7 November 2014

THE COMPETITION COMMISSION
36/F., Wu Chung House,
197-213 Queen's Road East,
Wanchai,
Hong Kong.

By post and also
by email: submissions@compcomm.hk

Dear Sirs,

Response to Market Consultations on Draft Guidelines in respect of:
(A) Complaints
(B) Investigation, and
(C) Application for Decisions on Exclusions/Exemptions/Block Exemption Orders

This is our submission to the (1) draft Guidelines on Complaints, (2) draft Guidelines of Investigation, and (3) draft Guidelines on application for a decision under S.9 and 24 (exclusion/exemption) and under S. 15 (block exemption order).

1. DRAFT GUIDELINES ON COMPLAINTS

1.1. Employee, customers, and politicians may make anti-competition complaints for one reason or another. Frivolous or vexatious complaint wastes the resources of the Commission. Some jurisdiction requires a complainant to demonstrate a "legitimate interest" before his complaint may be entertained by the competition law agency (e.g. being representative of a sector affected by the anti-competitive conduct in question).

1.2. Paragraph 3.2 of the draft Guidelines on Complaints does not state whether the complainant is as duty-bound as the Commission to keep confidential his complaint, and whether legal consequence will attach if the complainant deliberately publishes or intentionally leaks his complaint with the media. If it turns out that the complaint is unmeritorious, the entity is left with no redress for the business reputation damage it has suffered.

1.3. We expect the complainant is similarly *duty-bound* to keep confidential the complaint he has made with the Commission. We hope the Commission can clarify what step it will take to ensure a complainant will not publishes or leaks his complaint with media.

1.4. Making false report to waste the resources of the police is a crime. We urge the Commission to set rules empowering it to investigate and penalize complainant who files frivolous or vexatious complaints with the Commission, publishes or intentionally leaks news about his complaint, or abandons his complaint after getting media publicity.

2. DRAFT GUIDELINES ON INVESTIGATIONS

2.1. It takes considerable amount of management time and efforts to gather the documents and information the Commission requests. As a matter of fairness, the Commission should set out strict and clear guidelines on the scope and depth on the information to be requested under S.41 (the ***S. 41 notice***) and reassure the business community how the Commission avoids engaging in investigations so wide in scope that amount to "fishing expedition".

Minimum amount of time to comply

2.2. The draft Guidelines on Investigation acknowledge the need to give time for the entity concerned to respond to a S. 41 notice. Competition law is a specialized area of law, relatively new to Hong Kong. For SMEs who do not have internal legal counsels or have retained external counsels in advance, specialized legal advice may not be always to hand. Appointing legal advisors can take time. Some entities may have to report and take instructions from their overseas headquarters before responding to the S. 41 notice.

2.3. We thought a period of 14 business days is required before an informed decision on complying with the request in the S. 41 Notice or otherwise can be made by the entity concerned. This amount of time is reasonable, given under S.51 of the Competition Ordinance there is serious consequence for not complying or not complying in time, and given also the confidentiality issue discussed under paragraph 2.6 below.

2.4. We further suggest the Guidelines may also want to provide for a process under which the entity under investigation may negotiate, by itself or through its legal advisors, with the Commission a timeframe under which documents that are of priority concern to the Commission can be swiftly identified and provided, leaving ancillary or peripheral information for a second stage production.

The Reasonable Excuse Defense

2.5. S.52 of Competition Ordinance provides a "reasonable excuse" defense in relation to the possible offences of refusing to provide documents and information under S. 41, refusing to attend before the Commission or giving evidence under oath (under, respectively, S. 42 and 43), and complying with the search warrant obtained from Court under S. 50.

2.6. It helps if the Guidelines can give examples of what constitute "reasonable excuse". For example, does it amount to reasonable excuse if the entity concerned is in the meantime waiting for judicial adjudication on issues it has raised in response to the Commission's request under those Sections? What if the entity is being precluded from providing certain documents by an injunction order obtained by the other party to those documents or is being precluded by foreign laws from disclosing certain information? Confidentiality clauses in commercial contracts typically oblige the party being compelled to disclose to inform his counterparty and afford the contract counterparty an opportunity to either contest the disclosure or request the disclosure be limited or conditional on certain use by the Commission. Negotiation with contract counterparty takes time, especially when the counterparty is an overseas MNC and has its own concerns on disclosures. Also can compliance be suspended when the entity concerned is negotiating a commitment with the Commission?

