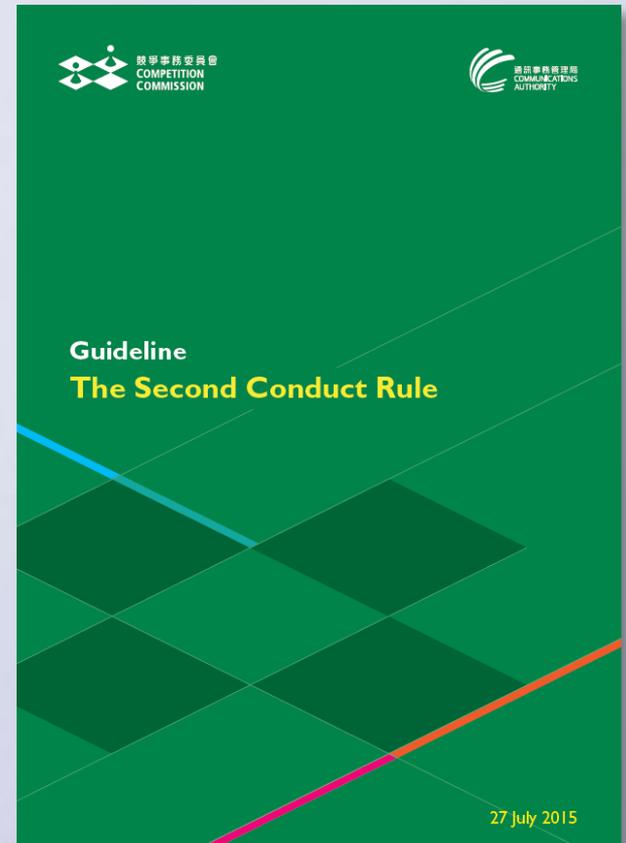
- Targets an undertaking where
  - the undertaking has substantial market power (“SMP”) in a market
  - it abuses its SMP
  - by engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong

## 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

- Discussions on
  - Market definition
  - Assessment of SMP
  - Abuse of SMP
- Examples of conduct that may constitute an abuse
  - Predatory pricing
  - Tying and bundling
  - Margin squeeze
  - Refusals to deal
  - Exclusive dealing
- Discussions on the exclusions and exemptions applicable to SCR



# Merger Rule

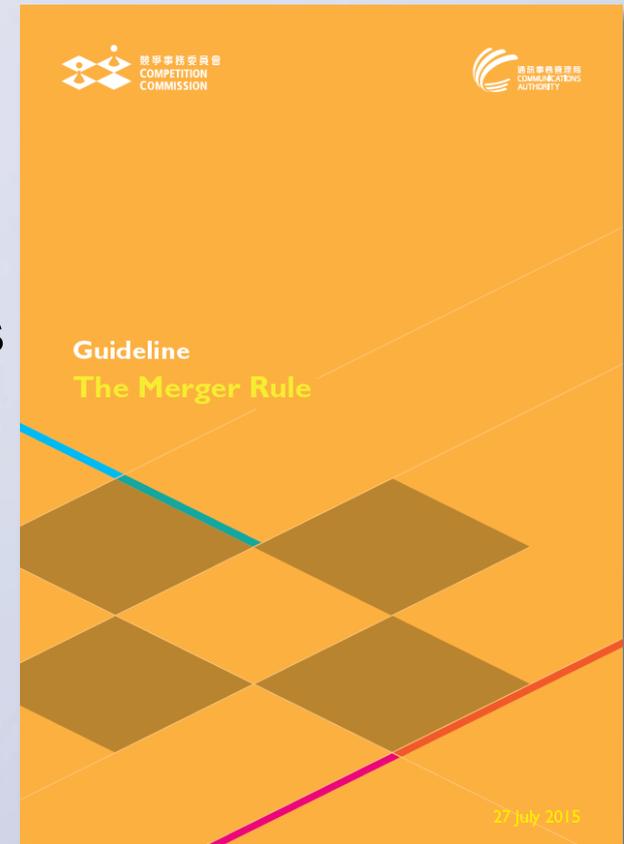
- Meaning of a “merger”:
  - undertakings merge and cease to be independent of each other
  - acquisition of direct or indirect control of the whole or part of an undertaking (including the creation of a joint venture on a lasting basis)
  - acquisition of the whole or part of the assets of an undertaking
- The Merger Rule only applies to mergers involving 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*

