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November 7, 2014

Submissions on Draft Guidelines
Competition Commission
36/F, Room 3601
Wu Chung House
197-213 Queen's Road East
Wanchai, HONG KONG

Re: Joint Comments on Hong Kong Draft Procedural Guidelines under Competition Ordinance

Dear Sir/Madam:

On behalf of the American Bar Association ("ABA") Sections of International Law and Antitrust Law (the "Sections"), we are pleased to submit the attached comments on guidelines under the Hong Kong Competition Ordinance issued by its Competition Commission and Communications Authority.

Please note that these views are being presented only on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the position of the ABA.

If you have any questions after reviewing these comments, we would be happy to provide further input.

Sincerely,



Marcelo E. Bombau
Chair, Section of International Law



Howard Feller
Chair, Section of Antitrust Law



COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF
ANTITRUST LAW AND INTERNATIONAL LAW ON DRAFT GUIDELINES
ISSUED BY THE HONG KONG COMPETITION COMMISSION AND
COMMUNICATIONS AUTHORITY REGARDING COMPLAINTS,
INVESTIGATIONS, AND APPLICATIONS UNDER THE COMPETITION
ORDINANCE

November 7, 2014

The views stated in this submission are presented only on behalf of the Antitrust Law and International Law Sections of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the Association.

The Sections of Antitrust Law and International Law of the American Bar Association (“ABA”) (together, the “Sections”) welcome the opportunity to provide comments on the Draft Guideline on Complaints (“Draft Complaints Guideline”), Draft Guideline on Investigations (“Draft Investigations Guideline”), and Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Order (“Draft Applications Guideline”) (together, the “Draft Guidelines”) issued by Hong Kong’s Competition Commission and Communications Authority (the “Commission” and “Authority”). The Sections commend the Commission and Authority for their commitment to provide comprehensive, transparent, and practical guidelines for companies, their legal advisors and others concerned with compliance with the Competition Ordinance, and their decision to solicit public comment. Providing for public comments helps both to gain support for the enforcement efforts and approach of the Commission and Authority, and to identify concerns, questions and ambiguities before enforcement begins.

The Sections’ comments are the work of members of the Sections who practice competition law in the United States and in other jurisdictions around the world. The Sections are generally very supportive of the content of the proposed guidelines. Our comments (i) support the establishment of benchmarks for the timing of investigations, (ii) recommend generally allowing complainants to disclose that they have submitted a complaint to the Commission, (iii) clarify that the Commission and Authority would disclose a complainant’s identity only in exceptional situations, and (iv) strengthen the guidance providing that the Commission will endeavor to notify and consult the provider of confidential information prior to disclosing such information.

Timelines

The Commission may wish to consider some benchmark timelines to be included for its initial assessments, investigation of complaints, and consideration of applications for exemptions and exclusions. In this regard, the Sections note the benchmarking for completion of investigations in the existing guidance for the telecommunications sector provided by the

Authority in its Competition Investigation Procedures. For example, those guidelines state at paragraph 46:

The CA, depending on the complexity of the case, will aim to complete full investigations within 12 months of receiving a complaint, including the Preliminary Enquiry stage. The target timescales set out in these guidelines are indicative and will be kept under review. They do not constitute a binding commitment on the CA although the CA would be prepared to explain any delays in the event that they occur. Further, if the CA finds that a case merits urgent action, the CA will take all steps to expedite the process so as to provide an effective remedy to a justified complaint. The aim of the CA will always be to complete investigations speedily and effectively without compromising the quality of the investigation or the rights of the parties to the case.¹

The Sections suggest that the Commission and Authority include similar benchmarks in the Draft Guidelines for the review and investigation of complaints and for the review of applications for exclusions and exemptions and block exemption orders.

Confidentiality

The Sections have comments on two areas involving confidentiality discussed in Section 3 of the Draft Complaints Guideline and Section 6 of the Draft Investigations Guideline. Our first comment relates to the freedom of complainants to publicize the fact that they have filed a complaint; our second comment relates to the disclosure of confidential information, including the identities of complainants.

Complainants' freedom to publicize their complaints. The Commission and Authority request that complainants keep their complaint confidential, citing the possibility that the government's ability to investigate a complaint may be hindered if the fact of the investigation or the complaint is "widely known" or "publicized."² The Draft Guidelines do not explain why the Commission believes its ability to investigate a matter would generally be compromised if the complaint or investigation becomes public knowledge. While publicity regarding a complaint could potentially impede the effective investigation of the matter (e.g., the subject of an investigation might destroy relevant evidence), an investigation could in some cases also benefit from wider knowledge among the general public of the complaint. For example, publicity about the complaint could encourage persons with relevant information and even other similarly situated undertakings to come forward to provide information to the government.³ Further, a "widely known" complaint or investigation may provide an opportunity to educate the public about the new law. Hence, the Sections respectfully suggest that complainants should be

¹ http://www.coms-auth.hk/filemanager/common/policies_regulations/cop/guideline_compe_proce_e.pdf.

