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9 December 2014

Submissions on Draft Guidelines  
Competition Commission  
36/F, Room 3601  
Wu Chung House  
197-213 Queen's Road East  
Wanchai, Hong Kong

Dear Sirs,

**Submission to the Hong Kong Competition Commission in response to the draft Competition Guidelines**

**1. Introduction**

- 1.1 Baker & McKenzie welcomes the opportunity to respond to the Competition Commission's and the Communications Authority's (together, the "Commission") invitation to comment on the draft Competition Guidelines.
- 1.2 Baker & McKenzie is a leading global law firm with more than 4,200 locally admitted lawyers in more than 70 offices worldwide, including a major presence in Hong Kong.
- 1.3 Our Global Antitrust and Competition Law Group has played a significant role in the development of competition laws as leading lawyers, advisors to governments and regulators and active participants in the law reform process in numerous jurisdictions worldwide. Our comments in this submission are based on our extensive experience in advising on and active participation in the development of competition law.
- 1.4 We set out below our submission to the Commission on the Draft Guidelines on how the Commission expects to interpret and give effect to the:

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- (a) First Conduct Rule (“**Guideline on the First Conduct Rule**”);
- (b) Second Conduct Rule (“**Guideline on the Second Conduct Rule**”);  
and;
- (c) Merger Rule (“**Guideline on the Merger Rule**”).

1.5 We also provide comments on the draft Guidelines on Complaints, Investigations and Applications.

## 2. General Comments

- 2.1 The draft Guidelines are extensive, user friendly and offer welcome clarity and guidance on many aspects of the Hong Kong Competition Ordinance (the "**Ordinance**"). We believe that in the areas identified below further clarity would be helpful to provide the business community with the certainty needed for effective planning and implementation of compliance programmes in Hong Kong. We would encourage the Commission to treat its statutory obligation to issue guidance as a continuing one, so that the Guidelines are refreshed and re-issued periodically.
- 2.2 There is a risk of over-applying competition laws due to: (i) the general nature of certain aspects of the Guidelines; and (ii) an absence of clear safe harbours or guidance on conduct that clearly falls within the category of "permissible" market behaviour. We understand the Commission's desire to retain flexibility but suggest that as the Commission's enforcement experience grows the Guidelines can be refined and expanded to more complex areas of competition law.
- 2.3 There is a risk that business will be left guessing as to what is problematic conduct and the magnitude of risk. Warning Notices cannot be relied on to provide this clarity. Given the possible reputational damage arising from the proposed publication of warning notices, prudent companies will simply seek to refrain from any conduct which might give rise to a Warning Notice.
- 2.4 Similarly, waiting on Tribunal decisions to provide clarity is also an imperfect solution due to the inevitable delay in building a body of case law as well as the Commission's wide discretion on which cases to bring before the Tribunal. This uncertainty may deter potentially pro-competitive conduct and deprive consumers in Hong Kong of the benefits of aggressive, vibrant and intense competition.
- 2.5 We would encourage the Commission to include more hypothetical examples in the Guidelines as such examples are very helpful for the business community to understand the Ordinance. In particular, it would be useful to include more examples of permitted conduct (or conduct which would not be regarded as contravening the Ordinance) to avoid stifling competition. For example, the Guidelines on the First Conduct Rule include 16 examples of non-permissible conduct but only seven examples of permissible conduct.