2.7. It is noted that the "reasonable excuse" defense has not been set out in S. 54 of the Competition Ordinance (obstructing the execution of search warrant). Often, execution of the search warrant is a potential area when the entity concerned may have dispute with the Commission. Dispute can arise on the scope of the search warrant, timing of compliance, etc. The entity being served with the search warrant (upon legal advice) may take issue on the validity and the scope of the search warrant, or the manner of its execution, etc. to Court for adjudication. We hope the Guidelines of Investigation can specify that these are reasonable excuses for withholding compliance pending final adjudication of the issues on search warrant by Court.

Confidentiality & Stock Exchange Announcements

2.8. A listed company is under duty of disclosure when it has come into possession inside information. Possibility of major litigation is one of the instances of inside information, mindful that successful prosecution on violation of competition laws attracts hefty fine and follow-on law suits in private-actions. The duty to disclose inside information to the stock market is a statutory requirement under the Securities and Futures Ordinance and the Listing Rules of the Hong Kong Stock Exchange for all listed companies to comply with.

2.9. When news of a complaint with the Commission hits the press/electronic media, the securities regulators will likely require the listed company to issue a Stock Exchange announcement. For news that the listed company is being investigated by the Commission, it is highly likely that the securities regulators will require the listed entity concerned to issue a Stock Exchange announcement. Securities regulators often require the listed entity to update the stock market on development of the situation with further announcement, as they perceive investigation (and likelihood of prosecution) by government authority is likely to affect share price.

2.10. We hope the Commission can clarify in the Guidelines of Investigation that stock exchange announcements responding to complaint and investigation situations do not breach the confidentiality obligation under Part 8 of the Competition Ordinance.

Self-incrimination

2.11. Under S. 42 (and S. 43), the Commission has power to require a person to attend interview to give information. Under S. 45, that person cannot refuse to answer question put to him by the Commission on the ground that it may expose him to subsequent legal proceedings.

2.12. Paragraph 5.20 of the draft Guidelines states that the Commission will not object if the person who is required to appear before its officers may be accompanied and represented by legal advisor.

2.13. The right of a person to remain silent before he can make an informed decision as to his right in answering or declining to answer potentially incriminating questions should be upheld. Accordingly, we hope the draft Guidelines of Investigation can clarify that the questioning/interrogating of the person being required to appear before the Commission should not commence before that person's legal advisor arrives and has the opportunity to advise his client, and further that the legal advisor is entitled to stay with his client throughout the meeting with the officers of the Commission. The legal advisor should also be afforded privacy – in the absence of and any interruption by officers of the Commission – when the person concerned needs the moment to seek legal advice.

Search warrant

2.14. What if there is a dispute on whether documents sought under the search warrant are covered by a valid claim of legal professional privilege? The entity subjected to the search warrant should be afforded an opportunity to consider complying, and the extent to which it should comply, with the search warrant in the context of legal professional privilege, upon consultation with its legal advisors.

2.15. We are mindful of the impact on the entity concerned once becoming the subject of a search warrant. This is particularly so when there is media publicizing that the entity concerned has become the subject of a search warrant by the Commission. We suggest in the absence of evidence suggesting possibility of destroying or removing of evidence to evade investigation, the Commission should withhold executing the search warrant before the external legal advisors has the opportunity to advise the entity concerned. The risk of evidence being tempered with can be dealt with by an agreed process under which documents and information that is not disputed are swiftly provided and those under dispute are isolated and frozen pending adjudication by court.

Loss flowing from unsubstantiated investigation

2.16. An investigation brings disruption to daily operations of the subject entity. It has to allocate manpower and resources to comply with the house search, deal with enquiries from the Stock Exchange (if it is listed) and from its own stakeholders (shareholders, business partners, bank lenders, creditors, etc), and spend considerable time (and incur legal cost) with his advisors to consider the appropriate response. Its business reputation may suffer if the fact that it is under investigation by the Commission has been made public. All of these are losses to the entity concerned.

2.17. Neither the Competition Ordinance nor the draft Guidelines address how could the entity recover the loss it has suffered in the event of a malicious complaint leading to a misconceived and fruitless investigation. Entity which is innocent should have a redress and be able to recover the loss which it can prove as directly flowing from a misconceived investigation. This deters also groundless complaint.

