

18th floor, United Centre  
95 Queensway, Hong Kong  
香港金钟道95号统一中心18楼  
Telephone 电话 +852 2868 0789  
Fax 传真 +852 2868 1504  
DX 009225 Central 1



罗夏信律师事务所  
STEPHENSON HARWOOD

**Competition Commission**

Room 3601, 3607-10,  
36/F, Wu Chung House  
197-213 Queen's Road East  
Wanchai  
Hong Kong

Email  
Direct line  
Direct fax  
Our ref

8<sup>th</sup> December 2014

Dear Sir/Madam,

**Re: Comments on the draft Competition Rule Guidelines**

I would like to commend the Competition Commission on publishing the draft Competition Rule Guidelines ("Draft Guidelines"), which would provide better guidance to businesses in ensuring compliance with the new Competition Ordinance, and clarity on the Commission's interpretative stance of the Competition Ordinance.

**1. Vertical price-fixing**

In the Draft Guidelines, the Commission indicated in paragraphs 3.7, 5.5 and 5.6 of the Draft Guidelines that resale price maintenance ("RPM") agreements are considered to have the "object" of harming competition, and thus subject to stricter treatment under the Competition Ordinance with respect to Serious Anti-competitive Conduct.

It is submitted that such a strict *per se* illegal approach towards RPM may not be suited to the Hong Kong context. As a regional trading hub, Hong Kong serves as a distribution channel for goods and services flowing in and out of China and other neighbouring markets. Whether a RPM arrangement would pose competitive concerns to the Hong Kong market should be subject to a closer competitive analysis, and not be automatically consigned to the category of hard-core conduct.

Further studies of the effect of RPM in an open economy like Hong Kong with substantial entrepot activities should be undertaken, with a more nuanced approach towards RPM. Comparative studies can be made of the treatment in Singapore, that is similarly a small but open economy, where a benign approach is taken towards vertical arrangements including RPM.

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**PARTNERS** Hilda Chiu, Ian Devereux, Martin Downey, Malcolm Kemp, Giovanna Kwong, Voon Keat Lai, Lynia Lau, Lui Chun Fai, Mark Reed  
Andrew Rigden Green, Phillip Rompotis, Jamie Stranger, Ivan Tan, Paul Westover, Simon Wong, Stephanie Wong, Hongkai Zhou

**CONSULTANTS** Anthony Chan, Roy Chan, Pamela Chu, Jezamine Fewins, Peter Hodson, Alice To, Yeeling Wan

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## **2. Assessing anti-competitive effect**

In addition, as the economy of Hong Kong is closely intertwined with the mainland China, further guidance would be useful on how paragraphs 3.11 to 3.18 of the Draft Guidelines should be applied in assessing anti-competitive effect for business transactions that straddle the two markets in Hong Kong and mainland China. If a distribution agreement, for example, covers the distribution of goods mainly destined for the mainland market, it is possible that the anti-competitive effect on the geographic market in Hong Kong is limited. The Draft Guidelines have provided ample case studies in the form of hypothetical examples on different types of anti-competitive conduct, but it should be useful to shed light on how to approach the applicability of the Competition Ordinance vis-à-vis cross-border transactions.

Overall, the Draft Guidelines provide much needed guidance for the public. As a new antitrust regime, it is submitted that an incremental approach to implementing the Competition Ordinance should be adopted, and to avoid Type I over-enforcement error in the early days. As the competition law regime is rolled out over time, and real life experiences accumulate, enforcement priorities and interpretative stance can be fine-tuned, with continuing consultations between the Commission, businesses and legal advisors. These should contribute towards realizing the long-term benefits, and strengthening public understanding and compliance with the Hong Kong competition law regime.

Yours faithfully



**CF Lui**

**Partner**

**STEPHENSON HARWOOD**