### 3. Guidelines on the First Conduct Rule

- 3.1 It would be helpful to offer greater guidance on the distinction between "market power" related to the First Conduct Rule (paragraph 3.15) and "substantial market power" under the Second Conduct Rule. The concept of "market power" under the First Conduct Rule is not defined. This creates legal uncertainty. Businesses will need to self-assess by reference to a concept for which there is little guidance.
- 3.2 The Commission states in paragraphs 3.4 and 3.9 that some categories of agreement are "by their nature" so harmful to competition that they are deemed to have the "object" of harming competition. Paragraph 5.4 lists the types of cartel agreement that are considered "serious anti-competitive conduct". We respectfully submit that clarity is required as to what, if any, conduct outside of "serious anti-competitive conduct" could be open to such a presumption. Under the Guidelines there is a risk that the EU concept of "by object" infringements and the Hong Kong concept of "serious anti-competitive conduct" is blurred.<sup>1</sup> It would be helpful to clarify how, if at all, conduct which falls within the category of serious anti-competitive conduct is to be distinguished from what the EU refers to as "by object" infringements. In this regard, it would also assist if the Commission could confirm, as we assume is the case, that it is not proposing to take an approach that is more restrictive than the recent European decision in *Groupement des Cartes Bancaires (CB) v European Commission*.<sup>2</sup>
- 3.3 We respectfully submit that the provisions on information exchange do not sufficiently consider the pro-competitive effects of information exchange and efficiency arguments for the exchange of information.
- 3.4 The Guidelines adopt a very strict approach to Resale Price Maintenance ("RPM") despite the efficiencies which may be generated by this form of conduct. The Commission categorises RPM as anti-competitive "by object" without sufficiently recognising the distinction between price restrictions in a vertical distribution context and price-fixing between competitors. The Guidelines also note that RPM may amount to serious anti-competitive conduct.
- 3.5 We would respectfully disagree as section 2(1) of the Ordinance does not refer to "resale" prices but, instead, targets horizontal conduct. Serious anti-competitive conduct should be reserved for horizontal cartel conduct which, under international best practice, is widely acknowledged as a serious restriction of competition. In contrast, international best practice recognises that there may be efficiencies and pro-competitive justifications for RPM, such as the introduction of a new product or new entrant into a market or the ability to address free riding considerations. We respectfully submit that an effects based analysis should apply to RPM.

<sup>1</sup> See further below our comments in relation to the use of the expression "object" in the Second Conduct Rule.

<sup>2</sup> Judgment of 11 September 2014.

- 3.6 The Guidelines are silent concerning many other types of vertical non-price restrictions. There remains significant uncertainty for business operators on how to organise their distribution strategies in Hong Kong to ensure compliance with the Ordinance. At a minimum, it would be helpful if the Commission could provide clarity and guidelines on selective distribution and dual distribution arrangements. Clear safe harbours or a vertical block exemption would be most helpful. This is particularly the case where selective distribution may be seen as a response to a strict "by object" treatment of RPM.
- 3.7 In paragraphs 2.4 to 2.7 the Commission comments on its approach towards a "single economic unit". Given that in many industries in China foreign players are required to partner with a local undertaking it would be helpful if specific guidance is provided on joint ventures and when joint venture entities will be deemed to be part of the same economic group.
- 3.8 We respectfully submit that it would be helpful to include in paragraph 6.9, (Figure 1) examples of conduct which will not or is unlikely to have the effect of harming competition.
- 3.9 Annex 2.1 to 2.23 confirms that there is an exclusion for agreements enhancing overall economic efficiency. However, it would be helpful to include more detail on how practically business should assess whether the efficiencies are sufficient to compensate for the harm to competition. In particular, we believe it would be very helpful if the Commission would clarify if this is a qualitative and/or quantitative test.

#### **4. Guideline on the Second Conduct Rule**

- 4.1 The Second Conduct Rule contains the words "object or effect". However, it cannot be presumed that the legislature's intention was to introduce EU "by object" infringements under the Second Conduct Rule. Abuse of market power cases require assessment of whether there has been an anti-competitive effect. Conduct cannot be assumed by its very nature to be an abuse of a substantial degree of market power. It would be helpful to confirm this in the Guidelines. Were the Commission, against international best practice, to consider any types of unilateral conduct as potentially falling under the "by object" limb of the Second Conduct Rules then the Commission should clearly specify the categories of conduct to which this applies.
- 4.2 We respectfully submit that the absence of one or more market share thresholds in relation to defining "substantial market power" creates significant uncertainty.
- 4.3 We commend the Commission for recognising that the essential facilities doctrine only applies in exceptional circumstances.



