

SUBMISSION TO HONG KONG COMPETITION COMMISSION

in response to the

REVISED DRAFT GUIDELINES

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Provides policy advice to governments, enforcement training to regulators, and compliance training to companies in relation to competition law and economic regulation.

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This Submission

Sets out the views solely of Certari Consulting Ltd.

Confidentiality is not asserted in relation to any part of this submission.

Executive Summary

1. Certari Consulting Limited welcomes the issuance by the Competition Commission and Communications Authority of revised drafts of its proposed guidelines, prior to consultation on those with the Legislative Council. We are pleased to have the opportunity to offer the following comments on the Revised Draft Guidelines.¹
2. Certari Consulting Limited previously provided comments on the Draft Procedural Guidelines² (on [10 November 2014](#)³) and on the Draft Competition Rule Guidelines⁴ (on [10 December 2014](#)⁵). The present submission should be read in conjunction with those prior submissions.
3. We consider the development of clear, certain and economically principled guidelines a matter of vital importance to the successful implementation of the *Competition Ordinance* (Cap. 619).
4. We are pleased to observe that a number of the recommendations made in previous submissions by Certari Consulting (and, in some cases, by other parties) have been reflected in the Revised Draft Guidelines, including the following:
 - Some elaboration (though less than is desirable) of the status of the guidelines, in the introductory text of each of them;
 - Some adjustment (though less than is necessary) of the proposed approach to restrictions by “object”;

¹ Competition Commission and Communications Authority *Revised Draft Guideline on The First Conduct Rule; Revised Draft Guideline on the Second Conduct Rule* (30 March 2015); *Revised Draft Guideline on the Merger Rule* (30 March 2015); *Revised Draft Guideline on Complaints* (30 March 2015); *Revised Draft Guideline on Investigations* (30 March 2015); *Revised Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders* (30 March 2015) (collectively, “Draft Conduct Rule Guidelines”).

² Specifically, the Competition Commission and Communications Authority *Draft Guideline on Complaints – 2014; Draft Guideline on Investigations – 2014; and Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders – 2014*, issued in October 2014 (collectively, “Draft Procedural Guidelines”).

³ Available online at:
<http://www.compcomm.hk/files/submissions/S4_Certari_Consulting_Limited.pdf>.

⁴ Specifically, the Competition Commission and Communications Authority *Draft Guideline on The First Conduct Rule – 2014; Draft Guideline on the Second Conduct Rule – 2014; and Draft Guideline on the Merger Rule – 2014*, issued in October 2014 (collectively, “Draft Competition Rule Guidelines”).

⁵ Available online at:
<http://www.compcomm.hk/files/submissions/S39_Certari_Consulting_Limited.pdf>.

- Revision of the proposed approach in respect of information designated as “confidential” by the party providing it;
 - Limiting information that may be used for “other purposes” to information that has been *voluntarily* provided to the Commission;
 - Deletion of the statement that: “the category of serious anti-competitive conduct is an open one”;
 - Commitment to acknowledge receipt of *all applications* for a decision; and
 - Commitment to endeavour to keep Complainants generally informed as matters progress.
5. In relation to confidentiality, we submit that references to “claiming” confidentiality in respect of information should be changed to “*identifying*” information as confidential, to better accord with *Competition Ordinance* s 123.
 6. We note that the Commission states it “has not attempted to summarise the position at common law”⁶ in respect of confidentiality but submit that, in the context of providing guidance on its intended approach to the handling of information disclosed to it, it is incumbent on the Commission to provide general guidance as to its intended practice in respect of *compulsorily acquired* information, in respect of which it is more constrained.⁷
 7. The Commission is right, we submit, to omit the statement that “market definition has no precedential value” and to omit reference to the means of calculating market concentration in the context of the Second Conduct Rule.
 8. We submit that the Revised Draft Guidelines should be amended to incorporate the changes proposed in the following paragraphs, prior to opening consultations with the Legislative Council on them. In particular, the Revised Drafts Guidelines should be amended to:
 - Include in the introductory text of each of the guidelines a statement that

⁶ Competition Commission, Guide to the Revised Draft Guidelines para 144.

