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RETAIL MANAGEMENT
ASSOCIATION
香港零售管理協會

HONG KONG RETAIL MANAGEMENT ASSOCIATION

Submission on Revised Draft Guidelines Issued under the Competition Ordinance

20 April 2015

The Hong Kong Retail Management Association ("the Association") appreciates the opportunity to comment on the Revised Draft Guidelines ("the Guidelines") issued under the Competition Ordinance ("the Ordinance").

The Association sets out its views below, and also refers the Competition Commission ("the Commission") to the Association's previous submissions dated 10 November 2014 (on the Draft Procedural Guidelines) and 19 December 2014 (on the Draft Substantive Guidelines), both annexed.

1. Vertical Agreements

We are disappointed that the Commission maintains its position that vertical agreements fall within the scope of the First Conduct Rule ("the FCR") and that some vertical agreements (e.g. Resale Price Maintenance ("RPM")) may even be considered Serious Anti-Competitive Conduct ("SAC"). The Commission's stance, coupled with its reluctance to issue block exemptions or provide indicative "safe harbours" for vertical agreements, will undoubtedly increase uncertainty and compliance costs for Hong Kong businesses.

Such over-regulation is inconsistent with international practice such as in the EU and Singapore, and risks putting Hong Kong businesses at a competitive disadvantage.

2. Economic Efficiencies

We reiterate that the Commission should be obliged to prove not only the harm on competition but also the lack of economic efficiency justification. The Commission

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already recognises in the Guidelines that economic efficiencies may outweigh the harm on competition. In addition, nothing in the Ordinance suggests the burden of proof under section I, Schedule I should rest with businesses.

For the Second Conduct Rule ("the SCR"), the Commission helpfully clarifies that most conduct will be assessed by reference to its actual or likely anti-competitive effects in the market and that economic efficiencies forms part of this analysis (in contrast to a standalone section I, Schedule I efficiency-based exclusion analysis). However, the Guidelines provide no further guidance on the application of legitimate/objective justifications, and we urge the Commission to do so.

3. Object vs Effect / Resale Price Restrictions

We welcome the Commission's clarification that an "object" violation is not *per se* illegal and that the analysis requires consideration of the purpose and aim of the agreement in its legal and economic context.

However, the treatment of "object" versus "effect" still raises confusion in the likely analytical process and ambiguity in the resulting outcome for businesses. For example RPM may, in certain circumstances, amount to a SAC, but in other circumstances be saved by efficiencies. In addition, the "effect" analysis requires the relevant effect to be "more than minimal" but such requirement is not applicable for an "object" analysis. This means that SMEs with very small market share who for example engage in RPM may violate the FCR even though there may be no or very minimal effect on competition.

The confusion and ambiguity over "object" versus "effect" in relation to RPM also extends to the treatment of recommended resale price ("RRP") and maximum resale price ("MRP").

In any event, it is not within a retailer's control if the upstream players implement a price monitoring system. We therefore reiterate the need to clarify and confirm in the Guidelines that downstream players (e.g. retailers) should not be liable for any infringement under the Conduct Rules for conduct initiated by the upstream players if the downstream players have exercised their right to set their own prices, which may turn out to be the same as the RRP or MRP.

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4. Franchise Arrangements and Selective Distribution

The Guidelines on franchise arrangements make no reference to the treatment of pricing arrangements between the parties. Joint determination of pricing by franchise partners should not fall foul of the FCR given that such discussions are a key commercial parameter directly related to and necessary for implementing franchise arrangements. More generally, the exchange of certain competitively sensitive information is also necessary for implementing such arrangements. Franchise arrangements should fall outside the FCR as they do not have the object or effect of harming competition by their nature. In the same vein, the Guidelines (at paragraph 6.107) make reference to "sales-related joint ventures" which are in their nature similar to franchise agreements and therefore should fall outwith the FCR.

The Guidelines also make no reference to the treatment of pricing arrangements between parties in selective distribution arrangements.

If the Commission determines that franchise arrangements and selective distribution are within the scope of the FCR, the Guidelines should clarify whether the RPM "effect" analysis is applicable to pricing arrangements in such circumstances, and if it will be considered as a form of price fixing that constitutes SAC.

