

## At Long Last: Draft Hong Kong Competition Law Guidelines Published

The Hong Kong Competition Commission (the “Commission”) today published long-awaited draft implementation guidelines (the “Guidelines”) to the Competition Ordinance (Cap. 619) (the “CO”).

A total of [six draft Guidelines](#) have been published, namely:

1. Draft Guideline on the First Conduct Rule (“FCR”)
2. Draft Guideline on the Second Conduct Rule (“SCR”)
3. Draft Guideline on the Merger Rule
4. Draft Guideline on Complaints
5. Draft Guideline on Investigations
6. Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders

This legal update is the first in a series of updates on the draft Guidelines. In this update we provide a snapshot of what the draft Guidelines say on the key issues, what they don’t say, and how they may affect business in Hong Kong.

### What do the draft Guidelines say?

#### FIRST CONDUCT RULE

The FCR captures both horizontal and vertical arrangements where they have an anti-competitive object or effect. With respect to vertical arrangements, the draft Guideline does not introduce a block exemption. The draft Guideline also indicates that as a general rule, the Commission will consider Resale Price Maintenance (“RPM”)<sup>1</sup> by its nature harmful to competition and in the absence of efficiency justifications (without consideration of its effect on competition) be taken to contravene the CO.

Further, in some cases, RPM may amount to serious anti-competitive conduct. For trade associations and professional bodies, the draft Guideline helpfully provides a number of examples where information exchange, price recommendations and fees scales are not likely to contravene the FCR.

#### SECOND CONDUCT RULE

The draft Guideline confirms that market definition will be determined in line with international best practice, taking into account product and geographic scopes. To address the concerns expressed by stakeholders regarding geographic boundaries of markets, the draft Guideline confirms that the realities and characteristics of the Hong Kong market will be taken into account with the Commission acknowledging that markets may be global, regional, limited or smaller than Hong Kong. The draft Guideline does not include a market share threshold for substantial market power with the Commission confirming that it will adopt an economic approach to defining substantial market power on a case by case basis.

#### EXCLUSIONS AND EXEMPTIONS

The Commission has expressed that it intends to adopt a narrow interpretation of exclusions and exemptions, further noting that as the CO provides for a self-assessment regime in respect of exclusions, it will only exercise its power to issue a Commission Decision or Block Exemption Order in limited circumstances. The draft Guideline addresses both substantive and procedural issues, setting out how the Commission will exercise its powers to make a decision or issue a block exemption order and the manner and form in which the Commission will receive such applications.

<sup>1</sup> RPM is defined in the draft Guideline as a form of resale price restriction where a supplier establishes a fixed or minimum resale price to be observed by the buyer when it resells the product affected by the RPM obligation.

## COMPLAINTS

The draft Guideline is largely procedural, describing the manner and form in which complaints may be made. It confirms that though the Commission will consider any complaint or query it receives regarding anti-competitive behaviour, it will not pursue all such complaints and queries. This may be of some comfort to those concerned that a complaint-driven regime may lead to abusive or frivolous investigations. The Commission sets out the factors it will consider in progressing a complaint and in exercising its discretion to decide if a complaint warrants further assessment. Each complaint is subject to a preliminary review after which the Commission can decide to take no further action, recommend the complaint to another agency or review the matter further by conducting an Initial Assessment (see below).

## INVESTIGATIONS

The draft Guideline confirms that the Commission will adopt a two-stage process following the receipt and assessment of a complaint. Stage one is the Initial Assessment Phase, where the Commission will assess whether there exists reasonable cause to suspect a contravention of the CO or further investigation is otherwise warranted. Stage two is the Investigation Phase, where the Commission may exercise its extensive evidence gathering powers. The draft Guideline helpfully clarifies that when conducting an investigation, the Commission intends to afford the business(es) under investigation opportunities to resolve the Commission's concerns either by way of preliminary informal contact and/or a formal warning notice. Alternatively business(es) under investigation may offer commitments at any stage of an investigation, upon the acceptance of which the Commission may terminate the investigation.

## MERGER RULE

The Merger Rule applies only to mergers involving, directly or indirectly, holders of carrier licences under the Telecommunications Ordinance (Cap. 106). The CO does not impose a mandatory obligation to notify a merger though the draft Guideline notes that parties are encouraged to contact the Commission at the earliest opportunity where they may seek the Commission's informal advice on the intended transaction. The draft Guideline identifies two safe harbour measures the Commission intends to apply

concurrently: the four-firm concentration ratio (CR4 Ratio) and the Herfindahl-Hirschman Index (HHI) test. Therefore, a merger that meets either one of the safe harbour measures will fall within the safe harbour. The draft Guideline also sets out the processes and procedures on a broad spectrum of issues including how to seek informal advice from the Commission, offering commitments in respect of mergers and circumstances in which the Commission may investigate completed or anticipated mergers.

## What do the draft Guidelines *not* say?

### NO INDUSTRY-SPECIFIC GUIDANCE

The Guidelines are of cross-sector application and do not as yet include 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.

### NO ADDITIONAL EXCLUSIONS OR BLOCK EXEMPTIONS

The Commission has also resolved not to introduce additional exclusions or block exemptions in the Guidelines. Businesses seeking exemption will under the current draft Guidelines have to apply to the Commission under the applications procedure on a case by case basis.

## What's Next?

### FURTHER PUBLICATIONS ON SMES, SELF-ASSESSMENT, LENIENCY, ENFORCEMENT PRIORITIES AND TURNOVER CALCULATION

The Commission indicated in its press release today that, for the benefit of SMEs, the Commission will prepare and release SME-focused brochures and self-assessment tools.

Also in the pipeline are other publications such as a leniency policy, a statement of the Commission's enforcement priorities, and guidance on how turnover will be calculated.

### OPERATIONAL RULES FOR THE COMPETITION TRIBUNAL

Draft operational rules for the Competition Tribunal, a superior court of record which has primary jurisdiction over competition cases, are understood to be under preparation by the Judiciary.

## COMMENTING ON THE GUIDELINES

The draft Guidelines are now open for public comment. Comments on the draft Guidelines on Complaints, Investigations and Applications are due by 10 November 2014, while those for draft Guidelines on the FCR, SCR and Merger Rule are due by 10 December 2014.

Once public consultation closes, the Commission expects to revise the draft and consult the Legislative Council for early feedback on the revised draft. The Guidelines will then have to be translated before they are adopted and come into operation, likely in early 2015.

## How can we help?

We will continue to monitor the Commission's progress and provide you with updates on the draft Guidelines over the next few weeks.

## Contact Us

Should you wish to know more about the draft Guidelines or have concerns regarding which you wish to submit comments to the Commission or evaluate internally, please contact the following persons or your usual contacts at our firm.

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