

Draft Guidelines under the Competition Ordinance - 2014
Submission received from The Hong Kong Institute of Chartered Secretaries

《競爭條例》草擬指引— 2014
由香港特許秘書公會提交的意見書

Introduction

HKICS is the industry organisation representing Chartered Secretaries as governance professionals in Hong Kong and China. HKICS is rooted with the Institute of Chartered Secretaries and Administrators (ICSA) in the United Kingdom with 9 divisions and some 33,000 members. It is also a founder member of the Corporate Secretaries International Association (CSIA) an international organisation comprising 19 national member organisations to promote good governance globally.

Comments on Draft Guidelines

We refer to the Draft Guidelines on Complaints, Investigations, Block Exemptions, First Conduct Rule and Second Conduct Rule for which we have collated high-level views received to date. We have not commented on the Draft Guideline on the Merger Rule, as it is of more narrow application to the telecoms industry.

SMEs

As we have previously submitted to the Competition Commission, competition rules are complicated, including as expressed under the Draft Guidelines. As such, efforts should be made by the Competition Commission to educate and facilitate SMEs' compliance through user-friendly toolkits and checklists. The current advertisement campaign does serve to raise general awareness and we look forward to further assistance by the Competition Commission to SMEs.

1. Draft Guideline on Complaints

In relation to the Draft Guideline on Complaints we have members' views on the following general points:

Enforcement Priorities. As the Competition Commission must have some sort of enforcement priorities and strategies, in all fairness, these should be communicated to the public. This is because such information will allow undertakings to allocate its resources and know where to assess high-risk areas. Also, any change of priority and strategies should be communicated beforehand to the public which should be provided

an opportunity to be heard on such change. We look forward to receiving draft guidelines on Enforcement Priorities well before the Conduct Rules are to take effect, to allow plenty of time for public consultation.

Appropriate Threshold for Commencing Investigation. There are concerns that the Competition Commission may adopt a low evidential threshold for commencing investigations. The Competition Commission should set forth the applicable evidential threshold under the Draft Guidelines, and should not commence investigations based on fanciful or unsubstantiated allegations, say by competitors who exploit a low evidential threshold. In addition, there is the concern that the Competition Commission should not engage upon fishing expeditions. As a reference point, the Competition Commission could consider the current evidential regime adopted under appropriate OFCA's rules for the guideline.

2. Draft Guideline on Investigations

In relation to Draft Guideline on Investigations we have members' views on the following general points:

Timeline. The timeline for the various phases of investigation should be set out under the Draft Guidelines as there must be finality of determination to prevent prolonged investigations which requires undertakings to commit resources to respond to. There should be related performance pledges and data analytics for the public to monitor the performance of the Competition Commission.

Applicable Standard. There are concerns, as with the Draft Guideline on Complaints, that the evidential threshold is set too low for commencing investigations. It will appear that a mere suspicion, albeit on reasonable basis, will give rise to an investigation. We have members' views that the applicable standard should be set higher. There should be credible and substantial evidence, which if established, could give rise to a prima facie breach of the applicable conduct or merger rules prior to commencement of investigations.

Dawn Raids/Raids. As raised by members at a recent seminar of our Institute where the Competition Commission spoke, there are issues relating to dawn or other raids. The main concern is that the Competition Commission should allow time for external counsel to arrive prior to executing its powers, or at least there should be some clarity as to how long the Competition Commission is willing to wait in this connection.

Other Matters. It will be helpful for the Competition Commission to state, in case where it believes that there is reasonable cause to suspect a breach, the reasons for the belief. This is because the Competition Commission as a statutory body is subject to judicial review of the rationale of its decisions.

3. Draft Guideline on Block Exemption

Timeline. Any timeline in terms of years to consider an application is not acceptable. An undertaking should not be left in limbo for a prolonged period pending a determination. There should be a much tighter and disciplined timeline. We suggest a maximum of six months for reaching a decision.

