Comments on the Draft Guideline on the First Conduct Rule and the Draft Guideline on the Second Conduct Rule by Mr. Kelvin Hiu Fai Kwok[1]

Introduction

1. This submission to the Competition Commission (**the "Commission"**) contains the author's comments on the *Draft Guideline on the First Conduct Rule* (**the "First Conduct Rule Draft Guideline"**) and the *Draft Guideline on the Second Conduct Rule* (**the "Second Conduct Rule Draft Guideline"**) recently issued by the Commission and the Communications Authority.

2. Apart from the two guidelines, this submission makes frequent reference to the following works:

   (1) Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) (**"Whish & Bailey"**); and

   (2) Kelvin Kwok, 'The New Hong Kong Competition Law: Anomalies and Challenges' (2014) 37 World Competition 541[2] (**the "Article"**).

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3. Para. 2.3: The Commission may wish to address any exceptions to the general rule that "any activity consisting in offering goods or services in a market regardless of whether the activity is intended to earn a profit" is an "economic activity", e.g. offering goods or services based on solidarity: see Whish & Bailey pp. 87-90.

4. In this connection, the Commission may wish to clarify whether it considers the subsidiary (which is not itself a statutory body) of a statutory body to benefit from the s. 3 exclusion for statutory bodies: see Marc Waha & Julienne Chang, *A Competition Law for Hong Kong*,[3] p. 3.

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[2] Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524763 .

[3] Available at: https://www.competitionpolicyinternational.com/assets/Free/cpiasiawaha-chang.pdf .

5. Paras. 2.6 and 2.7: The Commission may consider whether to adopt a presumption of "decisive influence" where e.g. entity B is a wholly-owned subsidiary of entity A: see *Akzo Nobel NV v Commission* [2009] ECR I-8237.

6. Para. 2.23 (and para. 6.14): As to whether "a non-binding recommendation of a trade association will amount to a decision", the Commission should consider not only "the association's objective intention", but also "whether members in the past have tended to comply with recommendations that have been made, and whether compliance with the recommendation would have a significant influence on competition within the relevant market" (Whish & Bailey pp. 111-112).

7. Para. 3.6: It would be more accurate to delete the word "merely" from the first sentence if the Commission intends to define "object" of an agreement in accordance with EU competition law: see Whish & Bailey p. 118 ("'object' in this context does not mean the subjective intention of the parties when entering into the agreement").

8. Para. 5.6: The Commission notes (correctly) that resale price maintenance (**"RPM"**) falls within "a literal reading of the definition of Serious Anti-competitive Conduct". However, the Commission notes in the same paragraph that it "considers ... that [RPM] may amount to Serious Anti-competitive Conduct in certain cases". The Commission may wish to clarify what cases of RPM involve Serious Anti-competitive Conduct and what cases of RPM do not.

9. Para. 6.35: The Commission may wish to clarify whether competitors sharing information on future prices/quantities falls within the definition of Serious Anti-competitive Conduct, and whether other kinds of exchange of information fall within such definition.

10. Para. 6.40: The Commission considers that "the more competitively sensitive the information", "the more likely it is that the information exchange will have the effect of harming competition". Footnote 17 states that "[c]ompetitively sensitive information includes information relating to price or elements of price, customers, production costs, quantities, turnover, sales, capacity, product quality, marketing plans, risks, investments, technologies and innovations". The Commission may wish to clarify the *relative degree of sensitivity* for the types of information listed in footnote 17.

11. Para. 6.65: The Commission may wish to clarify whether the fixing of recommended or maximum prices falls within the definition of Serious Anti-competitive Conduct, and

whether the Commission distinguishes between *horizontal* and *vertical* recommended/maximum price fixing in this regard (cf. para. 5.6 and footnote 15).

12. Para. 6.76: The Commission may wish to clarify whether exclusive distribution and exclusive customer allocation (as defined in para. 6.76) fall within the definition of Serious Anti-competitive Conduct by "allocating sales, territories, customers or markets for the production or supply of goods or services" (cf. para. 5.6 and footnote 15).

13. The First Conduct Rule Draft Guideline only discusses joint buying and joint production in detail, but not other types of joint ventures such as joint commercialisation and joint R&D. The Commission should consider providing more guidance on its intended analysis of other types of joint ventures.

