



HONG KONG
RETAIL MANAGEMENT
ASSOCIATION

香港零售管理協會

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Submission on Draft Procedural Guidelines under Competition Ordinance

10 November 2014

The Hong Kong Retail Management Association (“the Association”) appreciates the good intention of the Competition Commission (the Commission) in consulting the public’s views regarding the Draft Guidelines under Competition Ordinance.

The Association now submits our views on the draft procedural guidelines in below paragraphs. However, given the short timescale of the consultation, we reserve the right to raise additional comments after the deadline as part of the review of the substantive guidelines. Furthermore, we urge the Commission to push for a minimum transition period of 6-months, so that our members can have sufficient time to extrapolate the examples in the Draft Guidelines to their relevant operations and to make the necessary compliance steps.

I. Complaints

As the Conduct Rules in the Ordinance are broadly drafted, there is a real potential for a huge number of unmeritorious and vexatious complaints. The draft Guidelines refer to the value of “well-informed” complaints, but then seem to encourage “any person” to make a complaint, in any form (including anonymously) and without the need to provide any supporting evidence. This seems contradictory and is, we understand, much broader than the EU approach which requires the complainant to demonstrate a “legitimate



interest” in the subject matter of the complaint. We urge the Commission to adopt a similar more restrictive approach based on “legitimate interest”.

Likewise, complaints should be accompanied by supporting evidence at the time of submitting the complaint, including at least the information listed in Paragraph 2.4 of the Guideline on Complaints – rather than leaving it to the Commission to request such information, as Paragraph 2.4 currently suggests.

We are also surprised that the Guidelines indicate that a mere telephone call would suffice as a ‘complaint’. We note that in relation to complaints for other regulatory bodies, such as the Office of Communications Authority’s “Guide on How Complaints Relating to Anti-Competitive Practices ... are Handled” there are stringent standards for the submission of complaints. We recommend that the Commission adopt a similarly rigorous approach.

We note that the Commission retains discretion whether or not to investigate a complaint further and that one of the factors it will take into account is its ‘current enforcement strategy, priorities and objectives’. We therefore look forward to the Commission publishing its proposed enforcement strategy, priorities and objectives for public consultation as soon as possible (and in any event before the Conduct Rules take effect).

II. Investigations

The draft Guidelines do not give any timescales for the various stages of investigation. We appreciate that the Commission cannot give concrete deadlines, but it would be very



helpful for the trade if indicative timescales could be provided, as the Office of Communications Authority does in its Guide to Complaints.

Regarding the Commission's use of its information gathering powers, we believe that the proposed standard that the Commission be satisfied "at least beyond mere speculation" is too low a threshold, especially compared to international standards. Clearer guidance should be given on what constitutes "reasonable cause to suspect" and should focus on a genuine, reasonably held belief supported by objective evidence – i.e. specific facts and information, which would, if proved, establish a breach of the Competition Rules.

Given the sensitivity and importance of the Commission's 'enter and search' powers, it is crucial for businesses to be able to have their legal advisers present. Commission officers should therefore be obliged to wait for a reasonable period for legal advisers to arrive (whether in-house or external) – this should not just be left to the officers' sole discretion. The Guidelines should also give an approximate indication of what the Commission would consider a reasonable period of waiting to be, so that businesses can make the necessary preparations.

The draft Guidelines provide that the Commission must issue a warning notice for suspected contravention, which does not involve serious anti-competitive conduct, before commencing proceeding in the Tribunal, to provide parties under investigation with an opportunity to cease the conduct within a specified period. However, the warning notices and the commitment from parties under investigation will be published on the Commission's website. We are concerned that the publication of the warning notices and the commitment from parties under investigation will highly disincentivise undertakings from entering into such arrangements and defeat the original purpose of providing the



undertaking an opportunity to stop from non-serious anti-competitive conduct without incurring unnecessary time, efforts and costs by both the Commission and the subject undertakings. We urge the Commission to reconsider this approach.

III. Applications for a Decision for Exclusion and Exemption

We welcome the confirmation in the Guidelines that the Commission may issue a Block Exemption on its own initiative (rather than just in response to an application). However we are concerned that the Commission suggests that it may take several years before a block exemption order is made. Given that the Commission acknowledges (in the Guidelines on the First Conduct Rule) that vertical agreements are less harmful to competition and frequently generate efficiencies, it is important that vertical agreements be excluded from the First Conduct Rule as soon as legally permissible after the Conduct Rules take effect. We urge the Commission to exercise its power in this regard and to conduct the preparatory work now.

The draft Guidelines do not give any timescales for the various stages of the Commission's review of an application for a decision or block exemption order, neither do they prescribe any deadline for the Commission to make a decision or block exemption order. We appreciate that the Commission cannot give concrete deadlines, but it would be very helpful for the trade if indicative timescales could be provided. The Commission should also update the applicant from time to time during the review process as to the timescale within which the decision will be reached.



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If an Application is declined, the Commission should inform the applicant of the reasons. This is fair and reasonable, and would serve as guidance for the future on whether it is worth submitting an application.

Businesses may wish to have an initial discussion with the Commission to obtain comfort that particular agreements or conduct do not raise competition concerns. It would be helpful if the Guidelines could make it clear that the proposed 'Initial Consultation' process would also serve this purpose, rather than just focusing on the procedural process of making an Application.

Similarly, it should be made clear that businesses may submit reasons why the agreements or conduct do not harm competition and to obtain the Commission's 'negative clearance'. In the event that the Commission disagrees and believes that there is potential harm to competition then the business can submit, as an alternative, arguments for an exclusion.

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About HKRMA

The Hong Kong Retail Management Association (HKRMA) was founded in 1983 by a group of visionary retailers with a long-term mission to promote Hong Kong's retail industry and to present a unified voice on issues that affect all retailers. Established for 31 years, the Association has been playing a vital role in representing the trade, and raising the status and professionalism of retailing through awards, education and training.

Today, HKRMA is the leading retail association in Hong Kong with membership covering more than 7,800 retail outlets and employing over half of the local retail workforce. HKRMA is one of the founding members of the Federation of Asia-Pacific Retailers Associations (FAPRA) and is the only representing organization from Hong Kong. FAPRA members cover 17 Asian Pacific countries and regions.