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Ms Rose Webb
Senior Executive Director
Competition Commission
36/F., Room 3601
Wu Chung House
197-213 Queen's Road East
Wanchai, Hong Kong

10 December 2014

Dear Ms Webb,

Submissions on Draft Guidelines

In response to the public consultation of the Draft Guidelines published by the Competition Commission, please find the comments by the Federation of Hong Kong Industries as listed below:

1. Concerns on Draft Guidelines on Complaints

1.1 Para 2.1(b) indicates that the Commission will accept anonymous complaints. This may invite many frivolous complaints. According to clause 2.4(e), the Commission normally needs to get further details from the complainant including his basic personal details. The two clauses contradict each other.

1.2 On assessment of complaints, para 4.3 states that the Commission will exercise its discretion to decide which complaints warrant further assessment. One of the factors it will take into account is the Commission's current enforcement strategy, priorities and objectives (para 4.3(b)). This implies that the Commission's enforcement strategy, priorities and objectives will be changed from time to time. Our concern is whether the public will be updated/informed when such changes occur. Is there any transparent mechanism to endorse such changes? Or will this be just an internal operational matter? We consider that priorities in the enforcement strategy should not target SMEs, but rather the cartel behaviour of players with substantial market share should be of utmost concern.

2. Concerns on Draft Guidelines on Investigations

2.1 The Commission will make public the actions it is taking in some circumstances. Any public naming should be done only where fully justified, otherwise the reputation and image of the company concerned will be fairly tarnished.

2.2 According to the Guidelines, if proceedings are commenced in the Tribunal, the Commission will issue a press release on the case. Where a company makes a Commitment which is accepted by the Commission that negates the need for further investigation or Tribunal proceedings, the Commitment will be put on a public register.

2.3 While there may be justifications for the afore-mentioned disclosures, we are concerned that according to the Guidelines, where the Commission has reasonable cause to believe that there has been a contravention of the First Conduct Rule, it will issue a warning notice to the company concerned before commencing Tribunal proceedings. According to para 7.18 of the Guidelines, such warning notices will be published on the Commission's websites. Since the warning notice is issued before the completion of the investigation or the case being justified for commencing Tribunal proceedings, we consider it unjust to publish such warning notices in the websites as the company will be incriminated in public before a conclusion is reached on the case.

2.4 According to para 5.10 and 5.11, the Commission can seek extensive information under section 41 of the Competition Ordinance for investigation purpose. The information may be in different forms (hard copies, servers, databases) and may include confidential information (such as personal information like contact details of relevant persons, list of customers; and other commercially sensitive information).

2.5 The Commission has the power to publish confidential information in the course of its work. Para 6.7 of the Guidelines states that there are circumstances where the Commission may have to disclose confidential information to other persons to the extent necessary to seek clarifications or further evidence. Section 126(1)(c) of the Ordinance also provides that a disclosure of confidential information made by the Commission in accordance with any court order or any law is to be regarded as a disclosure made with lawful authority.

2.6 Section 46 of the Ordinance stipulates that a person is not excused from providing any information or document to the Commission where an obligation of confidence is owed to any other person. The business community is concerned that the disclosure of confidential information may lead to claims and lawsuits from third parties, e.g. as a result of disclosure of commercially sensitive information or personal data. The Government should ensure that enterprises are not affected by claims or other liabilities due to disclosure of confidential information required under the Ordinance.

3. Concerns on Draft Guidelines on First Conduct Rules

3.1 It is noted in para 3.3 of the Guidelines that, when considering whether an agreement has an anti-competitive effect, the Competition Commission will consider not only the actual effect but also potential effects. While it is reasonable for the Commission to take action on conducts with proven anti-competitive effects, we question whether it is justified for the Commission to guess the "potential effects" and penalize companies for what has not taken place or may not take place.

3.2 Para. 3.7 of the Guidelines states that in case of vertical agreements between parties at different levels of the supply chain (which presumably covers brand holder/principal and retail agents), “Resale Price Maintenance” (RPM) agreements will be considered as anti-competitive. Furthermore, according to para 5.6, RPM in vertical agreements may be considered as serious anti-competitive conduct against which the Commission may take legal action without prior warning.

3.3 RPM usually relates to minimum price being set. But para 6.66 and 6.67 say that even “recommended” price and “maximum” price may not be free of problems and their effect on competition has to be assessed. If they have the effect of facilitating price convergence, they will be seen as RPM.

3.4 It is common for many brand holders to engage licensed distributors or agents to offer their products. In addition, brand holders usually use multiple sales channels, e.g. operating their own physical shops, engage distributors and even sell on the internet. Pricing strategy, in the form of RPM or recommended price is very common. Such pricing strategy is necessary for holistic business planning for protecting the positioning of the brand, and the designated distributor system is a cost effective way for the brand holder to open up new markets. But such pricing strategy is seen as anti-competitive under the Competition Ordinance, unless they can be justified to fall under the exclusions under Schedule 1 to the Ordinance, such as the argument that the agreements concerned will enhance overall economic efficiency (by improving production or distribution, promoting economic progress etc, but at the same time allowing consumers a fair share of the benefits and will not eliminate competition in respect of a substantial part of the product in question). The same applies to exclusive distribution and exclusive customer allocation, which again is not uncommon in the business world. According to the Guidelines, the competitive impact of such arrangements has to be assessed to see whether it is a justified exclusion based on the economic efficiency arguments under Schedule 1.

