

Issued on: 17 November 2014

**HKIoD views and comments on  
certain Draft Guidelines to be made under the Competition Ordinance**

The Hong Kong Institute of Directors would like to present views and comments on certain Draft Guidelines to be made under the Competition Ordinance. The Draft Guidelines that are the subject of this submission include:

- Draft Guideline on Complaints - 2014
- Draft Guideline on Investigations - 2014
- Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders - 2014

; each issued for public comment on 9 October 2014.

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**Timelines for assessment and investigation of complaints**

We think the Guidelines should include indicative timelines for the assessment of complaints and for the completion of investigations. We understand that an example of such indicative timelines can be found in the Communications Authority's Competition Investigation Procedures.

**Timelines for review of applications for exclusions and exemptions**

Likewise, we think the Guidelines should include indicative timelines for review of applications for exclusions and exemptions.

**Commission's discretion to pursue case or not  
(Section 4.1 and 4.3 of Draft Guideline on Complaints)**

We can appreciate that the Competition Commission will have discretion to decide whether to pursue a case or not. We would only caution that a decision if injudicious, or seen to be so, could weaken the credibility of the Commission in carrying out its mission.

**Next steps following assessment of complaints  
(Section 5.1(b) of Draft Guideline on Complaints)  
(also, Section 4.1(c) of Draft Guideline on Investigations)**

The Competition Commission may wish to elaborate on the factors that would warrant referring a matter to another Government agency (or conducting market study).

**Matters not warranting further investigation  
(Section 5.3 of Draft Guideline on Investigations)**

Section 5.3 suggests there would be matters that, despite a reasonable cause to suspect a contravention, would still not warrant further investigation. The Competition Commission may wish to elaborate on the basis or factors that would call for such a determination.

### **Status of complaints**

#### **(Section 5.4 of Draft Guideline on Complaints)**

We can appreciate that, for operational reasons, the Complainant is unlikely to be advised of the status of a matter under consideration. But when consideration of the matter is completed, the Complainant deserves to be informed as a must, not just “likely to be informed”.

### **On Complainant’s identity**

#### **(Section 2. of Draft Guideline on Complaints)**

We can appreciate that, by design or by default, some individuals will seek to make complaints anonymously. Some of our members, however, consider it essential to require a Complainant to provide some details and information at the time of the initial contact. For these members of ours, some requirement to provide details from the start will reduce the likelihood of frivolous unsubstantiated charge being made at random, and thereby assist in keeping the complaint and investigation exercise serious.

### **On publicising the fact of a complaint**

#### **(Section 3 of Draft Guideline on Complaints)**

#### **(also, Section 6 of Draft Guideline on Investigations)**

We think the Guidelines should give Complainants the freedom to choose whether to make public the fact they have made a complaint. Wider knowledge of the fact of complaint could in fact encourage persons with information or similar complaints to come forward to offer additional evidence, as contemplated in Section 5.3 of the Draft Guideline on Complaints. There will, however, be occasions where the fact of a complaint being publicised could indeed impede or compromise the ability to investigate. The policy could be for Complainants to have the freedom to publicise unless there is good (but relatively rare) basis for the Competition Commission to specifically enjoin the Complainant from doing so. The Guidelines can attempt to set out the parameters of such basis.

### **Commission should normally not disclose Complainant’s identity**

#### **(Section 3 of the Draft Guideline on Complaints)**

While Complainants should have the freedom to choose whether to make public the fact they have made a complaint, the Competition Commission should as a norm NOT disclose the Complainant’s identity. The Guidelines should clarify this policy and should also set out the relatively rare circumstances that the Competition Commission would consider it “necessary” (per Section 3.4 of the Draft Complaints Guidelines) to make a disclosure of the Complainant’s identity.

### **Commission should consult the informant prior to disclosure of information given**

#### **(Section 6.9 of the Draft Guideline on Investigations)**

The Commission must always (not just “in most cases”) endeavour to notify and consult the person who provided confidential information prior to the Commission making a disclosure of such confidential information. For this purpose, the Guidelines should expressly include complainants as informants, and to further clarify that a Complainant’s identity is to be treated as confidential information.

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