5. Concession and Consignment Arrangements

The Guidelines do not address concession and consignment arrangements which, as explained in our previous submission, are common in the retail sector in Hong Kong. We urge the Commission to address in the Guidelines the treatment of such arrangements, and to clarify that such arrangements fall within the nature of agency and therefore outside the FCR.

6. Exchange of Competitively Sensitive Data

The Guidelines are unclear as to what types of information exchange (other than price and quantities information) will likely be assessed as having the object of harming competition. Furthermore, the Guidelines are unclear as to how the Commission will treat the exchange of current competitively sensitive

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information. The lack of guidance is already creating difficulties for some of our members in their discussion with suppliers (in anticipation of the law coming into full force). The Commission should clarify this, and also confirm that the burden to establish whether the exchange of data is competitively sensitive should lie with the Commission.

7. Exclusive Arrangements

Whilst we welcome the confirmation in the Guideline on the SCR (paragraph 5.23) that exclusive dealing commonly used in commercial arrangements will not in most cases harm competition, we again urge the Commission to exclude the review of exclusive arrangements from the FCR. If the Commission is minded to review exclusivity under the FCR, the Commission should provide further guidance as to how such arrangements are to be assessed. Without clear guidance, businesses will incur considerable time and costs for self-assessment and may adopt an overly cautious approach to exclusive arrangements.

In relation to exclusivity and non-compete arrangements in respect of retail property leases, we reiterate the need for the Commission to take into account the geographic and market conditions which are unique to Hong Kong when conducting its analysis.

8. Market Power vs Substantial Market Power

We again urge the Commission to adopt a uniform concept of "substantial market power" for both the FCR and the SCR for the reasons previously submitted. Otherwise, the Guidelines as they stand now do not provide clear enough guidance on how the Commission will interpret the two distinct concepts.

9. Market Definition

We welcome the Commission's clarification that the boundaries of the relevant market will be defined as precisely as required by the circumstances of the case and

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that the Commission will generally have regard to its previous cases when defining the relevant market.

In relation to geographic market definition, we reiterate the need to explain in the Guidelines a customer's willingness to travel will depend to a large extent on the value of a product and its availability.

10. Predatory Pricing

The Guide to the Guidelines and the Guideline on the SCR both state that pricing below Average Variable Cost (AVC) is unlikely to be economically rational and the Commission will infer the conduct has the object of harming competition.

This introduction of a "by object" offence for pricing below AVC totally ignores the fact that there is often a legitimate economic rationale for businesses to price below AVC, such as stock clearance promotions and "gifts with purchase" which are a common practice in the retail sector. Retailers also offer customer loyalty schemes which award points to members and may have the effect of bringing price on some products below AVC. Such commercial practices enable customers to enjoy welcomed bargains and are invariably pro-consumer and pro-competitive.

11. Procedural Guidelines

We refer the Commission to the Association's submission dated 10 November 2014, and urge the Commission to:

In relation to the Revised Draft Guideline on Complaints:

- adopt a more restrictive approach (similar to that of the EU) which requires complainants to demonstrate a "legitimate interest";
- reconsider the appropriateness of a telephone call as a method to file a complaint;

In relation to the Revised Draft Guideline on Investigations:

- provide an indicative timescale for the various stages of investigation;

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- raise the proposed standard that the Commission needs to be satisfied with in relation to a contravention of a Competition Rule before use of its information gathering powers from "at least beyond mere speculation" to "reasonable cause to suspect";
- oblige Commission officers to wait for a reasonable period for legal advisers to arrive on site for an unannounced inspection and indicate what time period would be considered reasonable;
- reconsider the appropriateness of publishing warning notices and commitments in relation to parties under investigation;

In relation to the Revised Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 (Block Exemption Orders):

- commence preparatory work to issue a vertical agreements block exemption; and
- provide an indicative timescale for the various stages of the Commission's review of an application for a decision and block exemption order.

- END -

About HKRMA

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ANNEX

HONG KONG RETAIL MANAGEMENT ASSOCIATION

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

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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

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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

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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.

- END -

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HONG KONG RETAIL MANAGEMENT ASSOCIATION

Submission on Draft Substantive Guidelines under the Competition Ordinance

19 December 2014

Further to the submission previously made by the Hong Kong Retail Management Association ("the Association") on 7th November, 2014 regarding the Procedural Guidelines, we now take this opportunity to set out the views of our members on the draft Guidelines on the First Conduct Rule and the Second Conduct Rule.

