Hong Kong Women Professionals & Entrepreneurs Association
香港女工商及專業人員聯會

Competition Ordinance – Comments on Procedural Guidelines

Complaints

- The Conduct Rules in the Ordinance are broadly drafted, hence, there is a chance for a huge number of unmeritorious and vexatious complaints. The draft Guidelines refer to the value of "well-informed" complaints, but then seem to encourage "any person" to make a complaint, in any form (including anonymously) and without the need to provide any supporting evidence. This is much broader than the EU approach which requires the complainant to demonstrate a "legitimate interest" in the subject matter of the complaint; we believe a more restrictive approach should be adopted instead.
- Complaints should be accompanied by supporting evidence at the time of submitting the complaint, including at least the information listed in para. 2.4 – rather than leaving it to the Commission to request such information (as para. 2.4 currently suggests). We are concerned that the Guidelines suggest that a mere telephone call can serve as a "complaint"; there should be tighter standards for complaints submission.
- The Commission has the discretion to decide whether to investigate a complaint further and this is based on factors such as "current enforcement strategy, priorities and objectives". We request the Commission to publish this information earliest, which should be earlier than the Conduct Rules taking effect.

Investigations

- We hope that the Commission can give clearer, or even indicative timescales for investigation and deadlines.
- Regarding the Commission's use of its information gathering powers, we believe that the proposed standard that the Commission be satisfied "at least beyond mere speculation" is too low a threshold, especially compared to international standards. Clearer guidance should be given on what constitutes "reasonable cause to suspect" and should focus on a genuine, reasonably held belief supported by objective evidence – i.e. specific facts and information, which would, if proved, establish a breach of the Competition Rules.
- Given the sensitivity and importance of the Commission's 'enter and search' powers, it is crucial for businesses to be able to have their legal advisers present. Commission officers should therefore be obliged to wait for a reasonable period for legal advisers to arrive (whether in-house or external) – this should not just be left to the officers' sole discretion. The Guidelines should also give an approximate indication of what the Commission would consider a reasonable period of waiting to be, so that businesses can make the necessary preparations.
- The draft Guidelines provide that the Commission must issue a warning notice for suspected contravention, which does not involve serious anti-competitive conduct, before commencing proceeding in the Tribunal to provide parties under investigation with an opportunity to cease the conduct within a specified period. However, the warning notices and the commitment from parties under investigation will be published on the Commission's website. We are concerned that the publication of the warning notices and the commitment from parties under investigation will highly disincentivise undertakings from entering into such arrangements and defeat the original purpose of providing the undertaking an opportunity to stop from non-serious anti-competitive conduct without incurring unnecessary time, efforts and costs by

both the Commission and the subject undertakings. We urge the Commission to reconsider this approach.

Applications for a decision for exclusion and exemption

- It is encouraging to see the confirmation in the Guidelines that the Commission may issue a block exemption on its own initiative (rather than just in response to an application). However we are concerned that the Commission suggests that it may take several years before a block exemption order is made. Given that the Commission acknowledges (in the Guidelines on the First Conduct Rule) that vertical agreements are less harmful to competition and frequently generate efficiencies, it is important that vertical agreements be excluded from the First Conduct Rule as soon as legally permissible after the Conduct Rules take effect. We urge the Commission to exercise its power in this regard and to conduct the preparatory work now.
- The draft Guidelines do not give any timescales for the various stages of the Commission's review of an application for a decision or block exemption order, neither do they prescribe any deadline for the Commission to make a decision or block exemption order. We suggest that the applicant should at least be given an indicative timeline and be well informed about the review status.
- If an application is declined, the Commission should inform the applicant of the reasons. This is fair and reasonable, and would serve as guidance for the future on whether it is worth submitting an application.
- Businesses would welcome more discussion with the Commission that particular agreements or conducts do not violate competition guidelines. Hopefully the Initial Consultation process can serve this purpose. Similarly, it should be made clear that businesses may submit reasons why the agreements or conducts do not harm competition and to obtain the Commission's 'negative clearance'. In the event that the Commission disagrees and believes that there is potential harm to competition then the business can submit, as an alternative, arguments for an exclusion.

Hong Kong Women Professionals & Entrepreneurs Association
香港女工商及專業人員聯會

Comments on First and Second Conduct Rules of the Guidelines

Resale price maintenance

In a vertical agreement (typically a distribution agreement), if a supplier imposes a fixed or minimum resale price on its distributors or retailers ("**resale price maintenance**" or "**RPM**"), the Commission views the arrangement as having an illegal object. In such cases, whether the arrangement causes any anti-competitive effects in the market is irrelevant. Possible scenarios in which efficiencies may arise include, among others, the introduction of new products, launch of a promotion campaign and prevention of free rides. However, the Commission's assessment will be made on a case-by-case basis. The Commission notes that RPM may in certain cases amount to serious anti-competitive conduct ("SAC") under the Ordinance, with the consequence that (1) the Commission may commence proceedings before the Tribunal without issuing a warning notice to the parties and (2) the *de minimis* threshold (exempting companies whose combined turnover does not exceed HK$200 million) does not apply.

Though the Commission recognizes that RPM may lead to efficiencies and the Guidelines provides that where a company can defend an RPM on efficiency grounds, there will be no infringement of the First Conduct Rule. The burden lies on the Commission to prove a restriction of competition, but on the defendant to justify any restriction on efficiency grounds, this approach effectively reverses the burden of proof in favour of the Commission. While the Guidelines seek to emphasize that the possibility of exemption is real, experience from Europe indicates that it is very difficult in practice to justify a restriction on efficiency grounds once it has been categorized as a restriction by object.

We urge the Commission to clarify (i) when RPM will be classified as SAC in the Guidelines; (ii) if the downstream players i.e. franchisee/retailers whom RPM has been imposed upon will be liable for the infringement initiated by the upstream players i.e. franchisor/suppliers; and (iii) if RPM would only be considered to be efficient in the context of a franchise or selective distribution system if it is for the purpose of organizing a co-ordinate price campaign of limited duration.

Ancillary restrictions

Ancillary restrictions which would usually be considered to have anti-competitive effects (e.g. non-compete clauses) may be considered to be reasonable if they are contained in agreements which otherwise do not harm competition and if they are directly related to, necessary and proportionate to the main agreement.

We urge the Commission to clarify if the common non-compete clauses in various agreements including leases and tenancy is considered to be directly related to, necessary and proportionate to the main agreement.

Trade associations

Information exchanges at trade associations, or price recommendations by a trade association or professional body have been common practices in Hong Kong for decades . It is appreciated that the Conduct Rules should have more insight into the practice of different industries practice hence allowing more room and flexibility for various types of business to follow so as not to violate the set Rules. It also discusses such issues as standard contractual terms promoted by the trade association, terms of membership in trade associations and the practice of certifying or awarding quality labels to

member companies for meeting certain minimum industry standards. The Commission sets out scenarios in which such activities are unlikely to raise Commission concerns and scenarios in which these activities may have an anti-competitive object or effect. Similarly, scenarios of industries practices which may not be anti-competitive should be set too.

Substantial market power

The Second Conduct Rule of the Ordinance addresses the abuse of substantial market by engaging in anti-competitive conduct. Examples of such abusive behavior include predatory pricing, tying and bundling, margin squeezes, refusal to deal, exclusive dealing. During the Ordinance's legislative process there was a debate over where to set market share thresholds. Ultimately, the Guidelines do not set a market share threshold. This is likely to be of disappointment to businesses, who would have welcomed a 'safe harbor" below which a company would be presumed not to have substantial market power under Second Conduct Rule. On the other hand, businesses may of course be relieved that there is no market share "danger zone" above which substantial market power will be presumed.

Instead, the Guidelines provide that market power is the ability to profitably maintain prices above competitive levels, or output below competitive levels, and it is determined based on the features of the market, including market shares, market concentration, barriers to entry or expansion, the competitive advantages of the parties and the existence of any countervailing power on the part of the buyer/suppliers.

A distinction has been made between market power under First Conduct Rule and substantial market power under Second Conduct Rule, we urge the Commission to provide a clearer indication of level of shares that constitute substantial market power and to clarify the difference between market power for analyzing market power under the First Conduct Rule and substantial market power under the Second Conduct Rule.

No industry-specific guidance

We suggest that the Guidelines should have industry- or sector-specific guidance, as previously requested by a number of industry stakeholders in their submissions to the Bills Committee on the Competition Bill.