香港地產建設商會
THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG
香港中環德輔道中19 號環球大廈1403 室
1403 World-Wide House, 19 Des Voeux Road Central, Hong Kong
Tel 2826 0111 Fax 2845 2521 www.reda.hk

15 December 2014

The Honourable Anna Wu Hung-yuk, GBS, JP
Chairperson
Competition Commission
Room 3601, 3607-10, 36/F, Wu Chung House
197-213 Queen's Road East
Wanchai Hong Kong

Dear Anna,

Draft Guidelines under the Competition Ordinance – 2014

We wish to thank the Commission for agreeing to meet with us on 13 November 2014. Following on from the discussions at our meeting, we are pleased to enclose for your consideration a submission on the Draft Guidelines published on 9 October 2014.

You will note that our submission focuses on three specific matters:

- firstly, the need for an "appreciability" threshold in the consideration of restrictions under the first conduct rule;
- secondly, the need for a market share threshold to assist with the assessment of a business actor's "substantial degree of power";
- and thirdly, the need to adequately recognise the benefits of joint ventures and joint collaboration arrangements, notably, bidding consortia in the context of projects in the real estate sector.

Although our submission concentrates on major matters of concern to our Association and our members, we would also request the Commission to provide general guidance on the formation of joint ventures, joint collaboration, and information exchanges. Particularly concerning information exchanges,

香港地產建設商會
THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG
香港中環德輔道中19 號環球大廈1403 室
1403 World-Wide House, 19 Des Voeux Road Central, Hong Kong
Tel 2826 0111 Fax 2845 2521 www.reda.hk

we would request the Commission to limit the circumstances in which an "agreement" or "concerned practice" may be inferred to those where there is a clear "meeting of the minds" amongst parties and not to infer the existence of a concerned practice from the mere innocent or unsolicited receipt of competitively sensitive information.

We hope the matters raised in our submission will be reflected in the finalised guidelines. Once again, we are grateful for the Commission's openness in engaging with us on issues of common concern, and would welcome any further meetings with the Commission as you consider appropriate.

In closing, may I take this opportunity to wish you and all staff members of the Commission a Merry Christmas and a Happy New Year.

Yours sincerely

Louis Loong
Secretary General

Draft Guidelines under the Competition Ordinance – 2014
Submission from
The Real Estate Developers Association of Hong Kong

1 The Real Estate Developers Association of Hong Kong (**REDA**) welcomes the release of the draft guidelines jointly issued on 9 October 2014 by the Competition Commission (the **Commission**) and the Communications Authority. In this submission, we are pleased to provide our views on the *Draft Guideline on the First Conduct – 2014 [CCCAD2014001E]* (the **Draft Guideline on the First Conduct Rule**) and on the *Draft Guideline on the Second Conduct Rule – 2014 [CCCAD2014002E]* (the **Draft Guideline on the Second Conduct Rule** and, collectively, **Draft Guidelines**).

2 We draw particular attention to two specific issues of concern to REDA with respect to which clarifications and further guidance are much needed from the Commission, for the benefit of REDA, the real estate industry and business interests across-the-board. These issues are summarised as follows:

(a) Contrary to the practice adopted in many foreign jurisdictions, the Draft Guideline on the First Conduct Rule fails to provide bright line rules on how "significant" or "appreciable" a restriction must be in order to be caught by the first conduct rule under the Ordinance. This could be easily achieved by providing indicative market share thresholds in the Guidelines;

(b) Similarly, the Draft Guideline on the Second Conduct Rule does not provide practical guidance on when a business actor would generally be considered to have a "substantial degree of market power". This is a threshold question (without that type of power the second conduct rule does not apply) and the Guidelines should provide a broad measure in the form of market share threshold, on the model of overseas experience; and

(c) The Draft Guideline on the First Conduct Rule does not adequately recognise the prevalence and benefits of joint venture projects. More specifically, the Draft Guideline on the First Conduct Rule fails to pay heed to joint ventures other than those related to production, in particular, bidding consortia and consortia arrangements.

We are confident that the Commission will be receptive to our comments and hope to see their incorporation into the finalised guidelines to be presented to Hong Kong's Legislative Council before their formal adoption.

I. Materiality thresholds under the first conduct rule

3 In the context of agreements, the experience in foreign jurisdictions is that short of being an agreement which has as its obvious object the restriction of competition, an agreement must produce "appreciable" restrictive effects on market competition in order to be caught by competition law provisions equivalent to the first conduct rule. The risk of appreciable restrictive effects is greater where the parties have market power – usually where they have a high or significant combined market share. Where the parties to an agreement have, as the case may be, a combined or individual market share below a certain threshold, appreciable restrictive effects are generally considered to be unlikely.

