

BT Hong Kong's response to the Competition Commissions request for comments on the draft Competition Guidelines

BT Hong Kong Limited ("BT") thanks the Competition Commission ("the Commission") and the Communications Authority ("CA") for the opportunity to provide comments to their draft Competition Guidelines 2014. This paper is BT's response in respect to the draft Guidelines on Complaints and Investigations.

BT believes that the introduction of the new cross-sectoral Guidelines is both timely and necessary, and we are supportive of the Commission and the CA's efforts in this regard.

We hope that both authorities consider the comments and feedback from all interested parties during their consultation process and adapt the Guidelines accordingly so that they truly reflect the needs and requirements of the Hong Kong market.

We support the Commission's open and transparent consultation process whereby the Commission publishes comments received from stakeholders. We also encourage the Commission to provide its reasons for accepting, or not, the comments and suggestions by stakeholders. We believe that such a process is very much in line with best practice in other jurisdictions.

Comments to the Competition Commission's Draft Guidelines on Complaints – 2014

The following are BT's comments in regards to the Draft Guidelines on Complaints.

Section 1 Introduction

The Complainant may comprise more than one party

The Complainant could comprise more than one party and this should be explicitly stated in the Guidelines. In such circumstances, there may be sharing of Confidential information between parties. Additionally, the Complainants may engage third parties to advise and information will be shared with such third parties.

Section 2 Making a Complaint to the Commission

Para 2.3 Acknowledgement of receipt of complaint or query

We believe that the Commission should acknowledge **all** complaints received and provide an indication of its response time for a decision as part of this acknowledgement.

This is important to enable the Complainant to determine its next course of action particularly where the conduct being complained about is detrimentally, or could detrimentally, affect it and/or its business. We understand that the Commission is constrained by the resources available to it, as well as the number of cases it is assessing/ investigating, and as such, it may reasonably adjust the expected response times to reflect these factors.

Para 2.4 Information and evidence required

BT recommends that the Commission publishes an indicative checklist of documents / evidence that it would expect for a Complaint, with view that they may request further information from the Complainant at a later stage. This would make the process more efficient, avoid Complainants having to second-guess the requirements of the Commission and enable a quicker response time by the Commission.

There may be more than one such checklist according to the nature of the Complaint.

Section 4 Assessment of Complaints and Queries

Para 4.3 Factors to consider when assessing complaints

We understand that the Commission intends to publish its enforcement strategy, priorities and objectives and we fully support that decision. BT urges the Commission to accept public comment on the matter as well.

We are concerned that the Commission considers “the likelihood of a successful outcome resulting from an investigation” as a factor in prioritizing which complaints to investigate. We are concerned that doing so could risk favouring cases that have precedent, that are less complex in nature, require a lower degree of investigation or even certain industries/ segments of the market. We recommend that the Commission removes this criteria as a factor in prioritizing its resources and focus.

Section 5 Next Steps

Para 5.3 Commission may reconsider the issues raised in a complaint or query

We are of the view that the Commission should inform and obtain consent from the Complainant should it determine to reconsider issues raised in a previous complaint or query. Such action involves the reference and use of information relating to the Complainant. Additionally the situation or information could have become outdated, irrelevant or inadequate.

We are also of the view that such powers by the Commission should be restricted to a specified period from the date of the original Complaint, for example 3 years.

Other comments: Commission audit and statistical information

In line with transparency, we believe that the Commission should make available information/ statistics on complaints/queries received, categorized by sector/ nature of complaint, amongst others, so as to provide an indication of the state of play. Additionally, the Commission should publish information on the number of such Complaints that have translated into Investigations.

Such audits and publishing of statistical information are in line with practices of other regulatory authorities in Hong Kong.

Comments to the Competition Commission’s Draft Guidelines on Investigations – 2014

The following are BT’s comments in regards to the Draft Guidelines on Complaints.

Section 3: Initial Assessment Phase

As per our comments on the Draft Guidelines on Complaints, we do not believe that the Commission should necessarily favour cases because there is a higher likelihood of a successful outcome. We believe that doing so could risk the favouring of cases that have precedent, that are less complex in

nature, require a lower degree of investigation or even because they involve certain industries/ segments of the market. We strongly suggest that the Commission removes this criteria as a factor in prioritizing its resources and focus.

Section 4: Possible Outcomes of Initial Assessment Phase

We would like to understand why the Complainant will not be advised if the Commission decides to proceed to the Investigation Phase. As per our comments on the Draft Guidelines on Complaints, we are of the view that clarity of the Commission's intended course of action (and timelines) is important to enable the Complainant to determine its next course of action particularly where the conduct being complained about is detrimentally, or could detrimentally, affect it and/or its business.

Section 5: Investigation Phase

Para 5.23 Enter and Search Premises under Warrant (Section 48 warrant)

We are of the view that the Commission should provide the party that it has searched a list of all documents/ possessions that it has taken from the premises or made copies of, or provides reasonable time for the party to document this. Additionally, the searched party should be allowed to make copies of the documents seized.

This is consistent with practices in other jurisdictions. For example, in Australia, under the ACCC, if material is seized, the person executing the warrant must provide both an itemised receipt and if the occupier requests it, copies. We are of the view that some sort of guidance in the new ordinance/guidance note to make it express that the Commission should do the same in case of seizure of documents in an investigation.

Para 5.25 Power to search under warrant

Whilst we understand that there may be circumstances in which the Commission will need to search premises belonging to other parties, we are of the view that it would be helpful if the Guidelines set out some requirements in relation to the Commission's application for a warrant e.g. the information that the Commission would need to provide in the application/the warrant should set out (i) the premises in scope with specific name of company if applicable and address, (ii) what the investigation is about (iii) specify and describe the information/documents that the Commission requires. The search of other parties' premises should be very specific to the Investigation and only information vital to the Investigation should be ceased.

Section 6: Confidentiality

Para 6.13 Use of information by the Commission

The paragraph in the guideline states that information obtained by the Commission in one matter may be used by the Commission in another matter. It would be helpful if the Commission could give some further elaboration regarding its power to use information obtained including under what circumstances can this power be used and the limitation in use. We could suggest that there are a few points to consider in terms of the further elaboration i.e.

- (i) Power of use – the power of using information obtained from one case in another case should be limited to exceptional cases only. This is because, the information obtained from

one case when being collected was for a specific purpose e.g. under a specific warrant granted by the court and should only be used for that specific purpose/case only. Only where there is any urgent / exceptional reason should the power be exercised.

- (ii) Duty of confidentiality - where the information being used is confidential/sensitive information obtained from one company, when the Commission decides that it wish to use such information in another case, the Commission should first seek the agreement of the information provider for using of such information in another case.
- (iii) Retention period – there should be a guideline as to how long information obtained by the Commission in one case can be retained by the Commission. Information should really only be retained for as long as it is required to complete the investigation/proceedings for which the information was first obtained. The Commission should also ensure that the retention of such information is consistent with the Data Protection regulations in Hong Kong.

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