

**RESPONSE TO THE HONG KONG COMPETITION COMMISSION'S
CONSULTATION ON REVISED DRAFT GUIDELINES:**

(1) ON COMPLAINTS

(2) ON INVESTIGATIONS

**(3) ON APPLICATIONS FOR A DECISION UNDER SECTION 9 AND 24
(EXCLUSIONS AND EXEMPTIONS) AND
SECTION 15 BLOCK EXEMPTION ORDERS**

(4) ON THE FIRST CONDUCT RULE

(5) ON THE SECOND CONDUCT RULE

(6) ON THE MERGER RULE

20 APRIL 2015



Freshfields Bruckhaus Deringer

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I. Introduction

1. Freshfields Bruckhaus Deringer LLP welcomes the opportunity to respond to the public consultation on the six Revised Draft Guidelines that have been published on 30 March 2015 (together, the *Revised Draft Guidelines*).
2. The Revised Draft Guidelines have been published by the Hong Kong Competition Commission and the Communications Authority (together, the *Commission*) as required by the Competition Ordinance (Cap. 619) (the *Ordinance*). We set out below our general comments, and then address specific issues that may merit further consideration. Our comments are based on our significant experience and expertise in advising on competition law proceedings in numerous jurisdictions around the world.
3. The comments contained in this paper reflect the views of many in Freshfields Bruckhaus Deringer LLP. They do not necessarily represent the views of every partner in the firm, nor do they represent the views of our individual clients.

II. General Observations

4. We warmly welcome the Commission's decision to publish the Revised Draft Guidelines and seek a further round of comments from stakeholders in Hong Kong. The Revised Draft Guidelines contain amendments which reflect some of the comments made by stakeholders in the initial consultation on the draft guidelines published on 9 October 2014. In addition, the Commission's desire to seek a further round of comments on the Revised Draft Guidelines shows a willingness on the part of the Commission to be transparent in its processes and a desire to engage with the Hong Kong business community.
5. We continue to consider that by the standards of guidance published by new competition authorities, the Revised Draft Guidelines are extensive and impressive

in scope. They provide helpful guidance on the new regime, especially to companies that have not previously been exposed to competition law.

6. It is also encouraging that the Commission has sought to provide further guidance and clarification on a number of key issues. We note, for instance, that there have been a number of amendments to the guidance on information exchange, including:
 - (a) the inclusion of a clearer statement recognising the pro-competitive effects of information exchange; and
 - (b) the setting out of the relevant criteria in relation to so-called “*hub and spoke*” arrangements in an attempt to provide guidance as to what will constitute legitimate commercial conduct as opposed to conduct which may be deemed to be anti-competitive. This is in-step with international best practice. This is a highly complex and controversial area of competition law, and the nuances and further guidance introduced by the Commission are necessary and welcome.
7. We also welcome the Commission’s more detailed guidance as to what constitutes a “*true distribution agent*” which is important for companies seeking to understand whether certain contractual arrangements will be outside the scope of the First Conduct Rule (**FCR**).
8. It is also helpful that the Commission has included further guidance in relation to:
 - (a) selective distribution agreements, franchise agreements, and joint ventures in the Revised Draft Guideline on the FCR;
 - (b) the objective justification defence under the Second Conduct Rule (**SCR**) and confirmation that exploitative abuses (e.g. excessive pricing) as well as exclusionary abuses can amount to abuse under the SCR; and
 - (c) which transactions will be subject to the Merger Rule by clarifying what amounts to “*decisive influence*” in the Revised Draft Guideline on the Merger Rule.

III. Specific observation on continued areas of concern

9. The Commission does not have, by definition, decades of decisions and case-law upon which to draw when preparing the Revised Draft Guidelines and - despite the additional guidance - it continues to reserve its position or adopt a high level approach in several areas. In many ways, this approach will enable the Commission to develop the Hong Kong competition regime and specifically the guidance relating to the regime in a manner that is most tailored to Hong Kong.
10. Nevertheless, we would encourage the Commission to elaborate further in the Revised Draft Guidelines its policy on certain key issues, drawing - in the Commission’s own phrase - on “*international best practices*”. The incorporation of further detail, drawing inspiration from guidance published by other authorities, would provide greater legal certainty to businesses.