4 Although the statutory text of the first conduct rule does not explicitly refer to a materiality threshold, it appears from the parliamentary debate that the legislative intent clearly was that a materiality threshold will be read into its interpretation such that only agreements having an "appreciable" adverse impact would warrant action by the Commission. In other words, the appreciably requirement is implicit in the statutory test. The Administration agreed with this view during the legislative process and expressly stated that "[t]he materiality threshold for the first conduct rule is whether a conduct has an <u>appreciable</u> adverse effect on

competition" (emphasis added).[1] This approach was reflected in the illustrative guidelines on the first conduct rule which the Administration provided to the Legislative Council, whose paragraph 3.12 included a detailed discussion of materiality under the first conduct rule.[2] This approach also draws support from the precedents of the EU Court of Justice, which have long held that only appreciable restrictions of competition will be considered under the EU equivalent of the first conduct rule, in which an express materiality threshold is also absent.[3]

5 While a materiality requirement should be read in the first conduct rule, the Ordinance does not imply a mechanical approach, whereby any party below a certain set market share threshold would be automatically immune. Similar to the approach in other jurisdictions, the Ordinance leaves it to the Commission and the Courts to determine what materiality levels require regulatory or judicial intervention. There is no requirement that materiality be only measured by reference to market share. Foreign experience shows that competition authorities have retained the flexibility required for an economics-based enforcement while providing practical guidance to business actors and the general public in the form of market share and other thresholds. Foreign competition authorities have provided many useful indicative thresholds in their guidance:

- In the EU, horizontal arrangements between competitors with a combined market share of less than 10% are generally deemed not to affect competition to a degree that warrants intervention;[4] in Singapore, the threshold is set at 20%, taking into account the characteristics of local markets;[5]
- In the EU, vertical restraints concluded between non-competitors are also unlikely to result in significant restrictive effects where each

---

1 See the Commerce and Economic Development Bureau's Responses to follow-up questions arising from previous meetings of 21 June 2011, LC Paper No CB(1)2420/10-11(02), at paragraphs 2 and 3, and the references to relevant precedent under the Telecommunications Ordinance (Cap 106).

2 See the Commerce and Economic Development Bureau's paper on Guidelines on the First Conduct Rule, LC Paper No CB(1)2336/10-11(01), at paragraph 3.12.

3 See, amongst many others, *Franz Völk v SPRL Ets J. Vervaecke* (Case 5/69) [1969] ECR 295.

4 Paragraphs 8 and 9 of the European Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) C(2014) 4136 final.

5 Paragraph 2.19 of the Competition Commission of Singapore's guidelines on the section 34 prohibition.

party has a market share of less than 15%;[6] in Singapore, where vertical restraints are excluded from the scope of the Competition Act's equivalent to the first conduct rule, the Competition Commission has set a market share threshold of 25% for agreements among non-competing undertakings, again taking into account the characteristics of Singapore markets;[7]

- In the EU, exclusivities between suppliers and resellers will not cause concern where the parties have a combined market share of less than 30% and the exclusivity does not exceed five years;[8] and
- In the United States, the policy of the Department of Justice and the Federal Trade Commission concerning joint purchasing arrangements indicates that these shall not give rise to concerns under US antitrust rules where the parties concerned fall short of specific thresholds, including if joint purchases account for less than 35% of the total sales of the purchased product or service in the relevant market.[9]

6 These thresholds serve as a useful first indication of whether businesses engaging in certain types of agreements should have concerns about the possible restrictive effects of these agreements. They provide clear focal points for the business community when ensuring their compliance with competition legislation upon which business managers may rely in determining their commercial strategies. With these thresholds, managers know when to consult their legal department; board members can rely on bright-line guidance when discharging their duties; and potential joint venture partners can determine early on whether competition law constraints will arise. Foreign experience has shown that the benefits of materiality thresholds far outweigh their potential disadvantages, and their importance to business operators in the business community, including real estate developers, is well-recognised. Accordingly, REDA suggests

---

6 Paragraphs 8 and 9 of the European Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) C(2014) 4136 final.

7 Paragraph 2.19 of the Competition Commission of Singapore's guidelines on the section 34 prohibition.

8 Articles 3 and 5 of the European Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ(2010) L102.

9 US Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care, August 1996, Statement 7, no 17.

that the Commission in its Guideline on the First Conduct Rule provides guidance in the form of indicative market share thresholds, as follows:

- horizontal arrangements, including joint ventures and consortia, between competitors with a combined market share of less than 25% are generally deemed not to appreciably restrict competition;
- cooperation arrangements, including joint ventures and consortia, between non-competitors with market shares of less than 25% on their respective markets are generally deemed not to appreciably restrict competition; and
- vertical restraints concluded between non-competitors are unlikely to result in appreciable restrictive effects where each party has a market share of less than 25%, and exclusivities between suppliers and resellers will not cause concern where the parties have a combined market share of less than 30% and the exclusivity does not exceed five years.