⁷ See, Certari Consulting Ltd, Submission on the Draft Procedural Guidelines (10 November 2014) para 14.

the Commission will state its reasons for departing from its own guidelines, in any case in which it does that.

- Confirm that whether an agreement has an “object or effect” that is anti-competitive will normally be assessed having regard to the *effects* that agreement is having in the relevant market or markets and, exceptionally, having regard to its object *in cases where the effects are yet to manifest*.
- Elaborate on the criteria for application of the “economic efficiency” exclusion, and provide meaningful indicia of efficiency enhancement, ensuring it is possible for undertakings (especially SMEs) to assess for themselves whether the exclusion properly applies to conduct they are engaged in or are contemplating.
- Amend the categorization of resale price maintenance and predatory pricing as harmful by object to confirm instead that resale price maintenance and predatory pricing will be unlawful only where they have had or will have anti-competitive effects in the relevant market.

I. Status of Guidelines

9. We are pleased to note that the Revised Draft Guidelines go at least part of the way towards implementing the submission by Certari Consulting that the guidelines should expressly state that the Competition Commission (and Communications Authority) will ordinarily adhere to their own guidelines.

10. We note the addition to each draft guideline of introductory text stating:

This Guideline describes the general approach which the Commission intends to apply to the topics covered in the Guideline. The approach described will be adapted, as appropriate, to the facts and circumstances of the matter.

11. The introductory text quoted above provides guideline users with less certainty than is appropriate, however. It is highly desirable, we submit, that the guidelines should adopt the statement made by the UK communications regulator Ofcom in its guidelines that:

Where we depart from the approach set out in these guidelines, we will be

prepared to explain why.⁸

12. Such a statement in the introductory text would help to give users of the guidelines (and Legislative Council members) confidence that the Commission's actual approach will in the normal run of cases conform to its announced intentions.

II. Agreements taken to be anti-competitive "by object"

13. Certari Consulting notes the Commission's revision of paragraphs under the heading "The object of harming competition," in the Revised FCR Guideline. Nevertheless, we submit that the proposed approach to restrictions "by object" should be reconsidered.
14. An approach to restrictions "by object" that is as broad as that proposed in the Revised FCR Guideline, if put into practice, would result in the Commission seldom having to assess whether conduct has any anti-competitive "effect". This would contribute little to public understanding of the new law and do little to promote voluntary compliance. It is important to recognize that public understanding of the law – and the legitimacy of the enforcement agency and the esteem in which it is held by the community – depend largely on its ability and willingness to explain its decisions to the public.
15. We submit that:⁹
 - the Commission's proposed approach to restrictions "by object" is not required by the language of the *Competition Ordinance* or by local circumstances in Hong Kong;
 - the Commission's proposed approach to restrictions "by object" is inconsistent with the legislative intent underlying s 6 of the *Competition Ordinance*;
 - the Commission should eschew an EU-style approach to restrictions "by object," which is inimical to the more useful and meaningful analysis of anti-competitive "effects";

⁸ See, e.g., Ofcom *Enforcement Guidelines* (2012) para 1.25; see also Ofcom *Dispute Resolution Guidelines* (2011) para 1.8.

⁹ For a more detailed explanation of these submissions, please refer to Certari Consulting Ltd Submission on the Draft Competition Rule Guidelines (10 December 2014) paras 13 – 33.

- the Commission should examine whether an agreement is likely to be restrictive “by object” only in those exceptional cases in which the effects of the impugned agreement have not yet manifested; and
- at a minimum, the Revised FCR Guideline should be amended to mirror the Revised SCR Guideline, which states that:

[T]he Commission is of the view that most conduct falling within [the] scope of the Second Conduct Rule will be assessed by reference to the conduct’s actual or likely anti-competitive effects in the market.¹⁰

16. An approach which deems agreements of certain kinds to be anti-competitive without investigation of their effects “sensibly conserves resources of competition authorities and the justice system”, as Advocate General Kokott has pointed out,¹¹ but the conservation of enforcement resources ought not to be the paramount consideration in the present setting. In Hong Kong, priority should be given to promoting legally compliant, competitive behaviour in business, rather than to cost-effective prosecution.

