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10 December 2014

Submission on Draft Guidelines  
Competition Commission  
36/F, Room 3601  
Wu Chung House  
197-213 Queen's Road East  
Wanchai, Hong Kong

**BY EMAIL (submissions@compcomm.hk)**

Dear Sirs,

**Re: Consultation on Draft Guidelines: Response of Woo Kwan Lee & Lo**

We, a firm of solicitors (see [www.wkll.com](http://www.wkll.com)), are delighted to be given the opportunity to submit our comments on the Competition Commission's draft guidelines under the Competition Ordinance.

This letter sets out the submissions of Woo Kwan Lee & Lo on the following draft guidelines:-

- (a) Draft Guideline on Complaints ("Complaint Guideline")
- (b) Draft Guideline on Investigations ("Investigation Guideline")
- (c) Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 (Block Exemption Orders) ("Application Guideline") ((a) to (c) collectively the "Draft Procedural Guidelines");
- (d) Draft Guideline on First Conduct Rule ("First Conduct Rule Guideline"); and
- (e) Draft Guideline on Second conduct Rule ("Second Conduct Rule Guideline") ((d) to (e) collectively the "Draft Substantive Guidelines").

Terms defined in the draft guidelines shall have the same meanings when used in this letter.

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## PART I – Draft Procedural Guidelines

### A. Complaint Guideline

A(1) To avoid the complaint process being abused, we recommend the Complaint Guideline to emphasize the importance of proper evidence. Pursuant to s 37(2) of the Ordinance, the Commission is not required to investigate a complaint if it does not consider reasonable to do so and may refuse to investigate if it is satisfied that the complaint is misconceived or lacking in substance. We recommend that the Complaint Guideline should provide clearly that every complaint will not be accepted unless supported by the information set out in its paragraph 2.4. It should be the complainants who are required to provide the said information, but not for the Commission to request it.

A(2) We also recommend that all complaint should be either in written form (i.e. by post, by email or by completing a prescribed online form) or lodged by the person at the Commission's office (by appointment only). A mere telephone call should not suffice. Paragraph 2.2 of the Complaint Guideline should therefore be revised.

### B. Investigation Guideline

B(1) Section 39(2) of the Ordinance expressly provides that *"the Commission may only conduct an investigation if it has reasonable cause to suspect that a contravention of a competition rule has taken place, is taking place or is about to take place"*. However, paragraph 5.1(b) of the Investigation Guideline considers this investigation threshold *"only requires that the Commission is satisfied, at least beyond mere speculation, that there may have been a contravention of a Competition Rule"*. We take the view that such interpretation has much lowered the "reasonable cause to suspect" threshold that the Ordinance required and is therefore over-intrusive. Legally, this might be ultra vires and subject to judicial challenge. We therefore suggest sub-paragraph (b) of paragraph 5.1 to be deleted, and to be replaced by the words *"such facts and other information would, if proved, demonstrate a contravention of the Competition Rule"*.

B(2) To assist businesses in their commercial planning and facilitate timely compliance, it would be useful to give indicative timelines as to when investigations will be completed. We suggest the Investigation Guideline specify a target of one (1) year to complete an investigation but state that the timeline could be considerably shorter in straightforward cases.

### C. Application Guideline

C(1) As stated in paragraph 1.7 of the Application Guideline, the Commission may issue a Block Exemption Order in response to an Application or on its own initiative. Paragraph 6.2 of the Application Guideline confirms that the Ordinance does not provide any timeframe for the Commission's review of an Application. To assist businesses in their commercial planning and facilitate timely compliance, it would be useful to give

indicative timelines as to when Decision following Applications will be made. We suggest the Application Guideline specify a target of six (6) months to make a Decision but state that the timeline could be considerably shorter in straightforward cases.

- C(2) As mentioned above, the Commission may issue a Block Exemption Order on its own initiative but paragraph 11.5 of the Application Guideline states that *"it is not unusual for the process leading to the issue of a block exemption to take several years"*. We observe that vertical agreements are potentially problematic usually only where one of the parties has substantial market power. Therefore, the Second Conduct Rule is sufficient to deal with them. We suggest the Commission to adopt an approach which is consistent with the EU and Singapore, i.e. that a Block Exemption Order may be issued for vertical agreements in a timely manner so that they are excluded from the First Conduct Rule. See paragraph D(1) below.