11. In that context, we would reiterate the observations made in our responses to the Commission in the first round of consultations insofar as they have not been reflected in the Revised Draft Guidelines.
12. In addition, we consider it is necessary to re-emphasise certain key points that merit further consideration by the Commission.
 - (a) *No indicative market share threshold in relation to the SCR.* The absence of an indicative market share threshold to establish a substantial degree of market power under the SCR remains problematic since it creates considerable business uncertainty. Uncertainty arises not only because of the ambiguity as to whether businesses might fall within the ambit of the SCR, but also from the necessary implication that, if the threshold for a business having substantial market power is low, then more businesses will need proactively to justify their pro-competitive commercial practices. This creates uncertainty and a potential chilling effect on pro-competitive practices. It is also worth highlighting that the Commission’s approach is out of step with most established competition regimes which include some form of indicative threshold (e.g. EU and China).
 - (b) *No indicative safe harbour in relation to vertical arrangements under the FCR.* The lack of an indicative “safe harbour” by reference to market shares in relation to vertical agreements is likely to increase compliance costs for businesses and, again, increase business uncertainty. This is unfortunate given there is general acceptance that some market power is required at the level of the supplier or the buyer (or both) for competition concerns to arise in relation to vertical agreements.
 - (c) *Ambiguous approach in relation to resale price maintenance.* In simultaneously considering that resale price maintenance (**RPM**) presents an inherent potential harm to competition such that it may be a restriction of competition by object but that it may also be capable of being justified by reference to efficiencies, the Commission has created ambiguity which is unlikely to be understood fully by companies with little experience of competition laws. Based on this guidance, businesses may frequently seek to use efficiency justifications in relation to RPM even though the consequences of any miscalculations are potentially serious. Businesses would therefore benefit from granular guidance as to when efficiencies may be sufficient for the Commission to consider that the use of RPM does not give rise to concerns under the Ordinance. In addition, while Hypothetical Example 18 provides further guidance on the evidence required to justify a claim that RPM can be justified by reference to efficiencies, there remains a risk that the hypothetical example underplays the level of evidence that companies may be required to provide by the Commission under Section 1 of Schedule 1 of the Ordinance.¹

¹ Agreements enhancing overall economic efficiency.

- (d) *No indicative timelines for decisions and merger reviews.* The Commission considers that the timeframe for preliminary assessment of an application for a decision or indeed the timeframe for reviewing a merger will depend very much on the nature and complexity of the issues that need to be considered and the resources available to the Commission at that point in time. As a result, the Commission considers that providing even indicative timelines is not desirable. This is not only a departure from international best practice (notwithstanding the complexity of the matters to be dealt with) but it is also out of line with the existing Hong Kong regime under the Telecommunications Ordinance.
 - (e) *Subsequent use of information provided to the Commission.* We continue to express concerns in relation to the Commission's view that information received from a company in the context of an application for a decision can be used by the Commission for any other purpose under the Ordinance (e.g. investigations). This approach gives rise to a number of issues, including: (i) generally, it is likely to inhibit the abilities of parties to engage in open and good faith discussions with the Commission; and (ii) it may discourage applications for a decision under sections 9 and 24 of the Ordinance which would reduce the ability of the Commission to set precedents in Hong Kong which would be of great value to companies and their advisers at the outset of the regime.
13. We note that while there is now limited time for the Commission to amend the Revised Draft Guidelines before they are presented to the Legislative Council on 27 April 2015, each of the issues highlighted above should be given further serious consideration by the Commission given that the current approach gives rise to significant business uncertainty, risks inhibiting legitimate commercial conduct and – in some respects – is out of line with international best practice.

IV. Conclusion

14. We would like to emphasise again that we strongly welcome the Commission's Revised Draft Guidelines which provide guidance to businesses on some key points. In providing comments in this response, we are endeavouring to suggest ways in which the Commission could further clarify certain specific issues.
15. We would be happy to provide any further explanation of the points raised in this response, either in a meeting or otherwise. If such further discussion would be helpful, please contact: