

Countdown towards full implementation: revised Hong Kong competition law guidelines published

On 30 March 2015, the Hong Kong Competition Commission ("**Commission**") published revised guidelines ("**Guidelines**") which assist in interpreting the Hong Kong Competition Ordinance ("**Ordinance**"). This follows the publication of draft guidelines ("**Draft Guidelines**") on 9 October 2014¹. The Commission is inviting another round of comments by 20 April 2015. The Guidelines will then be presented to the Legislative Council ("**LegCo**") for consultation in late April. The publication of the Guidelines is an important step towards the full implementation of the Ordinance, expected by the end of this year.

This briefing outlines some high-level points of interest covered in the Guidelines.

Key Points

- Guidelines substantially similar to earlier draft
- Commission has not yielded to pressure to include safe harbours for market power
- No "automatic" infringement for agreements which have restriction of competition as their object
- Guidelines contains some useful procedural clarifications

¹ A client briefing on the Draft Guidelines can be found [here](#).

Background

The Ordinance was passed by LegCo on 14 June 2012 and it is being implemented in phases. The publication of the Guidelines (which is required by the Ordinance) is an important step towards the full implementation of the Ordinance – which is expected by the end of 2015.

The six Guidelines are:

- a) Guideline on the First Conduct Rule;
- b) Guideline on the Second Conduct Rule;
- c) Guidelines on the Merger Rule;
- d) Guideline on Complaints;
- e) Guideline on Investigations; and
- f) Guideline on Applications for a Decision, Exclusions and Block Exemption Orders.

The Commission has also published a guide to the Guidelines ("**Guide**") – which provides a summary of the changes made to the Guidelines (from the Draft Guidelines).

The following paragraphs outline some high-level points of interest in the Guidelines.

I. Object of harming competition

The Guidelines state that certain types of agreements between undertakings can be regarded, by their very nature, to be so harmful to the proper functioning of normal competition in the market that there is no need to examine effects. These agreements are considered to have the object of harming competition. Examples of such agreements include agreements between competitors to fix prices, share markets, restrict output and rig bids (defined in the Ordinance as "Serious Anticompetitive Conduct") and fixing resale prices (resale price maintenance) between parties at different levels of the supply chain (vertical agreements).

The Commission has clarified (in the Guide) that this does not mean that the examples of agreements mentioned above are automatically or *per se* illegal and that there is a distinction between having the "object" of harming competition to having *per se* contraventions of the Ordinance. Notwithstanding this, it would be sufficient for the Commission to show that the agreement in question has the potential to harm or is capable of harming competition in the relevant context. Determining the "object" of an agreement requires making an objective assessment of its aims. In examining the relevant context of an agreement, the following factors can be used to show that the agreement does not have the object of harming competition:

- in the case of an agreement between parties at the same level of the supply chain, an examination showing that the parties are neither actual nor potential competitors;
- an examination showing that at the relevant time there is in fact no competition in the market to be harmed; and
- if the primary objective pursued by an agreement does not contravene the First Conduct Rule, any restrictions which are necessary and proportionate to achieving that primary objective do not have the objective of harming competition and do not contravene the First Conduct Rule.

While the Guidelines are quick to remind businesses that agreements which are deemed to have the object of harming competition could be cured or exempt by way of the economic efficiency defence (i.e. proving that there are improvements in production or distribution, factors tending to promote technical or economic progress) – it is expected that this will be applied in a limited fashion especially towards Serious Anticompetitive Conduct. Furthermore, the economic efficiency defence is not relevant for determining whether an agreement has the object of harming competition. It is only after it has been established that an agreement has the object (or effect) of harming competition that a consideration of the efficiencies becomes relevant.

II. Vertical Agreements

The Guidelines maintain that resale price maintenance ("RPM") has the inherent potential to harm competition in Hong Kong. In this regard, conduct amounting to RPM will likely be treated as "by object" harmful to competition and even a form of "Serious Anticompetitive Conduct". RPM conduct would only be permitted by reference to what appears to be a limited set of efficiencies, such as introducing a new product to market for a limited time. Other justifications for RPM such as responding to pressure from a distributor seeking to limit competition from competitors of the distributor at the resale level or ensuring an "orderly market and to avoid customer confusion as a result of differing prices" are not valid justifications. As there appears to be a very low threshold applied to RPM, businesses may wish to tread cautiously and refrain from engaging in RPM.

The Guidelines contain a new section on the distinction between distributors and agents. Agreements with the former would be caught under the First Conduct Rule²; whereas agreements with the latter would not be caught. An agent would be considered part of the same single economic unit as a supplier, whereas a distributor would not. Hence, maintaining prices with agents will be permitted but not with distributors. Relevant factors that the Commission will consider include the level of control which a supplier exercises over the third party and the level of financial or commercial risk borne by the third party in relation to the activities for which it has been appointed as a distributor or agent by the supplier. This approach is consistent with the approach of a number of jurisdictions including the European Union and Australia.

III. Failing to object to or distance from anti-competitive conduct

The Draft Guidelines indicated that an undertaking may be considered by the Commission to be a party

to a concerted practice by merely attending a meeting at which an anticompetitive arrangement is reached and having failed to object and publicly distance from such conduct. Responding to calls for clarification on this point, the Guidelines have clarified the manner in which businesses should object to, or distance themselves:

- the undertaking must demonstrate that it had clearly indicated to competitors that it participated in the relevant meeting without any anticompetitive intention; and
- the undertaking may be asked to provide evidence that it had withdrawn from the meeting once the anticompetitive nature of the meeting became apparent.

This is an important point to bear in mind when reviewing compliance programmes.

IV. Information exchange

The Guidelines contain a new section which elaborates when information exchanged through a third party could breach the First Conduct Rule. This is where competitors use a "conduit" (e.g. a third party such as a supplier or distributor) for the indirect exchange of information for anticompetitive purposes (e.g. to share future pricing information). Such agreements are known as "hub and spoke" agreements or arrangements. Helpfully, the Guidelines state that there are three limbs which must be proven to establish an illegal hub and spoke arrangement:

- an undertaking exchanges information via a third party functioning as a conduit intending that the third party will make use of the information to influence market conditions by passing it to a competitor of the undertaking;
- the third party in fact transmits the information to the competitor; and
- the competitor uses the information to determine its conduct in the market. This guidance is useful given interactions with customers or distributors on competitor pricing are commonplace during the bargaining or negotiation process.

² The First Conduct Rule refers to the prohibition against agreements between undertakings that have the object or effect of preventing, restricting or distorting competition in Hong Kong.

V. Recommended prices by trade associations

The Guidelines have clarified that recommended fee scales and “reference” prices of trade and professional associations are decisions of associations which the Commission would likely consider as having either the object or effect of harming competition. Trade associations should therefore refrain from such conduct or have strong justifications for such conduct.

VI. Significant market power

The Second Conduct Rule prohibits “abusive” behaviour by undertakings with a substantial degree of market power. Despite a large number of submissions requesting the inclusion of some form of market share-based threshold which can be used to indicate a substantial degree of market power – none has been included in the Guidelines. This causes much uncertainty and makes it challenging for businesses in terms of analyzing whether the Second Conduct Rule could apply to them. Businesses are reminded that during the early stages of consultation, it was mentioned that undertakings with market shares of as low as 25% could be deemed as having significant market power.

VII. Exploitative conduct

The Draft Guidelines did not address whether the Second Conduct Rule would apply to “exploitative conduct” – defined as fixing and maintaining prices or charges at an excessively high level and setting unfair trading terms and conditions. Exploitative conduct is expressly prohibited by dominant telecommunications licensees in the Ordinance. The Guidelines similarly do not address this point. However, in its Guide, the Commission confirms that exploitative conduct falls within the scope of the Second Conduct Rule – although the Commission will focus on exclusionary conduct as its main enforcement focus.

Procedural Rules Guidelines

Regarding the procedural guidelines (i.e. the guidelines on complaints, investigations and applications for a decision, exclusions and block exemption orders), the Guidelines include a number of helpful and notable clarifications including the following:

- in the context of a dawn raid and where there are no in-house legal advisors present, the Guidelines have clarified that officers from the Commission, may, at their sole discretion, wait a “reasonable time” for external legal advisors to arrive. During this time, the officers will take measures to prevent tampering with evidence such as instructing employees to move away from their work places, requesting that computer/IT systems be blocked and sealing offices and filing cabinets;
- a new section on the manner in which information subject to legal professional privilege will be treated (in the context of an investigation) has been added in the Guidelines. The Guidelines also state that the Commission will be publishing a procedure for dealing with disputes with respect to claims on legal professional privilege;
- on block exemptions, the Guidelines have clarified when it may be appropriate to make a sector-specific Block Exemption Application. Applicants seeking a sector specific Block Exemption Order are expected to show evidence of a greater need for cooperation between undertakings in the relevant sector as compared with other sectors in the economy. The Commission also encourages applicants to seek an initial consultation meeting before embarking on applications; and
- on decisions (in relation to applications), the Guidelines have been amended to reflect that the Commission is likely to consult on a draft proposed decision where the decision is likely to be of wider relevance for the market or the Commission considers that the views of parties likely to be affected by the proposed decision, if made, would assist the Commission in its assessment of the application.

Conclusion

The Guidelines are a significant and welcome step towards the countdown of the implementation of the Ordinance.

In the lead up to the full implementation of the Ordinance, the Commission is expected to develop and release publications to assist businesses to comply with the new law. These include a statement of the Commission's enforcement policies and a leniency policy.

In terms of enforcement, whilst there have been much speculation about which businesses or sectors the "first case" is likely to involve – the Commission has said publicly that it is less likely that it will devote a majority of its resources into investigating alleged breaches immediately – rather, it is more likely that it would devote a significant part of its resources into developing market studies in certain sectors in which anticompetitive conduct has been alleged to take place.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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