Vertical Arrangements. We have members' views that the Singapore and EU models are preferred, and the Competition Commission should issue a block exemption for vertical arrangements. This would be on the basis that vertical arrangements generally create overall economic efficiencies that outweigh any harm to competition. In the meantime, until such time as a block exemption is issued (which should be done as soon as practicable after the Conduct Rules take effect), the Competition Commission should state in the guideline that it will not focus on vertical arrangements, or otherwise inform the public that this is the case. This will assist undertakings in allocation of their finite resources, instead of being concerned with vertical arrangements.

Informal Discussions. As with certain other regulators please kindly consider if there could be the opportunity to informally consult the Competition Commission on an application for block exemption prior to making a submission. This should be on the basis that any information should not be used to find competition concerns.

Information. In case of a rejection of an application, as part of the rules of natural justice, the reasons for declining the application should be communicated to the applicant. Also, for accepted applications, the rationale should be explained to the public to build up the necessary jurisprudence as reference to potential applicants.

4. Draft Guideline on the First Conduct Rule

In relation to Draft Guideline on the First Conduct Rule we have members' views as follows:

Burden of Proof. As it is the Competition Commission that seeks to establish cases at the Competition Tribunal, it bears the burden of proof to prove the elements of breach of the conduct rules and the nonapplicability of any exclusions or exemptions. In relation to suggestions under the guideline otherwise, this is untenable in the absence of specific legislative provisions under the Competition Ordinance.

Not Per Se Deeming. A related aspect is that there can be no deemed per se agreement or conduct that amount to anti-competitive behaviours. It will appear that each case depends on its facts. Further, there may be applicable exemptions like overall economic efficiencies. Please therefore review suggestions under the guideline that certain matters may be per se anti-competitive including relating to certain “agreements”, “contacts between competitors”, “effect”, “object”, “price-fixing”, or other conducts. Again, it should be for the Competition Commission to prove the alleged anti-competitive behaviour to the satisfaction of the Competition Tribunal.

Clarification on MP/SMP. It is not clear to us what is the difference between “market power” and “substantial market power” used under the guidelines on the first conduct rule and the second conduct rule respectively. It appears that the concepts are effectively the same, but if there is a difference, this should be clarified under the guidelines.

Vertical Agreements. As undertakings have finite resources, and given that Vertical Agreements should not be a priority of enforcement by the Competition Commission, this should be stated to be the case, as noted above. Also, the need for case-by-case consideration and availability of exceptions like for overall economic efficiencies should be clarified under the guideline.

Hypothetical Examples. We do not necessarily follow the rationale of hypothetical examples 5, 6 and 16. Please kindly review if it is an over-simplification of the complex dimensions of the issues. There are certainly issues relating to the analysis like market size and relative market positions, along with other relevant considerations to determine if the arrangements are anti-competitive.

RPM. This is a vexed question under competition law and is case specific. Thus, we do not agree that RPM automatically harms competition. This cannot be the regulatory philosophy adopted by the Competition Commission.

Annex. There needs to be more details as to the weighing of overall economic efficiencies against harm to competition as these may require qualitative assessment.

5. Draft Guideline on the Second Conduct Rule

Abuse of SMP. It should be made clear under the guideline that while an undertaking has SMP, even a high SMP, this does not per se necessarily give rise to competition concerns. Rather, it is abuse of such SMP in the future that is relevant.

Overall Economic Efficiencies. There should be a clear statement that the overall economic efficiencies principle could apply to conduct by an undertaking which has SMP. It is fair and equitable for the market to have the statement of this established principle.

Property Rights. There should be a respect for property rights and there needs to be a proper balance as to the exercise of such rights and competition concerns. The presumption should be in favour of the principle that the exercise of property rights to refuse facility access is legitimate, and this should be discussed under the guideline.

Should you have any questions, please feel free to contact Mohan Datwani, Director, Technical and Research at

Yours faithfully,

For and on behalf of

The Hong Kong Institute of Chartered Secretaries