

Response to the Public Consultation on The Draft Guidelines by The Advocacy Business Consulting

1. General Comments

1.1 The guidelines are welcomed as general illustrations on how the Competition Commission (“The Commission”) interpret the law. It does not however constitute a binding effect on how the Commission will act in the future. Although it is understood each case should and will be judged in the context of the market circumstances, arbitrariness and uncertainty still abound as a number of key concepts such as the “economic efficiency” or “effect of harming competition” lack objective and quantifiable standards. It is the responsibility of the Commission as the enforcement agency to give society an unbiased and clear understanding on these instrumental concepts.

1.2 The hypothetical cases provided might be helpful to some of the industries and businesses to understand how the Commission interpret the provisions. Most of these hypothetical cases are crafted to describe economic activities involving simple and straight-forward manufacturing, wholesale and retailing of goods and products. The economy of Hong Kong, however, are predominately a service based one, and the relationship between undertakings are more complex in nature. It will give a better picture should the guidelines contain cases more relevant to the specific circumstances in Hong Kong market.

1.3 Competition authorities in other established jurisdiction often conduct and publish research results on key economic activities and their respective market structures. Given the importance of (i) the financial services industry, including banking, insurance, stock brokerage and other wealth management services, and (ii) the real estate sector including sales, leasing and development of commercial and residential properties, the Commission should have an impartial and robust research agenda to thoroughly understand these markets before taking on any enforcement actions. Research activities should be conducted independently from the law enforcement division of the Commission and the Commission should made it explicit that the research is not a precursors to investigation nor prosecution. The research outcomes should also be included in the guidelines in the future to provide different stakeholders better understanding of the Commission’s expectation on their respective conducts in the context of the market structure in Hong Kong.

1.4 Existing regulatory regimes, including but not limited to rules governing (i) the conduct of sales and promotions of financial products and residential properties, (ii) land use policies and terms in land leases, (iii) disclosure of information by listed companies, (iv) various licensing regimes, might result in circumstances that are deemed to be anticompetitive by the Commission. The Commission should made clear its stance in case there are conflicts in the laws.

1.5 Although it is stated in the ordinance compliance of legal requirement as a defense, land leases are in nature contract yet lessees are obliged to adhere to all conditions of the leases which might result in situation the Commission interprets as harming competition. The Guidelines should clarify in specific if complying with the terms dictated in land leases is a valid defense and whether it will be positively and favorably considered as a reason for an application for exemption under section 9 of the Ordinance.

2. Draft Guidelines on The First Conduct Rule

2.1 It is implied that parallel behavior by businesses, even without direct contact, explicit negotiation or agreement, may or may not be considered “concerted practice” depending on whether the market is “highly competitive”. The definition is tautological and the reasoning circular. It is unrealistic to assume businesses know if the market is “highly competitive” and if their decisions on output and pricing in response to actions of their competitors will be deemed anticompetitive. It is the responsibility of the Commission to provide a quantifiable definition on “highly competitive market”. The conditions for exemptions to the First Conduct Rule on the ground of “economic efficiencies” as defined in paragraph 4.2 do not clearly elaborate how the benefits and the “fair share” allowed for consumers will be measured. In reality it is likely the Commission can consider any attempt to increase prices as a detriment to consumers hence effectively turned the provision into a blanket ban in the increase in price.

2.2 It is stated the Commission will take into consideration if the undertakings jointly or individually exercise “some degree” of market power. Paragraph 3.14 to 3.17 attempts to clarify but failed to provide an objective and quantifiable definition on the concept.

2.3 The guideline made a broad case against exchanging information between undertakings, directly or indirectly via a third party. In reality businesses are often required to share business information such as forecast on price, quantity to buy and sell to suppliers or buyers during the course of business process. It will also effectively render market research and intelligence activities be liable to prosecution even when the undertakings as no intention to harm competition.

2.4 Decision on output is a crucial business decision and often made with reference to the forecast and estimation based on market research and intelligence on competitors. The Commission should clarify whether decision made based on these assumption amount to having an objective to “harm competition”. Moreover, in market where excess supply takes place it is normal to expect businesses to reduce output hence maintain profitability. The hypothetical case as provided contrarily considers such rational decision as anticompetitive.