Executive Summary

Hong Kong is proud of its thriving retail sector, with products imported from around the world and a diverse choice of goods and services through a wide range of retail outlets. It is of vital importance that the Guidelines set clear parameters for businesses so as not to deter innovation and vigorous competitive behavior, which ultimately may result in reduced quality and less choice for consumers. The Association therefore supports greater clarification in the Guidelines regarding the points set out in this submission to ensure legal certainty for all concerned.

The Guidelines should also reflect international norms with regard to competition law, drawing on the experiences of well-established regimes elsewhere, whilst at the same time taking account of Hong Kong's unusual position as effectively a 'city state' economy.

In particular, we would focus the Commission's attention on the following points:

- Vertical Agreements - It is internationally acknowledged that vertical agreements generally only give rise to competition concerns in situations of market power and in many countries there is a Block Exemption (or equivalent), such as in the EU and Singapore. If the Commission takes a different approach and over-regulates in respect of vertical agreements it risks putting Hong Kong businesses at a competitive disadvantage regionally, as they may be overly cautious about the types of supply and distribution arrangements they put in place. **We would therefore urge the Commission to confirm it will only tackle vertical agreements (such as exclusive distribution agreements) in cases where there is substantial market power, and to promptly issue a Block Exemption, consistent with international practice.**

- Resale Price Maintenance (RPM) – The Guidelines are confusing as to whether RPM will be considered to automatically have the 'object' of harming competition, or whether the

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'effect' should also be taken into account. It is also unclear as to when economic efficiency justifications may apply and when RPM may constitute 'Serious Anti-Competitive Conduct'. **The Guidelines should therefore be revised to remove references to RPM as a restriction 'by object' and should clarify that the economic context and effect should always be taken into account. The Commission should also clarify that 'Serious Anti-Competitive Conduct' is intended to catch horizontal price fixing (cartel type behaviour) not RPM.**

- Franchise, Concession and Consignment – These types of arrangements are very common in the Hong Kong retail sector. Franchise relies on the principles of uniformity and harmonisation to build and maintain brand image. The franchisor should be entitled to impose common standards and practices and the use of vertical restraints in this regard should not be prohibited. Concession and consignment model is also very common, where ownership of the stock is retained by the supplier until sale to the end-customer and the supplier is usually responsible for merchandising and setting the retail price. The retailer is effectively just acting as the 'agent' and so should not be caught by the First Conduct Rule. **The Guidelines are almost silent on these types of arrangements which create great uncertainty for businesses operating these types of internationally recognised models. We would therefore urge the Commission to confirm it will only tackle franchise in cases where there is substantial market power, and to promptly issue a Block Exemption.**

- Exchange of Information – The broad concept of information exchange in the Guidelines is of concern to our members and risks capturing legitimate information flows between supplier and distributor / retailer. The Guidelines seem to ignore the practical reality of commercial negotiations and risk huge uncertainty for businesses. They also seem to indicate that the bare fact of receiving so called 'competitively sensitive information' (which is itself so broadly defined) could result in infringement, without any need to show an element of intention. **The Guidelines need to be tightened up to make it clearer what types of information and use of such information is prohibited and to clarify regarding exchange of information through a third party.**

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1. Vertical Agreements

As Hong Kong is a very small market in the global arena and relies heavily on imports, the retail industry has numerous vertical agreements to protect both the local distributors and overseas vendors. Such distributorship arrangements are crucial to the Hong Kong economy.

We are therefore encouraged to see that the draft Guidelines state that vertical agreements are generally less harmful to competition than horizontal agreements (particularly cartels) and that pro-competitive benefits may outweigh the potential harm. However, there is very little real comfort for businesses about how such vertical agreements will in practice be handled and what kinds of efficiency exclusions will apply.

The Commission has indicated that vertical agreements are unlikely to amount to 'Serious Anti-Competitive Conduct' and therefore the warning notice mechanism would be used in such cases. This does not adequately address the practical concerns of our members, as a warning notice is still not something most companies would consider lightly and carries with it the risk of reputational damage.

The risk of over regulating in respect of vertical agreements is that it puts Hong Kong at a competitive disadvantage regionally and businesses may be overly cautious about the types of supply chain arrangements and other vertical agreements they put in place, as compared to other jurisdictions. In particular for example, another similar 'city' economy like Singapore where vertical agreements are generally exempted (unless the market share is over 60%).

