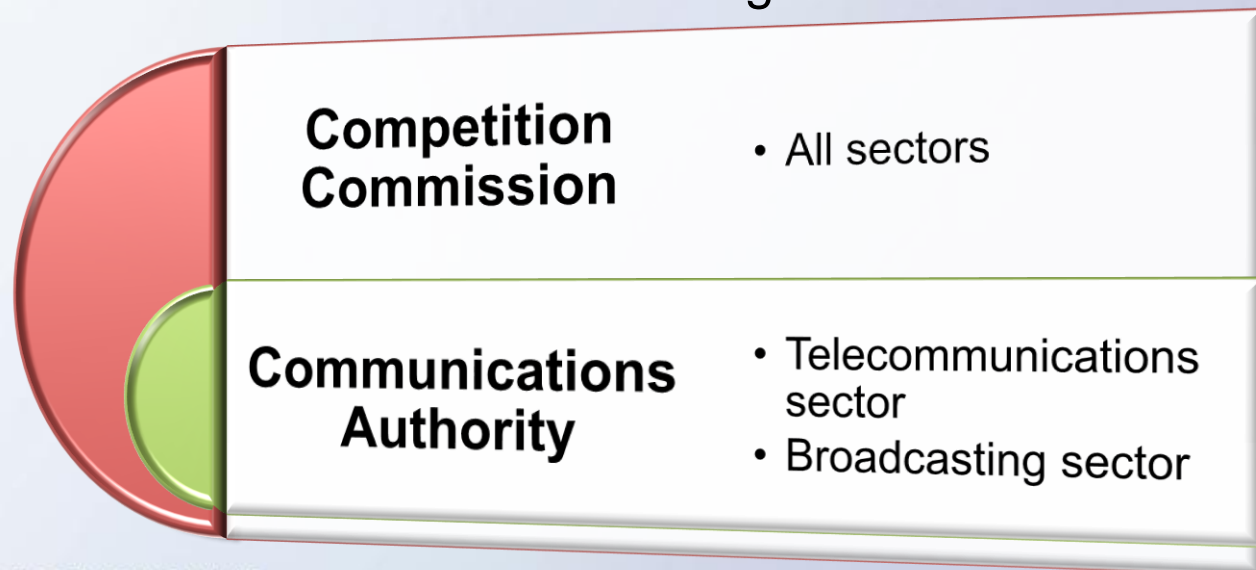


Competition Guidelines Issued under the Competition Ordinance

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

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

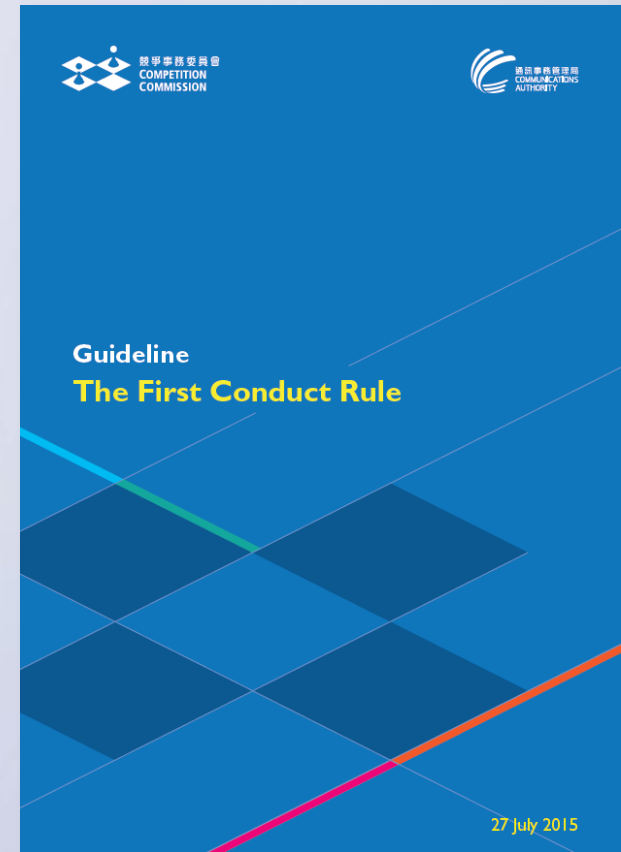
First Conduct Rule

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

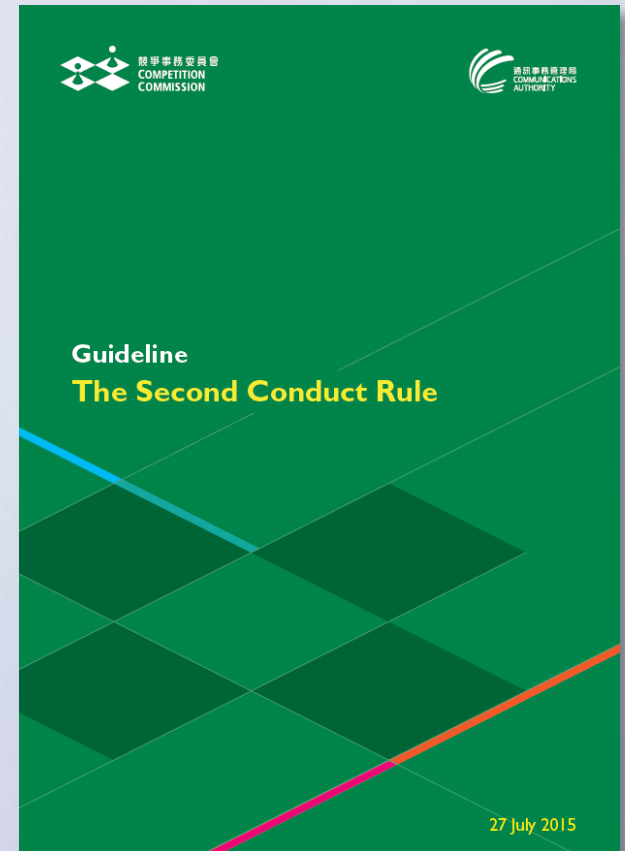
- Targets an undertaking where
 - the undertaking has substantial market power (“SMP”) in a market
 - it abuses its SMP
 - by engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong

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

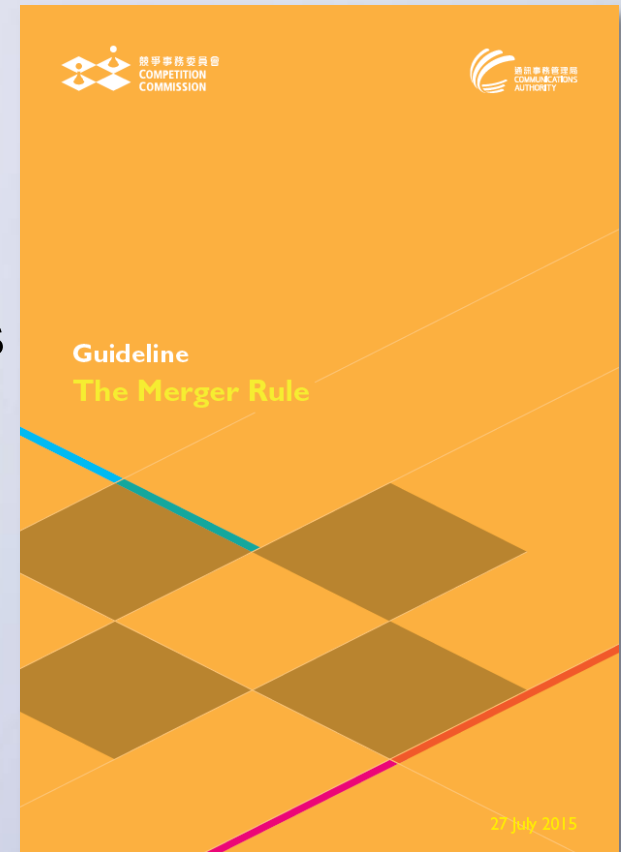
- Meaning of a “merger”:
 - undertakings merge and cease to be independent of each other
 - acquisition of direct or indirect control of the whole or part of an undertaking (including the creation of a joint venture on a lasting basis)
 - acquisition of the whole or part of the assets of an undertaking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