III. Clarification of the “Efficiency Exclusion”

17. Elsewhere in the Revised FCR Guideline, the Commission claims that: “the Commission has not simply adopted the position taken by overseas jurisdictions to particular competition issues but has tailored the Guidelines to suit the Hong Kong context.” In relation to the “efficiency exclusion” under s 1 of Schedule 1 of the *Competition Ordinance*, the guidance appears, with respect, insufficiently ‘tailored’ for Hong Kong.
18. The Competition Commission’s Revised FCR Guideline appears to preserve the full complexity of the European Commission (“EC”) interpretation of Article 101(3) but provides only a fraction of the explanation that is made available in the relevant EC instruments. It would be preferable, we submit, either to: (i) adopt an analytic approach that is more streamlined than the EC’s; or (ii) offer guidance at a level of detail similar to the EC’s. We submit that the combination of a complex analysis and relatively limited guidance will make self-assessment more difficult than it needs to be, particularly for SMEs.

¹⁰ Competition Commission, Revised SCR Guideline, para 4.13.

¹¹ Opinion in *T-Mobile* case C-8/08 [2009] ECR I-4259, [2009] 5 CMLR 1701, para 43.

19. The Revised FCR Guideline notes that: “detailed guidance from overseas agencies is a result of decades of enforcement practice and case-law by their courts” which “is not yet available in Hong Kong.” It is precisely those decades of experience of which the Commission should be taking advantage. Since 1957,¹² EU case law and EC guidelines have provided detailed elaboration on the Article 101(3) exclusion. Long experience in the EU with Article 101(3) has brought to light many of the shortcomings of that provision and responses to at least some of its problems. Hong Kong could usefully avoid many of the controversies that have beset Article 101(3) by providing more complete guidance at the outset.

IV. Resale price maintenance

20. For reasons set out in our previous submission, agreements for resale price maintenance should not be deemed to be anti-competitive “by object”.¹³ We do not restate those arguments here but query whether resale price maintenance can amount to “serious anti-competitive conduct.” The Commission reasons that:

Paragraph (a) of the definition of Serious Anti-Competitive Conduct in section 2(1) of the Ordinance provides that conduct which consists of “*fixing, maintaining, increasing or controlling the price for the supply of goods or services*” is Serious Anti-competitive Conduct. Resale price maintenance involves the supplier fixing, maintaining or controlling the resale price for its products.

21. The difficulty with the Commission’s reasoning, we submit, is that resale price maintenance involves maintaining, etc, the *resale* price for *resupply* of goods or services, whereas *Competition Ordinance* s 2(1) refers to maintaining, etc, “*the price for the supply*” of goods or services. Construing “the price for the supply” of goods or services as applying to the resale price, charged by a third party, for resupply by the third party, appears an unjustified gloss on the language of the statute, we submit.

V. Presentation of Guidelines

22. In general, footnotes are used appropriately in the Revised Draft Guidelines to cite statutory provisions or to cross-refer to other Commission documents.

¹² See, *The Treaty of Rome* (25 March 1957) Article 85.

¹³ See, Certari Consulting Ltd, Submission on Draft Competition Rule Guidelines (10 December 2014) paras 38 – 40.

Some footnotes, however, contain text that provides substantive guidance or material examples (see, for example, footnotes 12, 13, 17, 20, etc. of the Revised FCR Guideline). Placing information of these kinds in footnotes, rather than in the main text, may hamper users' understanding of the guidelines.

23. We submit that the Revised Draft Guidelines should each be reviewed and amended to bring into the main text of each document text currently appearing in footnotes that provides substantive guidance or material examples.

VI. Conclusion

24. In conclusion, we submit that the Competition Commission and the Communications Authority should proceed to amend the Revised Draft Guidelines to incorporate changes that address the concerns identified above, prior to opening consultation on them with the Legislative Council.

Submitted for Certari Consulting Limited

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