2.18. We urge the Commission to consider making rules empowering it to make application to the Competition Tribunal for cost order against a malicious complainant (e.g. one who does not have a legitimate interest, or who abandons his complaint or refuses to cooperate with the Commission without good reason) in respect of the investigation cost of the Commission and the defense cost of the entity concerned if it turns out that his complaint is groundless. Such rules should also empower the entity to recover cost against the Commission if the statutory request of the Commission or the search warrant the Commission obtained is invalid or the scope is cut down by Court upon successful challenge by the entity.

3. DRAFT GUIDELINES ON APPLICATION FOR DECISION UNDER S.9 AND S. 24 (EXCLUSIONS AND EXEMPTIONS) AND UNDER S. 15 FOR BLOCK EXEMPTION ORDERS

3.1. We note the remark in paragraph 5.15 of the draft Guidelines to the effect that making an application under S. 9/S.24 (for a Decision on exclusion) or under S. 15 (for block exemption order, or a ***BEO***) does not afford immunity and the Commission may use information provided under a S. 9/S.24 application in subsequent enforcement action against the applicant entity.

Policy intent backfire

3.2. We assume that the policy intent of S.9/S.24 and S.15 is to "save" certain anti-competitive agreement/conduct when the harm they carry is demonstrably outweighed by the benefits they bring to consumers as a whole. When there is a concern that the information one provides to the Commission in the application may subsequently be used against him, few will apply for exclusions/exemptions.

3.3. An individual has protection under S. 45 (against self-incrimination) when he answers question from the Commission. We fail to understand why protection is not similarly afforded to an entity when it volunteers information to the Commission in genuine belief that his agreement/conduct is legitimate and in honest application under S.9/S.24 for an exclusion/exemption. There is inconsistency in the treatment in this regard. Information supplied to the Commission in application for exclusion/exemption under S.9/S.24 and S.15 should be granted the same level of immunity and not be used in subsequent enforcement action against the applicant. This encourages legitimate use of the provisions. We hope the Commission can re-consider its "no-immunity" stance on this matter.

3.4. If one satisfies all the "economy efficiency" conditions under S.1, schedule 1, the defense of "economy efficiency" is automatic. If he makes an application under S.9 (1) for a decision by the Commission on the same set of facts under the exclusion under S. 1, Schedule 1, he has to prove the additional elements of novelty, public interest, question of wide importance, etc. required by S. 9 (2). Who would bother to use S.9 (1)?

Which body of law to look at?

3.5. Under S. 9(2) (b) (similar for S. 24 (2) (b)), the applicant is expected to show that his application for an exclusion involves, among others, a question for which there is no clarification under "*existing case law*". Which body of case law the applicant should look at? Is it the EU law or the UK law and is the applicant required to also exhaust the US/Canadian or Australian/NZ case laws? There is wide difference among these different jurisdictions reflecting the difference among them in economic structure, country size, culture, politics, constitutional background, and legal system.

3.6. The Commission should indicate which jurisdiction it will primarily consult. Otherwise, businesses may find it difficult to obtain advice and plan their operations with a view to become competition law compliant.

Block Exemption Orders

3.7. The draft Guidelines says the Commission considers the issue of a BEO an exceptional measure and that there must be shown public benefits. Given vast amount of time, data and analysis is required to show that there is public benefit before the Commission may consider a BEO application, should the Commission take lead to give directions on what are the possible areas or trades which the Commission consider suitable for BEO application? With such indication from the Commission, relevant trade associations (e.g. retailers association) can organize resources and expertise among their members to make a meaningful BEO application.

3.8. It is noted that the UK Office of Fair Trade issued BEO on land agreements. Singapore Competition Commission also published from time to time trade and market studies to give guidance to businesses. SMEs and many other businesses alike will be interested to know whether their business/trade practice or documentation/contract terms conventionally used among their members are suitable for a BEO application.

We hope our views assist the Commission in the consultation process. Should the Commission require us to deliberate further, please contact me or our Director (Legal) & Company Secretary Mr. Ricky Chan at

Yours faithfully,

Andy Cheung, CFO & Executive Director
The Link Management Limited
(as Manager of The Link REIT)