It is internationally acknowledged that vertical agreements are unlikely to give rise to competition concerns in the absence of market power, and indeed the Guidelines also seem to confirm this position. We would therefore urge the Commission to confirm it will only tackle vertical agreements in cases where there is substantial market power, and to promptly issue a Block Exemption, consistent with international practice such as in the EU and Singapore.

2. Economic Efficiency

The Guidelines recognise that potentially anti-competitive agreements or arrangements may lead to economic efficiencies which outweigh the anti-competitive effect. According to paragraph 4.3 of the Guidelines the burden of proving such efficiency justification, in the Commission's view, rests with the businesses concerned, notwithstanding that nothing in the Ordinance suggests that such burden of proof should rest on the businesses seeking to rely on the general exclusion. The Commission should be obliged to prove not only that the agreement or arrangement prevents, restricts or distorts competition, but also that it is not subject to the efficiency exclusion (except in the case where a party is seeking a decision under Section 9, in which case they will have to produce reasons as to why the general exclusion applies).

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There is no reference in the Guidelines as to the application of efficiencies under the Second Conduct Rule. If overall economic efficiencies can justify agreements which restrict competition under the First Conduct Rule, the same should logically apply to unilateral conduct under the Second Conduct Rule, whether or not the business has substantial market power. We urge the Commission to state this clearly in the Guidelines.

3. Is RPM illegal per se? "Object or Effect"?

The draft Guidelines are confusing in respect of the concept of 'object' versus 'effect'. For example, on the one hand they state that resale price maintenance ("RPM") is considered a restriction of competition by 'object' (i.e. it is by its nature harmful to competition). On the other hand, they indicate that there should be a case-by-case assessment taking into account the economic context and other factors (see paragraphs 3.5 and 6.62 of the draft Guidelines).

We do not agree that RPM should be considered automatically as having the object of harming competition without regard to its economic context and effect.

This is particularly important as the Guidelines go on to note that RPM may constitute 'Serious Anti-competitive Conduct'. This is based on a literal reading of the definition in the Ordinance, however it would be open to the Commission to clarify that the concept of 'price-fixing' under the definition of Serious Anti-competitive Conduct in the Ordinance is intended to catch horizontal price-fixing between competitors, not RPM. We urge the Commission to clarify that RPM would not be classified as Serious Anti-competitive Conduct.

We welcome the Commission's acknowledgement in the Guidelines that there are a number of situations where RPM may lead to efficiencies. However, we are concerned that in practice it will be very difficult for businesses to justify a resale price restriction on efficiency grounds if it has been categorized from the outset as conduct having the 'object' of harming competition (and potentially even Serious Anti-competitive Conduct).

One of the examples of possible efficiencies given in the Guidelines is the use of RPM in relation to a franchise or selective distribution system for the purpose of "organising a coordinated price campaign of limited duration". We would ask the Commission to clarify the meaning of 'limited duration' in this context and to clarify that there may be other circumstances in which RPM may lead to efficiencies in franchise or selective distribution systems, as such systems are very common in Hong Kong. More examples and guidance on this issue would certainly be very helpful to the industry players. We also urge the Commission to expand the efficiency justifications to franchising and selective distribution systems more generally (See also below re 'Franchising').

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We would further like to draw the Commission's attention to an issue particular to joint ventures, where a supplier is typically also a shareholder. If the supplier sets a minimum resale price in respect of goods purchased by the joint venture company in which it is also a shareholder - how will the Commission determine whether the joint venture company is an "undertaking" for the purposes of compliance in this scenario?

4. Recommended and Maximum Resale Prices

The Guidelines indicate that printing a recommended resale price ("RRP") on the product may be indicative of RPM. It is common practice in certain sectors for suppliers to put a suggested RRP on the product and so long as the retailers/downstream players are free to deviate from the RRP and to set their own resale price, this should not be an issue. We urge the Commission to take out this example from the Guidelines as it causes a lot of confusion to the industry players.

