

New People's Party

Response to Draft Guidelines under the Competition Ordinance

We very much welcome the Commission's active engagement of the public and businesses in the drafting of the Guidelines (the "Guidelines"). We highly appreciate, in particular, the inclusion of practical case examples in illustrating whether certain actions and practices of undertakings could amount to potential infringement of the Competition Ordinance (the "Ordinance"). We believe that clear and detailed case-based explanations as such would be helpful in strengthening public understanding towards applications of the Ordinance.

Recommendations

- **Mechanisms to remedy the lack of sector-specific guidelines**

We notice a lack of sector-specific references with regard to both the substantive guidelines (concerning instances and practices that would potentially constitute infringement of the Ordinance) and the procedural guidelines (concerning criteria by which application for block exemptions are assessed). While it is fully understandable that the inclusion of industry-specific arrangements into written guidelines is neither practically feasible nor legally uncontroversial, we nonetheless advise the Commission to pay further attention, especially during the granted transitional period, to address sector-specific concerns by:

- (i) Identifying, with reference to overseas experience and and via stakeholders of specific sectors/ industries, industry practices that are more prone to potential legal controversies upon the application of the Ordinance;
- (ii) Initiating meaningful dialogues with members of the identified industries via respective trade associations to obtain thorough understanding of industry concerns and existing industry-specific conventions/ arrangements/ practices that could potentially constitute infringement to the Ordinance;
- (iii) Encouraging stakeholders to conducting research with regard to the

identified conventions/ arrangements/ practices by drawing on overseas precedence and legal references;

(iv) Advising stakeholders to file an application for Block Exemptions if they have sufficient grounds to believe that the practice in question fulfills the criteria for exemptions;

(iv) Encouraging stakeholders to establish searchable archives of information and opinions thus collected on identified cases of potential legal controversy; and

(iv) Establishing a dedicated point of contact by which industry stakeholders may carry out on-going dialogues with the Commission concerning potential legal controversies.

We strongly urge the Commission to include, in the written Guidelines, provisions that would grant the Commission discretionary authority over the handling of cases concerning industry/ sector-specific controversies by taking into account practical market conditions and functional concerns. We believe that by formally recognizing the need to consider industry specifics and thereby involving industry stakeholders at an earlier stage, the Commission will be able to help achieve more regulatory certainty. At the same time, the Commission, through on-going correspondence with industry stakeholders, would be much better informed and better equipped to handle upcoming cases.

- **Considering the interests of SMEs**

About 98% of all Hong Kong corporate are SMEs. Being an important source of employment opportunities and innovative ventures, they are one crucial element making up Hong Kong's long term core competitiveness. Many SMEs across different industries are currently employing business practices that might constitute possible infringements under the Competition Ordinance, but from a functional point of view, such practices might be crucial to maintaining a healthy ecological balance of interests between SMEs and the bigger players.

Taking into account considerations as such, we advise that the Commission employ a more SME-centric perspective in the drafting and subsequent interpretation of the Guidelines. Given the time and resources available that most SMEs are able to spend on reviewing impact of the Ordinance on their businesses and in seeking legal counsel in case of need, we advise that the

Commission deploy more educational and legal resources in assistance to those SMEs.

With regard to the criteria by which applications for Block Exemptions are reviewed, for instance, the Commission sets out such standards as ‘representative of a wider industry interest’ and ‘cooperation of all undertakings that are party to the agreements in question’ are potentially deterring a number of SMEs from making applications as many of their cases, despite being sufficiently significant to their businesses, might not be able to live up to the high standards set out in the current Guidelines . We therefore suggest that the Commission review once again its exemptions application criteria taking into consideration the scales and extent of cases filed by SMEs.

- **Considering the inclusion of vertical arrangements into practices qualified for Block Exemptions**

Vertical agreements cover agreements between undertakings at different levels along the supply chain. Examples of such include supply agreements, license and distribution agreements, sourcing agreements, procurement agreements, purchasing agreements and franchise agreements, bundling and tying agreements and exclusive dealing arrangements etc. They are very commonly seen in the market and are there to achieve higher productive and economic efficiencies. Most are probably neutral practices from the market competition perspective. Whether vertical agreements are deemed threatening to the competitive landscape would depend predominantly on the scale and the extent of the market power of the undertakings involved. In other words, it is often more to do with the scale of the undertakings in question than the nature of the agreements and arrangements.