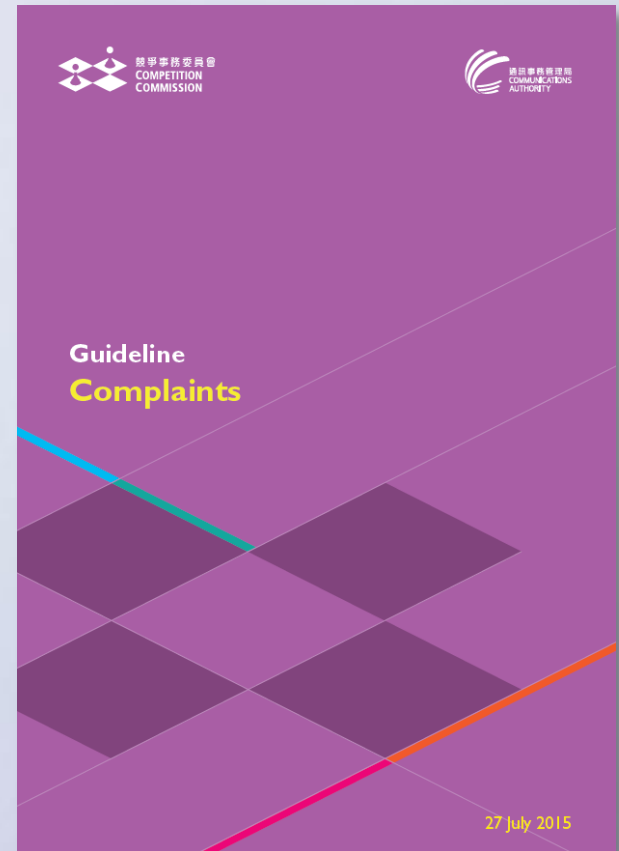
Guideline on Merger Rule

- 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



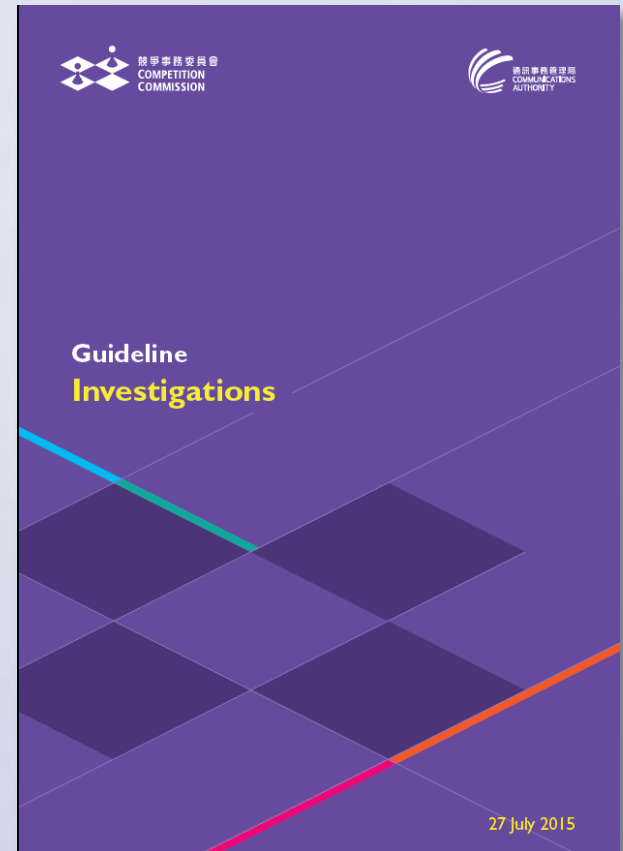
Guideline on Complaints

- 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



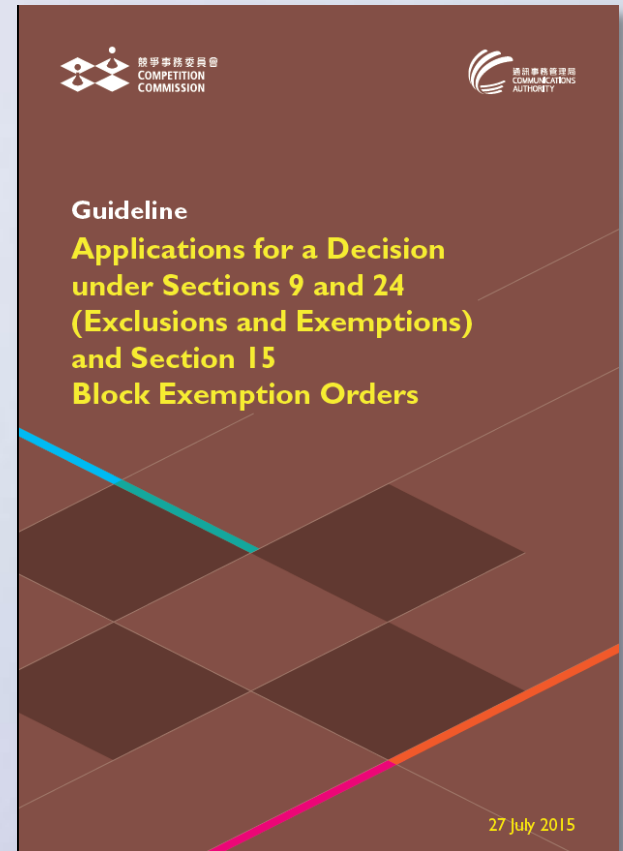
Guideline on Investigations

- 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)
 - Commission's website (www.compcomm.hk)

Thank you