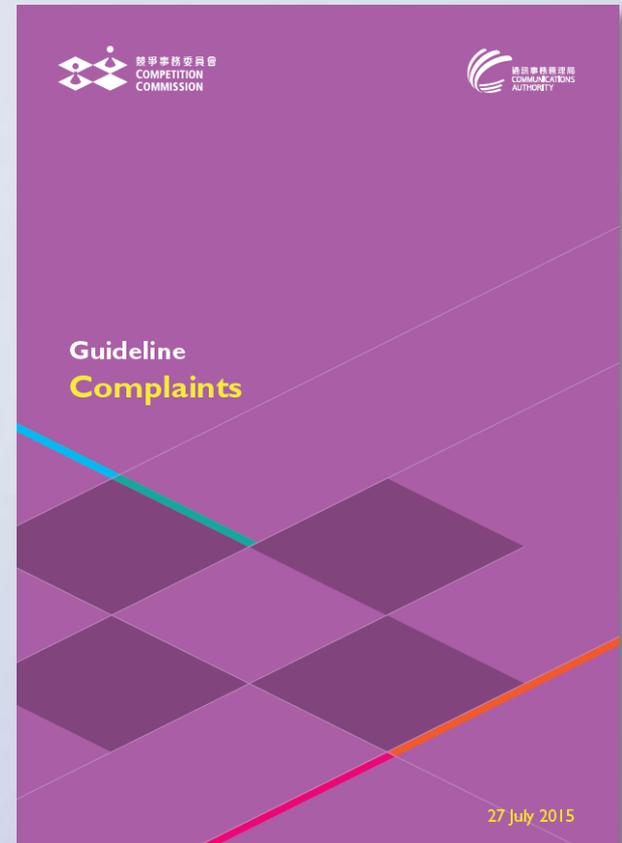
# Guideline on Merger Rule

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



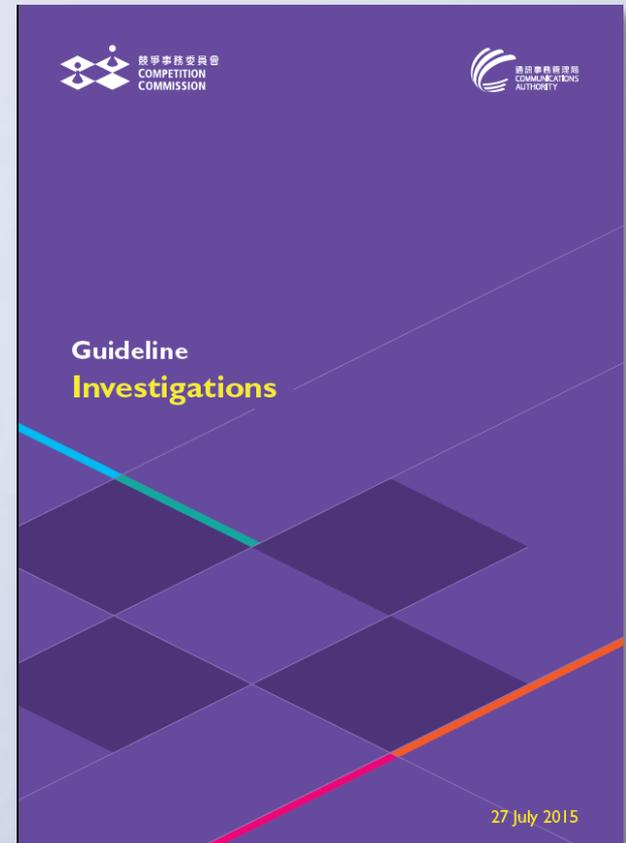
# Guideline on Complaints

- Describes the manner and form in which complaints may be made and how a complaint will be handled
- 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 where the complainant no longer wishes to cooperate with the Commission/CA



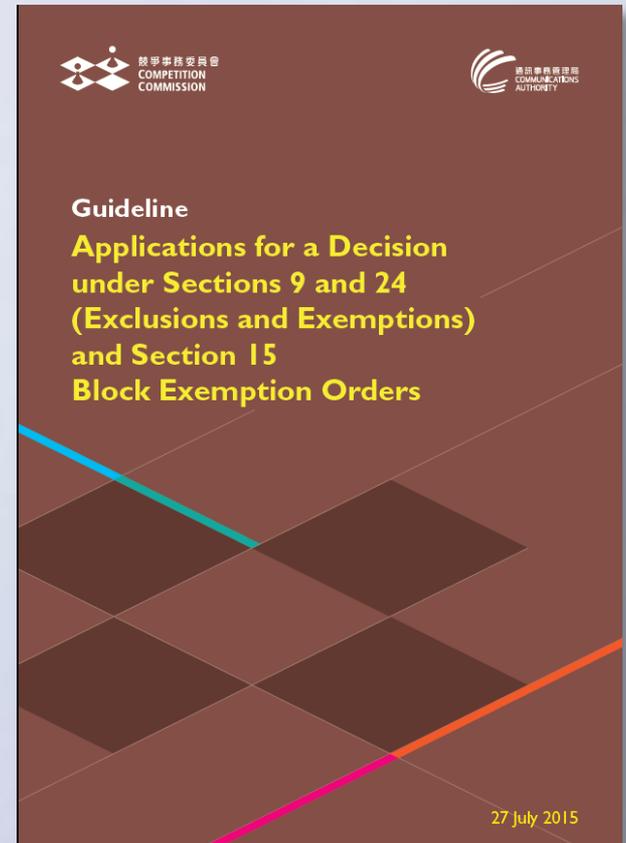
# Guideline on Investigations

- Two-stage approach:
  - Initial Assessment Phase
    - Generally a view has not yet been formed on whether there is reasonable cause to suspect a contravention of the competition rules
    - Information will be sought on a voluntary basis
  - Investigation Phase
    - A view has been formed that there is reasonable cause to suspect a contravention of the competition rules
    - compulsory evidence gathering powers under the CO may be used
- Discussions on the use of various investigation powers and handling of confidentiality



# Applications Guideline

- No requirement for undertakings to apply for exclusions or exemptions
- However, undertakings may elect to apply for decisions for exemptions or exclusions, or block exemption orders
- This Guideline sets out the procedure to be followed by applicants in making applications, and the process that the Commission/CA will follow in considering the applications



# Way Forward

- The CO is expected to commence full operation on 14 December 2015
- Upon full operation of the CO, the existing competition provisions in the Telecommunications Ordinance will be repealed subject to transitional arrangements
- CA is working with the Commission to complete all the necessary preparatory works for full commencement of the new cross-sector competition law

# Further information

- Guidelines are available on
  - CA's website ([www.coms-auth.hk](http://www.coms-auth.hk))
  - Commission's website ([www.compcomm.hk](http://www.compcomm.hk))

# Thank you