14. Annex, para. 7.1: The Commission should promptly consider whether to exercise its power under s. 15 to issue block exemption orders in favour of vertical agreements and other types of agreements: see Whish & Bailey pp. 169-170.

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15. Despite what is said at p. 11 of the *Overview of Draft Guidelines under the Competition Ordinance – 2014*,[4] the Commission may wish to re-consider whether to include some indicative market share thresholds for substantial market power for the sake of legal certainty. In this regard, the Commission may refer to the views of the author at § 3.2 (pp. 551-553) of the Article.

16. Regarding "object or effect" under the second conduct rule, the Commission may refer to the views of the author at § 3.3 (pp. 554-556) of the Article.

17. Paras. 4.5 and 5.5(b): Regarding the relationship between "object" and "subjective intention" and the latter's pertinence to predatory pricing, see the views of the author at pp. 555-556 of the Article as extracted below:

"[I]t remains doubtful that subjective intention should be accorded significant weight in competition law analysis, especially in the Article 102 context in which the economic approach dominates. ... The US courts take a particularly sceptical view of intent

[4] Available at: http://www.coms-auth.hk/filemanager/en/content_925/Overview_Oct_2014_en.pdf .

evidence in cases of predatory pricing. It was held in Barry Wright Corporation v. ITT Grinnell Corporation [724 F.2d 227 (1st Cir. 1983)] that:

> *'[I]ntent to harm' without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,' and long-term effects on consumers depend in large measure on competitors' responses. . . . Moreover, if the search for intent means a search for documents or statements specifically reciting the likelihood of anticompetitive consequences or of subsequent opportunities to inflate prices, the knowledgeable firm will simply refrain from overt description. . . . Thus, most courts now find their standard, not in intent, but in the relation of the suspect price to the firm's costs.*

However, intent evidence is of continual relevance in predatory pricing cases in the EU[.] ... It is less of a controversy if intent evidence is only used 'to interpret facts and to predict consequences' and the focus remains on the likely effect of below-cost pricing (and other types of unilateral conduct). But it will be unwise for the Hong Kong authorities to prosecute or condemn firms simply based on the injurious intent behind their conduct without regard to the actual or potential effects thereof. In short, 'object' under the second conduct rule should not be treated as synonymous with 'intention'."[5]

18. Paras. 4.8 and 5.5(a): The Commission appears to adopt some kind of *per se* rule for pricing below average variable cost. Regarding the relationship between "object" and *per se* rules, see the views expressed at pp. 554-555 of the Article as extracted below:

"One possibility is that ['object or effect' under the second conduct rule] refers to the difference between the per se and the effects-oriented (or 'rule of reason') approach to treating single-firm conduct as an abuse of market power. The EU authorities have developed so-called 'per se rules' for exclusive dealing and loyalty rebates as instances of abuse of dominance under Article 102 TFEU. ... Nevertheless, advancement towards increasingly effects-oriented and economically-grounded enforcement of Article 102 TFEU is confirmed by the recently-released Guidance on the Commission's enforcement priorities in applying Article [102][.] ... The 'object or effect' distinction under the second conduct rule could be interpreted to mean that certain types of conduct (say, exclusive dealing and loyalty rebates) are 'abuses by object, so that there is no need to prove effects',[citing Whish & Bailey at p. 200] whereas others must be assessed by their

[5] Reprinted from World Competition, Volume 37, Issue 4, December 2014, pp. 555-556, with permission of Kluwer Law International.

effects as to whether they are anticompetitive and hence abusive. However, the range of per se illegal conduct should be narrowly circumscribed, in line with the tendency in the EU and the rest of the world."[6]

19. The Second Conduct Rule Draft Guideline focuses on exclusionary abuses (see para. 5.1) and does not discuss exploitative or discriminatory abuses (except that footnote 20 mentions "excessive pricing" and "discriminatory pricing"). The Commission may wish to clarify whether it considers exploitative abuses and discriminatory abuses to be regulated by the second conduct rule: see pp. 545-546 and 551 of the Article.

Conclusion

20. Should the Commission have any questions on the comments above, please do not hesitate to contact me at

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