The Guidelines state that RRP and maximum resale price are not considered to have the 'object' of harming competition, but "may have the effect of harming competition". However, they also state that where a supplier retaliates (or threatens to) when its RRP is not followed, this will be viewed as conduct having the 'object' of harming competition. Again this raises the confusing ambiguity between the concept of 'object' and 'effect'. In any event, it is not within a retailer's control if the upstream players use a price monitoring system. Thus, we urge the Commission to clarify and confirm that if the downstream players (e.g. retailers) have exercised their right to set their own prices, which may turn out to be the same as the maximum or RRP suggested by the upstream players, they should not be liable for any infringement under the Conduct Rules initiated by the conduct of the upstream players.

5. Franchise, Concession and Consignment Arrangements

As discussed previously with the Commission, the international franchise model is very common in Hong Kong and relies on the principles of uniformity and quality standardization, to build and maintain brand image. Franchises are a unique form of organization with many economic efficiencies. The franchisor should be entitled to impose certain common standards and practices on the franchisee, and therefore vertical restraints used in the context of such franchise arrangements, should not fall foul of the First Conduct Rule. The Guidelines should clarify this.

Similarly, concession and consignment arrangements are frequently used in the retail market in Hong Kong. Under these arrangements the title to the stock (and risk in the stock) is retained by the supplier until sale to the end-customer. The supplier would also usually be responsible for merchandising of the stock and would generally set the retail price. We believe these arrangements would be covered by the 'agency' example in the Guidelines (Hypothetical Example 1), i.e. if the retailer is just acting as the 'agent' then the First Conduct Rule would not apply. We would be grateful for the Commission's confirmation on this point.

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We also ask the Commission to clarify the determining factor(s) to qualify as an 'agent' in that example (and hence not caught by the First Conduct Rule) – i.e. as between the following: stock title, risk of unsold stock and returns, risk of shrinkage, product liability risk, risk of payment delay by customer, advertising costs, delivery and installment costs to customer etc. We understand that title to the stock would generally be the most important factor, but please could the Commission clarify the weighting that will be given to these determining factors?

6. Exchange of competitively sensitive information

The broad concept of information exchange in the Guidelines is of concern to our members and risks capturing legitimate information flows between supplier and retailer as part of their day-to-day negotiations. For example, the section entitled "Other forms of information exchange" (paragraph 6.38 onwards) does not distinguish between horizontal and vertical information exchange and refers to the exchange of "competitively sensitive information". This is so broadly defined it could encapsulate every conceivable element of information which would regularly (and justifiably) be discussed in a buy / sell arrangement, including price, quantities, customers, turnover, sales, product quality, marketing plans.

We would be grateful for the Commission's guidance as to what type of conduct would give rise to concern that exchanges of competitively sensitive data between supplier and retailer have taken place, and what documentation the Commission would expect to see in place between suppliers and retailers to establish that the duty of care has been discharged to prevent the exchange of such "competitively sensitive data". Furthermore, where does the burden of proof lie? Is it for the Commission to establish the exchange of data is competitively sensitive, or for the supplier and retailer to establish that it is not?

In respect of information exchanged via customers or suppliers, the wording of the Guidelines is also too vague. Paragraph 6.36 states that competitors "may seek to use a third party supplier or distributor as a conduit…". The words "seek to use" seem to imply an element of intention on the part of the competitors but this should be expressly clarified in the Guidelines. In order to establish a breach of the First Conduct Rule, the Commission would need to demonstrate intent to share information with a competitor via a third party.

We would also like to understand whether the Commission will make any distinction regarding exchange of information with 'pure suppliers' versus 'supplier/competitors'? A supplier which does not directly retail, or 'e-tail', in the distributor's market may be considered as a 'pure supplier' and therefore the risk of exchange of data having anti-competitive effect is substantially reduced, provided confidentiality is maintained as between the parties. On the other hand, for 'supplier/competitors' who are both supplier and also competitor at the distributor / retail level, the perceived risk may be higher and therefore what may be considered competitively sensitive data may be different. Generally for 'supplier/competitors' the currency and granularity of the data would be limited (i.e. only historical aggregated sales data would be provided).

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In certain circumstances there may be specific commercial justifications to disclose detailed current product level sales data to 'supplier/competitors'. For example in the case of auto-replenishment for stock sold via counter sales made by supplier staff in a retailer's multi-brand environment, detailed sales data is provided to the supplier on daily or weekly basis in order to determine auto replenishment orders.

