

Draft Guidelines under the Competition Ordinance - 2014
Submission received from AIA Group

《競爭條例》草擬指引—2014
由AIA Group 提交的意見書

Dear Sirs,

Re: Draft Guidelines on Competition Rules

These comments are made to the Competition Commission and the Communications Authority (“the Commission”) in relation to the:

- Draft Guideline on The First Conduct Rule; and
- Draft Guideline on The Second Conduct Rule

These comments are made by AIA Company Limited on behalf of the AIA Group, which includes businesses conducted in Hong Kong.

AIA appreciates the opportunity to comment on the draft Guidelines and commends the Commission on its plain language approach to drafting the Guidelines.

AIA is of the view that since block exemptions are not anticipated in the near future and that the content of the draft Guidelines remains at a relatively general level in comparison to international best practice and having regard to Hong Kong businesses’ need for business certainty, that the draft Guidelines should be amended and then subject to a further round of public consultation prior to legislative vetting. The legislative council and the public at large have been anticipating that answers to many questions are to be found in the Guidelines and AIA urges the Commission to expend further time and effort at this stage to ensure that this is the case.

Status of the Guidelines

As with the draft procedural Guidelines, and again understanding that the Guidelines are not law, AIA considers that it would be appropriate for the Commission to declare that, except as may be necessary to conform to any binding case or judgment, the Commission will itself adhere to its Guidelines and that in any case where the Commission departs from the Guidelines that it would consider itself obligated to explain the basis for the departure.

Comments on the Conduct Rules

AIA submits that the draft Guideline on the First Conduct Rule may too broadly define the categories of conduct which would be considered by the Commission to have as their object the harming of competition. AIA seeks neither to justify nor defend cartel behaviour. However, it is preferable that the Commission should take an approach which commits greater attention to market effects over deeming a harmful object. There are two reasons for this view:

- a. the Guidelines will require more detail in order to provide business with the clarity and certainty that they need to function in compliance with a new regime. For competition law to be understood in practice, businesses will observe the way that the Commission approaches specific cases. While the Commission's imputations and inferences arising from the legal and economic context of conduct and the way in which an agreement is implemented may provide some guidance, for the vast majority of the marketplace the guidance needed – or at least of greatest practical value - will relate to how the impact of conduct is perceived and assessed.
- b. In a context in which the Commission has suggested that block exemptions are not likely to be at the forefront of the agenda, a burden of self-assessment will fall on business to establish economic efficiency. Since the self-assessment of efficiency will invariably involve review of the impact of conduct, it is in this area where the Commission's practical guidance will have greater value.

Given the significance that self-assessment of economic efficiency will assume, and to better align with international best practice, AIA submits that the Guidelines should provide more detail in relation to the assessment of economic efficiency. We would also note:

- a. The burden on an undertaking to demonstrate (by evidence) all of the elements identified in paragraph 2.8 of the Annex, including matters such as the time when efficiencies will be achieved, appears unduly high;
- b. The differential standard for evidence set out in paragraph 2.9 of the Annex is of concern and we would urge the Commission to revisit this either by removing it or providing greater detail of the basis for its inclusion and the manner and circumstances in which different standards might be used by the Commission to assess evidence;
- c. The requirement that undertakings must be able to demonstrate that the relative benefit and impact to consumers “must at least be neutral” (paragraph 2.17 of the Annex) is too strict an interpretation of the concept of “a fair share”. Given that many of the benefits to consumers may be very difficult to quantify (the current

value of future innovation, for example) a requirement that undertakings must be able to establish that consumer benefits are at least neutral compared to impact to competition would be unduly restrictive.

AIA considers that percentages of market share giving rise to presumptions or indications of market power, while imperfect, may provide greater business clarity and notes that examples of this practice can be found in other jurisdictions.

AIA also notes that the “warning notice” procedure (and the de minimis provisions for agreements of lesser significance) do not apply to forms of conduct that are within the definition of “serious anti-competitive conduct”. These are likely to be regarded as significant consequences by many Hong Kong and international businesses. Accordingly, AIA submits that it would be helpful for the boundaries of the Commission’s understanding and application of the concept of “serious anti-competitive conduct” to be clearly drawn, by specific guidance on the meaning and limits of the four forms of conduct referred to in the definition in this particular context.

Finally, and most practically, AIA suggests, in order to provide guidance to laypersons and a greater degree of certainty, that parts of the Guidelines (such as Figure 1 on page 21 of the draft Guideline on the First Conduct Rule) should be converted into “safe conduct” checklists so that undertakings and their employees, and others, have clear indications of the view of the Commission towards certain types of conduct.

If you have any questions, please contact John Yeung, Regulatory Counsel-Group Legal at