3.5 Given the novelty of the Competition Ordinance in Hong Kong and the huge variety of commercial arrangements in the business world, the business sector is likely to be unsure whether their RPM arrangement or distribution models will contravene the law or can be justified as exclusions under Schedule 1. According to the Guidelines, there is no requirement for a company to apply to the Commission to secure the benefit of an exclusion. But a company may choose to seek greater certainty by applying to the Commission under section 11 of the Ordinance for a decision in respect of an exclusion. But the Commission is NOT required to accept all such applications. The Commission will accept an application only under certain conditions e.g. where there is no clear precedence in case law. This will create great uncertainty for those doing business, fearing that they may violate the law inadvertently. This is especially so if the conduct concerned is considered as being a serious anti-competitive act against which the Commission can take legal action without prior warning. (The same concern applies to the Second Conduct Rule. The Commission may or may not act on an application for exemption made under section 26.)

3.6 We believe the vast majority of enterprises are law abiding. Since the Competition Ordinance is new to Hong Kong, we consider it desirable for the Commission to give warning to companies when they detect a problem, whether the contravening act is a serious anti-competitive conduct or less serious conduct, before taking legal action. Companies will then have the chance to stop or correct any inadvertent mistakes.

3.7 The concept of “intra-brand competition” is referred to in para 6.77 of the Guidelines. A brand is normally owned by a single entity. While the branded product may be sold through different channels managed by different entities (e.g. the brand holders sell through physical shops in HK and sell through e-commerce, and at the same time appoint authorized agents in other countries), “intra-brand competition” is not normally allowed as part of the brand owner’s business strategy. Setting “intra-brand competition” as one of the considerations in assessing competitive impact is misguided and unacceptable.

3.8 Hypothetical example 2 and para 2.23: Industry surveys conducted by trade and industry associations on business environment often provide useful reference for companies to formulate their development strategy and direction. Results of these surveys very often include cost/price related information. [CONFIDENTIAL INFORMATION REDACTED]

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[CONFIDENTIAL INFORMATION REDACTED]

However, these non-binding recommendations may risk being considered as a contravention of the First Conduct Rule.

4. Concerns on Draft Guidelines on Second Conduct Rule

4.1 It is stated in para 5.29 that rebates granted by an undertaking with a substantial degree of market power can be perceived as having anti-competitive impact, such as foreclosure effects. It appears that many common rebates in the form of customer loyalty programmes may be caught under the competition rules. The Guidelines seem to suggest that benefits to consumers in terms of not forestalling new entry of suppliers in the long to medium term would outweigh any short term gains to consumers in terms of rebates. Since the objective of the Competition Ordinance is to facilitate fair competition so as to protect consumers’ interests, whether outlawing such loyalty schemes would indeed be welcomed by the consumers requires careful consideration. The Consumer Council should be consulted on the matter.

5. Concerns on Draft Guidelines on Merger Rule

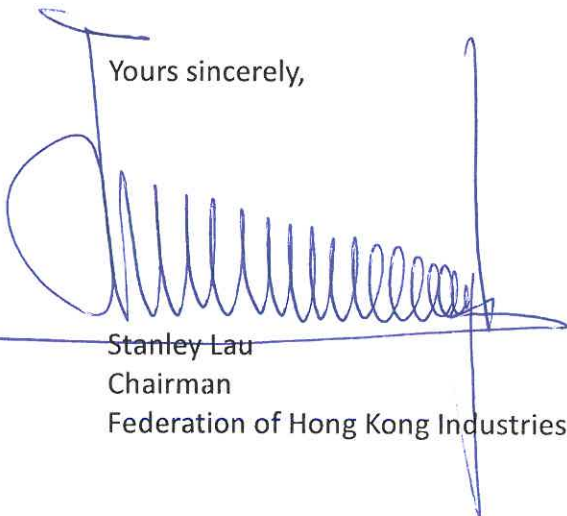
5.1 It is stated in para 5.26 of the Guidelines that the Commission can publish a notice stating that an investigation had commenced on a merger or anticipated merger. As we have mentioned before, it is inappropriate to make a public notice BEFORE investigation has been completed and a prima face case for contravention exists. Otherwise the reputation and image of the company concerned will be unfairly tarnished.

5.2 Another disclosure issue which may cause concern relates to the publishing of commitment made to the Commission to avoid contravention of the law. According to Schedule 2 of the Ordinance, before accepting the commitment, the Commission must give notice of the proposed commitment to those likely to be affected by the merger, allow them to make representations before deciding whether to accept the commitment. Such public disclosure will cause problems in respect of a merger not yet in public domain. Para 5.32 of the Guidelines states that the Commission will balance the need to safeguard commercially sensitive information and the need for consultation with the parties to be effected when publishing the proposed commitment. In actual practice, we doubt whether such a balance can be struck. The business community is adamant that commercially sensitive information should be protected.

Conclusion

The Federation hopes the Commission can give a response to our concerns and take account of our views when finalising the guidelines.

Yours sincerely,

A handwritten signature in blue ink, consisting of a large initial 'S' followed by a series of vertical, wavy lines, and a long horizontal stroke at the bottom.

Stanley Lau
Chairman
Federation of Hong Kong Industries