II. Market share thresholds under the second conduct rule

7 It is clear from the statutory text that commercial practices cited as examples of abusive conduct under the second conduct rule in the Competition Ordinance are immune from scrutiny unless they involve an undertaking with a substantial degree of market power.

8 As with the application of the first conduct rule, the Ordinance does not imply a mechanical approach, whereby any party below a certain set market share threshold would be automatically immune. On the contrary, the Ordinance in its s 21(3) invites the consideration of several factors, including market share, to determine the existence of a substantial degree of market power. This is also the approach in the vast majority of overseas competition legislations, and in particular those that have served as an inspiration to the Hong Kong legislator. Despite the complexity of the analysis, competition authorities in most countries have been very comfortable providing general guidance to businesses in terms of what levels of market shares – amongst other factors – may be indicative of the

presence of dominance or a significant degree of market power. For example:

- In the EU, low market shares are considered a good proxy for the absence of substantial market power and an undertaking is unlikely to be dominant if its market share is below 40%;
- in Singapore, an undertaking is likely to be considered dominant only where its market share exceeds 60%;
- most notably, in Hong Kong, a "licensee" under the Broadcasting Ordinance (Cap. 562) is unlikely to be dominant if its market share is below 40% and a presumption of dominance only arises if its market share is persistently above 50% and evidence to the contrary is absent.[10]

9 These thresholds serve as a useful first indication of whether a market actor should consider the second conduct rule when setting its commercial policies. Accordingly, REDA suggests that the Commission in its Guideline on the Second Conduct Rule provides that an undertaking is unlikely to be considered to have a substantial degree of market power if its market share is below 50%.

III. Joint ventures and consortia

10 It is well understood that many forms of joint ventures will be considered as "mergers" and will as such fall outside of the scope of the Competition Ordinance, except where they involve telecommunications carrier licensees.

11 As regards those forms of joint ventures that do not qualify as "mergers", the Draft Guideline on the First Conduct Rule refers to joint production arrangements, joint buying arrangements, joint commercialisation arrangements and joint R&D ventures. There is however limited guidance on when these agreements will be considered to cause concern under the first conduct rule.

---

[10] Paragraph 55 of the Communications Authority's Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance.

12 Some comfort with respect to production joint ventures may be derived from the Commission's expression that it will consider the actual or likely effects of the joint venture as a whole on competition and the fact that the joint setting of price or output will not be considered as having the object of harming competition where it is necessary to the implementation of the arrangement. This principle should be expanded to apply to all forms of joint ventures, including joint ventures for the development of projects and joint bidding consortia, whose essential characteristics are the same as production joint ventures, i.e. the pooling of risks and rewards through the integration of a particular function.

13 Other principles that should apply to all forms of joint ventures, including joint development ventures and bid consortia, include:

(i) a recognition that joint ventures usually generate substantial efficiencies by fostering more competition, often in the form of increased market entry, investment and innovation; they enable undertakings to rationalise their activities and achieve economies of scale, improving productivity and quality;

(ii) restraints (such as exclusivities and non-competes) that are ancillary to the scope of the joint venture are generally legitimate; and

(iii) absent market power, joint ventures will generally not be a cause for competition concern.

14 Concerning the first principle, it should be recognised that cooperation between competitors will be unlikely to raise competition concerns where there are legitimate commercial reasons that drive competitors to cooperate amongst themselves, including, *inter alia*, portfolio or risk diversification, inability to finance the development themselves, reliance on a party's technical expertise or financial constraints faced by both parties. These are all examples of efficiency-enhancing conduct taking the form of joint ventures.

15 As regards ancillary restraints, while REDA acknowledges that initial guidance is provided in the Draft Guideline on the First Conduct Rule, it would be useful for the Commission to confirm that non-compete clauses that are limited to the scope and duration of the joint venture would generally be legitimate.

16 Finally, concerning the third principle, and as already mentioned above, the Commission should provide practical guidance by reference to market share and other thresholds, as other competition authorities have done in respect of cooperative arrangements among competitors and non-competitors.

17 We thank the Commission for this opportunity to present its views on the Draft Guidelines. Should the Commission have any queries regarding the above comments, we would gladly offer clarifications on our views.

The Real Estate Developers Association of Hong Kong
December 2014