## 5. Guideline on the Merger Rule

- 5.1 We respectfully submit that the CR4 ratio test (paragraph 3.14) is a complex test which will be difficult for businesses to apply due to a lack of market information. Clear uncomplicated guidance on a concept such as market concentration is essential. An unclear test risks creating uncertainty as to whether a transaction is potentially notifiable. We would suggest introducing a simpler, clear threshold test so parties to a transaction can readily identify if a transaction is notifiable in Hong Kong.
- 5.2 With reference to paragraphs 2.5 to 2.7 and 2.13, we would welcome clearer guidelines on what constitutes "control" - in particular sole and joint control and how this can arise on a legal and de facto basis.
- 5.3 In regard to the commencement of an investigation (paragraph 5.1) it would be helpful to include examples of when parties can consider the Commission *"ought to have become aware that a merger has taken place."* The ongoing risk that a transaction may be investigated at an unspecified future time creates uncertainty. It would also be helpful to clearly set out the stages of investigation in the six months prior to the Commission bringing proceedings before the Tribunal.
- 5.4 The Guidelines do not give any indicative timeframes for the informal advice process, for accepting commitments or awarding merger decisions. The inclusion of indicative timeframes would be welcome.

## 6. Guidelines on Complaints

- 6.1 The Guidelines encourage the making of complaints. We suggest that this should be limited to complainants with a "legitimate interest" (defined in the Guidelines by reference to the relevant conduct, the market and the relevant parties) and should outline best practices on the information which should be submitted.
- 6.2 The Commission retains discretion to investigate complaints. The Guidelines indicate that a complainant will obtain an "explanation" if the Commission proposes to take no further action. It is unclear if such an explanation is reviewable before the Tribunal or instead may be the subject of judicial review.
- 6.3 The Guidelines do not provide any indicative timeframes for the processing of complaints. These would be welcome.

## 7. Guidelines on Investigations

- 7.1 Paragraphs 7.12 and 7.15 do not sufficiently detail the processes and procedures by which the content and terms of commitments will be decided. Parties must be able to have access to sufficient information on the Commission's case and full state of evidence to meaningfully evaluate the Commission's case and determine whether to offer commitments. Without

this degree of transparency the procedure will be weakened as parties will be reluctant to engage with the Commission.

- 7.2 Paragraph 7.16 provides that the Commission must issue a Warning Notice before commencing proceedings for non-serious breaches of the First Conduct Rule and may issue an Infringement Notice before commencing proceedings for serious breaches of the First Conduct Rule (i.e.: conduct involving Serious Anti-competitive Conduct). No details are provided on how the terms of the Notices will be determined nor is any guidance provided on what will likely constitute the Commission's "reasonable cause to believe" a contravention has occurred. Both these areas of uncertainty should be clarified in the Guidelines.
- 7.3 The Guidelines state that Warning Notices "will" be published by the Commission. We respectfully submit that this proposal be reconsidered. Since the stated purpose of a Warning Notice is to provide the recipient with an opportunity to cease the relevant conduct, immediate publication is neither warranted or appropriate. Moreover, premature and unilateral publication of a Warning Notice by the Commission may result in reputational damage, in the case of listed companies the publication of price sensitive information and also potentially serious damage to a party's business.
- 7.4 The Guidelines helpfully provide a suggested timeframe for an investigation. Greater clarity would be welcome on whether, how and when a subject of an investigation will be notified and what information will be provided to the subject at each stage of the investigation.
- 7.5 Further clarification would be welcome on whether, when and how the Commission will liaise with other authorities in Hong Kong and overseas competition authorities on case specific matters.

## **8. Guidelines on Applications**

- 8.1 Under paragraphs 4.1 and 5.15 the Initial Consultation procedures involve a fee, are public and require third party engagement. Moreover, the Commission can use information received in the course of applications for exemption or exclusion decisions to commence enforcement proceedings (i.e. no immunity is foreseen). We respectfully submit that such qualifications are likely to discourage the use of the application procedure. The proposed approach will likely undermine the attempt to provide legal certainty to businesses and fail to engender a culture of openness and cooperation with the Commission.
- 8.2 Paragraph 6.2 does not provide a timeframe for the Commission's review of Applications or a deadline for the Commission to make decisions. To assist businesses in compliance planning we recommend the Commission provide target timelines.

**9. Conclusion**

9.1 Baker & McKenzie thanks the Commission for the opportunity to comment on the draft Competition Guidelines. We would be pleased to respond to any questions the Commission may have on these comments, or to provide additional comments or to participate in any further consultations with the Commission.

Yours faithfully

  
Baker & McKenzie