We understand that the Authority has briefly examined the specific types of vertical agreements that are more likely to constitute potential infringement to the Ordinance under both the First Conduct Rule and the Second Conduct Rule (where the undertakings involved possess substantial market power and are, through the adoption of the vertical agreement in question, abusing such power in harm of market competition). The Commission also states in the guidelines that vertical agreements involving most SMEs in Hong Kong are unlikely to constitute the said potential infringements. However, to provide more

regulatory certainties to businesses, we recommend that the Commission consider the written inclusion of the types of the relatively neutral vertical arrangements in the range of practices qualified for Block Exemptions, as adopted in many jurisdictions such as those in the EU. In doing so, we urge the Commission to set out clearer criteria in defining vertical agreements eligible for exemptions.

- **Arrangement regarding regulatory impact on overseas business operations of the undertaking in question**

It is highly likely that allegation of infringements could create an impact on operations of cross-border businesses and multinationals in jurisdictions other than Hong Kong. We urge the Commission to promptly set out policy guidelines in respect of such instances and initiate dialogues with corresponding authorities in other jurisdictions in respect of possible arrangements.

- **More comprehensive arrangements in handling complaints**

(i) Better mechanism design in prioritizing complaints submitted for the Commission's consideration: unlike the arrangement in the EU, the Hong Kong system makes it generally more open to the public to file complaints. The complainant is neither required to provide sufficient evidence or is able to demonstrate sufficient 'legitimate interests' in the case put forward, even complaints received in the form of phone calls and those filed by anonymous complainants will be considered. We consider such mechanism that virtually qualifies anyone to file complaints both practically infeasible and potentially too inviting for baseless and frivolous complaints.

We understand the Commission's intention to leave the mechanism relatively more open in consideration of the importance of complaints to investigations and its role in refining the newly established regime, but advice that the Commission establish written guidelines according to which complaints received are to be prioritized based on such factors as: the amount and validity of evidence provided, the extent of economic or legitimate interests of the complainant so demonstrated, the form in which the complaint is submitted (e.g. by making written submissions

before phone calls so that complaints would more substantiated).

- (ii) Setting out clearer criteria employed in the review of complaints received: the sets of criteria currently presented in the Guidelines based on which the Commission determine (a) whether or not to take a case from the stage of 'preliminary review' to 'initial assessment' and (b) from an 'initial assessment' to 'investigation' are virtually identical. We recommend that the Commission consider refining details of the criteria for each of the stages to give complainants better understanding of the assessment criteria and enable them to adjust their representations accordingly.
- (iii) We advise that the Commission set out and inform complainants of an approximate timeframe by which complaints are to be reviewed and handled, and provide, in writing, reasonably detailed explanations to complainants regarding the outcome of their submissions. We also advise that the Commission provide in the Guidelines the right of the complainants to submit written response to the Commission regarding an issued outcome. We believe such arrangement would grant both the complainants and the undertakings in question more certainties.

- **Refining mechanisms by which applications for Block Exemptions are handled**

- (i) Providing businesses with more regulatory certainty

Regarding the procedural provisions in the Guidelines, we advise the Commission to consider the following additional arrangements to give industry stakeholders in question more legal and regulatory certainties:

- (a) Setting out approximate timeframe by which applications for Block Exemptions are processed and reviewed;
- (b) Establishing more proactive mechanisms to reach out to existing and highly controversial industry practices and encourage stakeholders to consider filing applications to the Commission for early consideration. We believe effective on-going communications between the Commission and the industry stakeholders in question will help reconcile many industries'

- conventional self-assessment tendencies with the newly authorized capacities of the Commission and avoid potential controversies arising out of transitional adjustments;
- (c) Considering inclusion of clearer sector-specific operational details into the granted exemptions such as allowable price range and agreement terms;
 - (d) Conducting timely and effective communications with industry stakeholders regarding the granting of an exemption or rejection of an application; and
 - (e) Setting out a fixed effective period for every Block Exemption granted and formal review procedures of the exemption to reassess its relevance beyond the allowable timeframe.
- (ii) Reviewing the criteria in assessing eligibility for Block Exemptions to better fit practical and functional considerations, for instance, the extent of protection for SMEs under the present framework – are the standards being set unrealistically high such that its becomes virtually impossible for SMEs to apply for exemptions whilst multinationals would be much better equipped at “circumventing” the standards? We advise that the Commission take into consideration the need to balance interests between the bigger players and the smaller players in some industries.

● **General recommendations**

To ensure smooth and effective application of the Ordinance, we urge the Commission to:

- (i) Consistently refine/ update the Guidelines in accordance to such new developments as emerging new case precedence, changing industry environments and other regulatory changes that would impact on the application of the Ordinance;
- (ii) Instead of merely focusing on procedural arrangements, devote more resources to such areas as consultation services, education and the provision of legal assistance especially to SMEs; and
- (iii) Encourage and if resources allow, anchor the accumulation and development of local legal expertise on both the Ordinance itself and industry/ sector-specific counsels.

We once again thank the Commission for offering this opportunity to participate in the reviewing of the draft Guidelines.