7. Exclusive arrangements

It is common practice for retailers in Hong Kong to be appointed on an exclusive basis for certain brands or products. Such exclusivity arrangements help to incentivise distributors to take the risk of bringing new products onto the market and to invest in marketing and promotion. They should be encouraged not penalised.

The Guidelines recognise that exclusive distribution agreements may lead to economic efficiencies, whilst also presenting risks to competition and the Commission will therefore consider and assess the 'effects' of such arrangements to determine whether there are any competition concerns. However, the Guidelines provide very little guidance as to how such agreements are to be assessed, and it appears that the parties should undertake their own 'competitive effects' analysis each time, which will be very time-consuming and costly. Businesses may therefore need to adopt an overly cautious approach to distribution agreements which are broadly recognised in other jurisdictions as generally not giving rise to competition concerns.

We urge the Commission to therefore confirm that exclusivity arrangements are generally benign and will only be a cause for concern in cases of substantial market power, and should therefore only be tackled under the Second Conduct Rule.

We also reiterate our previous comments relating to exclusivity and non-compete agreements in respect of retail property leases. In Hong Kong shopping malls are often interlinked with adjacent malls and also to 'high street' shopping outlets, all of which can be readily accessed by customers on foot. This is very different from the 'out-of-town' type shopping malls which are more prevalent in the UK, Australia and the US. Equally it is important to note that the average retail lease term in Hong Kong is 3 to 5 years and hence there would be no appreciable foreclosure effect. These geographic and market conditions which are particular to Hong Kong need to be taken into account in assessing whether there is any detrimental impact to competition from exclusivity or non-compete restrictions. We would urge the Commission to address these factors in the Guidelines.

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8. "Market Power" versus "Substantial Market Power"

A distinction seems to have been made in the Guidelines between "market power" under the First Conduct Rule and "substantial market power" under the Second Conduct Rule. The Commission has indicated that the threshold for applying "market power" under the First Conduct Rule would be lower than "substantial market power" under the Second Conduct Rule. As market power is assessed on a case by case basis and market share is only one factor in the assessment, this leaves a very unclear situation for businesses. In order to simplify matters we would suggest not making a distinction at all and instead adopting the concept of "substantial market power" across both Guidelines for consistency and clarity.

9. Market Definition

We welcome the Commission's confirmation in the Guidelines that it will focus on buyer behavior in the relevant product market (as opposed to taking a segmented view based on any particular type of supply outlet). This is very important in a diverse retail market such as Hong Kong, where there are numerous different types of outlets (including department stores, chain stores, specialist independent shops, wet markets and other markets) operating in condensed geographical locations.

We also welcome the Commission's confirmation that ecommerce channels will generally be included in the relevant market alongside 'bricks and mortar' businesses and the Guidelines should expressly make this clear.

As regards the geographic market it would be helpful to explain in the Guidelines that a customer's willingness to travel will depend to a large extent on the value of a product and its availability. For example, for high value products such as electronics, home appliances and furniture, the consumer may well be prepared to shop around over fairly wide distances, perhaps even the whole of HKSAR. In some cases the geographical market would also extend to Macau and the Pearl River Delta. Clearly where online shopping is included the geographical scope will be much wider – including the Asia region and even worldwide.

10. Abuse of Substantial Market Power

As noted above in relation to the First Conduct Rule, the concepts of 'by object' restrictions on competition, as opposed to those which have anti-competitive 'effect', are very confusing to our members. We are therefore concerned that similar uncertainty arises under the Guidelines on the Second Conduct Rule.

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In order to determine whether there has been an abuse of substantial market power, there should be an assessment of whether there has been an exclusionary effect on competition in the relevant market. It seems therefore contradictory to refer to certain conduct, such as pricing below average variable costs, as having the object of harming competition, without analysis of its economic effect. Pricing below average variable cost may be justifiable depending on the circumstances and such practices should always be judged in their economic context and should only constitute an 'abuse' where there is anti-competitive foreclosure of the market.

As noted by the Commission in paragraph 5.3 of the Guidelines on the Second Conduct Rule, "charging low prices is the very essence of competition" and so treating practices such as pricing below average variable cost as a 'by object' infringement flies in the face of this and risks unwarranted commercial impacts, such as dampening aggressive price competition to the detriment of consumers.

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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.

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