



By email < submissions@compcomm.hk > and by hand

23 December 2014

Our Ref.: C/PAIBLP, M98028

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

Dear Sirs,

Draft Guidelines on the First Conduct Rule and the Second Conduct Rule

The Professional Accountants in Business Leadership Panel of the Hong Kong Institute of Certified Public Accountants (the "Institute") has considered the above draft guidelines, which outline how the Competition Commission (the "Commission") expects to interpret and give effect to the above two competition rules in the Competition Ordinance (the "Ordinance").

Our comments on the draft guidelines are provided below.

General

We note that Part 2, section 35 of the Ordinance provides that the Commission must issue guidelines indicating the manner in which it expects to interpret and give effect to the conduct rules. The Commission, in the "Frequently Asked Questions" (number 2) regarding the relationship between the guidelines and the Ordinance, has explained that the guidelines "... represent the Commission's interpretation of the Ordinance and provide guidance to businesses on how it will administer the Ordinance. ... it will be up to the Competition Tribunal and other courts to determine the position at law ...". The preamble of the guidelines also states: "*The Competition Tribunal and other courts are responsible ultimately for interpreting the Ordinance. The Commission's interpretation of the Ordinance does not bind them.*"

Nevertheless, section 35(7) of the Ordinance provides that: "*If, in any legal proceedings, the Tribunal or any other court is satisfied that a guideline is relevant to determining a matter that is in issue –*

- (a) *the guideline is admissible in evidence in the proceedings; and*
- (b) *proof that a person contravened or did not contravene the guideline may be relied on by any party to the proceedings as tending to establish or negate the matter."*

The above indicates that the guidelines on the conduct rules, which are issued pursuant to the Ordinance, are more than mere guidance, as they are relevant to and have implications in the legal proceedings. We recommend that the Commission should further clarify the relationship between these guidelines and the Ordinance in



the light of section 35(7) of the Ordinance, and further explanation in respect of their status should be set out in the preamble of the guidelines, which are issued pursuant to the Ordinance, to differentiate them from other general guidance issued or to be issued by the Commission.

Draft Guideline on the First Conduct Rule

Agents and distributors

The Commission acknowledges that businesses often choose to distribute their products through agents or distributors. Paragraph 2.9 states that the determining factor for identifying a genuine agency agreement is the level of financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal.

Paragraph 2.10 further states that for the purposes of the First Conduct Rule, the Commission will consider that an entity is a genuine agent, and therefore part of the same undertaking as the principal, if it does not bear any or bears only insignificant risks in relation to the contract concluded and/or negotiated on behalf of the principal.

We consider that it would be helpful to businesses if the Commission could give more specific guidance on the parameters of the principal/ agency relationship, in particular, on the levels of risk that can be assumed by the agent. The draft guideline currently refers to just risk passing as being sufficient to nullify the agency status. We consider that further clarification/ confirmation that some levels of risk can be passed would be helpful. For instance, how would the Commission interpret "insignificant risks" as indicated in paragraph 2.10?

Vertical agreements

Paragraph 6.6 states that vertical agreements are generally less harmful as compared with horizontal arrangements, but will nonetheless contain provisions which have the object or effect of harming competition. Paragraph 6.8 further states that competition concerns will only arise where there is some degree of market power at either the level of supplier, the buyer or at the level of both. It is unclear how the "some" degree is intended to be interpreted, as opposed to "significant" or "substantial". Greater clarity in the guideline on this area would be helpful.

Recommended or maximum prices / Resale price maintenance ("RPM")

Paragraph 6.65 states that where a supplier recommends a resale price to a distributor or requires a reseller to respect a maximum resale price, it will not be considered by the Commission to have the object of harming competition. On the other hand, if a supplier asks its distributor or reseller to adopt its pricing policy in order to ensure an orderly market and avoid potential customer confusion caused by differing prices of certain branded products across the territory, this would be viewed by the Commission as RPM (example 15). It appears that the Commission intends to take a pretty tough stance on RPM, as it considers RPM as having the object of harming competition and may amount to serious anti-competitive conduct in certain cases.



However, it would be difficult to draw a line between recommended prices and RPM. We consider that further guidance in this respect would be required in order to improve clarity and enable businesses to have a better understanding of these two practices so as to avoid anti-competitive behaviour.

Draft Guideline on the Second Conduct Rule

Substantial market power

Section 21(3) of the Ordinance stipulates that market share is a factor to be taken into account in determining market power. We note that the Commission does not indicate in the guideline any particular market share threshold which may constitute "substantial market power". While we understand that without prescribing any market share threshold to establish a substantial degree of market power would give the Commission greater flexibility to include undertakings within the ambit of prohibited conduct, this would however be at the cost of the businesses. This lack of certainty risks companies being overly cautious in doing business and spending time and money on gathering data and uncertain analyses which may not produce a clear result. There is also a concern that this may give the Commission too much scope to commence investigations.

The main point behind an indicative threshold is that, from a practical compliance perspective, it gives businesses a reasonably easily ascertainable yardstick at which concerns over unfair competition practices would be raised. It can also be used as a reference guidance for the law enforcement benchmark. Although calculating a company's market share is not without uncertainty and requires analysis to a greater or lesser degree, it can generally be ascertained on a fairly objective basis by, for example, making reference to market reports.

It is noted that the European Union, which has a well established competition law regime, adopts an indicative threshold, and so does Singapore. We submit that it would therefore be desirable if the Commission could give further consideration to provide an indicative threshold to enable businesses have greater certainty on where they stand. The precise threshold can be a subject of further discussion and deliberation.

The above comments and observations reflect our views on the draft guidelines. Our apologies for this delayed response but, nevertheless, we hope that you will be able to take our views into account.

If you have any questions on this submission or wish to discuss it further, please contact me at the Institute on

Yours faithfully,


Mary Lam
Director, Member Support

ML/ay