## PART II – Draft Substantive Guidelines

### D. First Conduct Rule Guideline

D(1) The observation we made with regard to vertical agreements above is supported by paragraph 6.6 and 6.8 of the First Conduct Rule Guideline, in particular, *"competition concerns will only arise where there is some degree of market power at either the level of the supplier, the buyer or at the level of both"* in paragraph 6.7. For reasons mentioned above, there is no rational basis for subjecting Hong Kong businesses to stricter regulation than other jurisdictions such as EU and Singapore as regards vertical agreements and so a Block Exemption Order should be issued for vertical agreements as soon as possible.

D(2) Table at paragraph 6.9 and paragraph 6.64 suggest that retail price maintenance (RPM) will always be regarded as harming competition. We suggest that this approach appears to be too stringent and should be relaxed, because RPM has pro-competitive effects. The following examples are illustrative of the pro-competitive effects of RPM:-

- (a) An overseas luxurious brand may give up Hong Kong market if RPM is not allowed. For image reasons, such brand owner may wish to set a floor price to compete with similar luxury products. RPM in this situation enables a new product to enter the market, therefore increasing inter-brand competition.
- (b) By using RPM, a manufacturer may reduce competition among distributors and retailers selling its product (intra-brand competition). This, in turn, can encourage the retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. This may eventually stimulate and enhance inter-brand competition.

There is thus no justification for treating RPM as a restriction "by object", and that an analysis of its effects on the market is always necessary. Each case should be looked at on its own facts and analysis.

E. Second Conduct Rule Guideline

E(1) The Government indicated during the resumption of second reading of the legislative proposal that, taking into account international practices and the actual circumstances of Hong Kong, a market share of 25% should be adopted as the “minimum” threshold for “substantial degree of market power”<sup>1</sup>. It is therefore rather surprising that Second Conduct Rule Guideline, in particular, its paragraph 3, contains no such safe-harbour. We suggest that the Second Conduct Rule Guideline should reinstate the 25% safe-harbour as this would help creating business certainty and would reduce compliance costs.

E(2) Section 21(2) of the Ordinance defines “abuse” as “*predatory behaviour towards competitors*” or “*limiting production, markets or technical development to the prejudice of consumers*”. Paragraph 4 of the Second Conduct Rule Guideline provides little further guidance on what is “abusive behaviour”. As a matter of commonsense, services which are more efficient or products which are better may exclude competitors from the market. This is a natural result of the competitive process. Naturally, more efficient products or better products should not *per se* be regarded as abusive. Therefore, we suggest the Second Conduct Rule Guideline should make clear that exclusion of competitors resulting from business efficacy or provision of better products or services will not be regarded as “abuse”.

E(3) Under the principle of freedom of contract which decrees that one should be free to deal with whom one chooses, an undertaking, whether or not having substantial market power, does not have an absolute obligation to supply or satisfy all those who request them to do so. This principle is acknowledged by paragraph 5.15 of the Second Conduct Rule Guideline. Paragraph 5.17, however, suggests that a refusal to deal, by preventing a downstream undertaking from seeking access to the relevant input from operating in that market or operating in that market as an effective competitive constraint, *per se*, is harming competition in the particular downstream market. We suggest that paragraph 5.17 is inconsistent with paragraph 5.15 and the “freedom of contract” principle mentioned above and should be deleted.

We hope the above submissions are useful for the Commission’s consideration. If we could be of further assistance, please do not hesitate to contact our Partner Kenneth Wong at  
and and Solicitor Cedric Poon at and

Yours faithfully,

  
WOO, KWAN, LEE & LO

<sup>1</sup> Getting Prepared for the Full Implementation of the Competition Ordinance and Discussion Note on Preparation of Guidelines (<http://www.compcomm.hk/en/pdf/consultations-en.pdf>), Page 21 (Published in May 2014)