2.5 Standard terms and standardized agreements are common practices in many industries, and often encouraged by regulatory regimes. Many of these standardized contracts are broadly adopted it limits the variety of products and services available to consumers. The Commission should clarify in specific under what circumstances these standard terms and agreements are considered acceptable.

2.6 While Schedule 1 Section 5 of the Ordinance provides a general exclusion of agreements of lesser significance, i.e. undertakings, association of undertakings or concerted practices with combined turnover in any calendar year below HK\$200 million. Undertakings however often operate multiple lines of business independently in different domains and in different markets which are irrelevant to the activities being questioned. The Ordinance and the guideline do not provide any clear guidance on whether these revenues will be included in the calculation.

3. Draft Guideline on the Second Conduct Rule and Draft Guideline on the Merger Rule

3.1 The definition of “relevant market” is key to the enforcement of the law. In paragraph 2.3 it however states that the Commission “will not follow mechanically each and every step described in this Guideline in each and every case”. The ambiguous approach creates uncertainty and arbitrariness. In the discussion of Geographic market, paragraph 2.14 states it may cover “a global or regional area, or be limited to Hong Kong or a part of Hong Kong”. It must be noted that if the relevant market is defined too narrowly and unrealistically, many of the landlords or operators of retail business might be liable to be prosecuted. The Commission is responsible to clarify on how it define “relevant market” for different types of business operations.

3.2 The administration indicated that it may consider using 25% of market share threshold as an indicative level of “substantial degree of market power”. In fact, overseas jurisdiction such as European Union and mainland China use 50% threshold as the indicative level of “dominance” while Singapore adopts an even higher standard at 60%. In Hong Kong, the telecommunication industry enjoys a safe-harbor of 40% threshold and it is stated that there might not be any investigation on the market players as long as they have not attained “dominance”.

3.3 The Commission should set out a robust research agenda to study each of the concerned industry and provide a definite guideline to all stakeholders.

4. Draft Guideline on Complaints

4.1 While the Commission is normally obliged to keep confidential during the investigation stage, complainants are not bounded to maintain confidentiality hence creating prejudice and bias even before a case enter the judicial proceedings. It is clearly a detriment to the independence of the judiciary and therefore the Commission should consider requiring complainants to maintain confidentiality during different stages of investigation.

5. Draft Guideline on Investigations

5.1 Businesses should be given sufficient time to comply when they are under the request from the Commission for information under section 41. The guideline should provide a clear and reasonable timeframe for compliance.

5.2 Section 52 of the Ordinance provides that businesses under investigation might refuse to provide information given a “reasonable excuse”. It would be helpful if the guideline can list out what constitute “reasonable excuse”.

5.3 Listing rules of the Hong Kong Stock Exchange requires listed companies to disclose price sensitive information. The guideline should clarify that listed companies under investigation by the Commission publish stock exchange announcements on the investigation should not be put into jeopardy of breaching the confidentiality obligation under the Ordinance.

5.4 As a safeguard to the rights of those who are summoned by the Commission to provide information, the guideline should clarify (i) that personal may remain silent before acquiring legal advise and he may be accompanied and represented by legal advisor, and (ii) the legal advisor and the person invited have the right of privacy and seek advise in the absence of the Commission’s officers.

6. Draft Guideline on Applications for a Decision on Exclusions, Exemptions and Block Exemptions Orders

6.1 Information provided to the Commission for application for exclusion and exemptions may be used against the applicants in case there are subsequent enforcement actions. The lack of protection and immunity effectively discourages the use of such provisions which was originally designed to help streamlining the Commission's operation and avoid wasteful investigations.

6.2 It would be helpful if the Commission set out a robust research agenda to study on different industries, which might provide insight and guidance on whether there will be reasonable ground for granting Block Exemption Orders. It is a common practice in other jurisdictions the competition authorities to undertake such initiatives to facilitate a more effective regulatory regime on market competition.

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