² Draft Complaints Guideline at Section 3.2; Draft Investigations Guideline at Section 6.2.

³ The Commission appears to acknowledge the possibility in Section 5.3 of the Draft Complaints Guideline, stating that while the Commission may initially decide to take no further action on a Complaint, it "may later reconsider the issues raised in a complaint ... where additional evidence has been obtained or where a pattern of conduct arises which warrants further consideration." "Additional evidence" or evidence of "a pattern of conduct" could be obtained as a result of publicity of the initial complaint or investigation.

free to publicize the fact that they have filed a complaint, unless the Commission or Authority specifically requests that the particular complaint be kept confidential.

Disclosure of Confidential Information. The Commission notes in the Draft Investigations Guideline that “Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to the Commission.”⁴ Section 6.4 of the Draft Investigations Guideline provides examples of information that the Competition Ordinance deems “to be confidential by its very nature,” including “the identity of any person who has given information to the Commission.”⁵ Moreover, “[u]nder section 123 of the Ordinance, a person may obtain the general confidentiality protection of section 125 of the Ordinance by clearly identifying the part of the information provided to the Commission considered to be confidential and providing reasons in support of their claim for confidentiality in writing.”⁶

Nonetheless, Section 3.4 of the Complaints Guideline provides that “[t]he Commission will not normally disclose the details of a Complainant without their consent. In some cases, however, it may be necessary to disclose the Complainant’s identity. This includes where disclosure is ordered by the courts, or where the Commission considers it necessary to make a disclosure in the performance of its functions.” In addition, “Section 125(I)(b) of the Ordinance permits the disclosure of information by the Commission in the performance of any of its functions, or in carrying into effect or doing anything authorized by the Ordinance.”⁷ When disclosures are to be made in accordance with a court order or by law, Section 6.9 of the Investigations Guideline stipulates that “[i]n most cases, the Commission will endeavor to notify and consult the person who provided confidential information prior to making such a disclosure.”

The Sections suggest that the guidelines clarify that “any person who has given information to the Commission” also includes complainants, and that “the part of the information provided to the Commission considered to be confidential” also includes the identity of the complainant. In order to encourage complainants to come forward to the Commission, and to assure complainants that they would be protected from potential retaliation from the subject of the complaint if their identity is made public, the Sections submit that the final guidelines should clarify and provide examples of situations in which disclosure of a complainant’s identity may be deemed “necessary.” The Sections suggest that the final guidelines expressly clarify that situations in which a complainant’s identity will be disclosed are the exceptions, rather than the rule. The Sections also respectfully suggest that the last sentence of Section 6.9 in the final Investigations Guideline omit the phrase “[i]n most cases,” so that the sentence would read “The Commission will endeavor to notify and consult the person who provided confidential information prior to making such a disclosure.” The Sections appreciate the balance between transparency and confidentiality, and respectfully suggest that the studies conducted by and in connection with the International Competition Network regarding competition agency

⁴ Draft Investigations Guideline at Section 6.3.

⁵ Id. at Section 6.4(c).

⁶ Id. at Section 6.5.

⁷ Id. at Section 6.6.

transparency and confidentiality practices worldwide may be helpful to the Commission and Authority as they further refine their procedures.⁸

Conclusion

The Sections appreciate the opportunity to provide these comments and are available to provide additional comments or to participate in any further consultations that may be helpful to the Commission and Authority. The Sections also plan to submit comments on the draft First and Second Conduct Rules Guidelines during the relevant consultation period.

⁸ See, ICN Report on Competition Agency Confidentiality Practices (2014), available at: <http://internationalcompetitionnetwork.org/uploads/library/doc1014.pdf>; ICN Report on Competition Agency Transparency Practices (2013), available at: <http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf>; and Sean Heather, James Rill, Charles Webb, Summary Responses: The Treatment of Confidential Information in Competition/Antitrust Administrative Proceedings (April 2014) available at: https://www.uschamber.com/sites/default/files/A%20Practitioner%E2%80%99s%20Survey%20on%20the%20Use%20of%20Confidential%20Information%20in%20Competition%20Proceedings%20-%20April%202014_1.pdf.