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Hong Kong Construction Association

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16 December 2014

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Senior Executive Director  
Competition Commission  
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36/F, Wu Chung House,  
197-213 Queen's Road East,  
Wanchai, Hong Kong

Our Ref:



**By Fax & by Post**

2522 4997

Dear Ms Webb,

**Comments on the Draft Guideline on the First Conduct Rule issued by the  
Competition Commission**

We refer to the Draft Guidelines jointly issued by the Hong Kong Competition Commission and the Communications Authority on 9 October 2014. Please find the attached comments from our Association for your consideration.

Yours sincerely,

Thomas Tse  
Secretary General

**HONG KONG CONSTRUCTION ASSOCIATION**

**COMMENTS ON THE**

**DRAFT GUIDELINE ON THE FIRST CONDUCT RULE**

**ISSUED BY THE COMPETITION COMMISSION**

1. The Hong Kong Construction Association ("HKCA") welcomes the opportunity to provide comments on the Draft Guidelines jointly issued by the Hong Kong Competition Commission (the "Commsston") and the Communications Authority (the "Authority") on 9 October 2014. The HKCA regards the Draft Guidelines as important signposts on the way to the full implementation of the Competition Ordinance. We value highly the Commission's proactive interest in working with stakeholders in industry to facilitate a better understanding of the Competition Ordinance.
2. In general, we are supportive of many of the positive steps taken by the Commission and the Authority in promulgating the Draft Guideline on the First Conduct Rule. We hope that our concerns and comments will be a platform for further engagement with all stakeholders prior to the finalised Guideline on the First Conduct Rule being submitted to Hong Kong's Legislative Council.

No	Reference	Issues	Comments
1	2.06	Decisive influence test in relation to whether there is a single economic unit	<p>The HKCA notes that the Commission proposes to apply the 'decisive influence' test to determine whether an undertaking constitutes a single economic unit test.</p> <p>The HKCA is concerned as to the lack of clarity in relation to the test proposed by the Commission. Whilst the term may be well understood by competition law specialists, it would be difficult for industry professionals to easily understand whether they have decisive influence in respect of another undertaking or not. Furthermore, it is not clear whether the 'decisive influence' actually needs to be applied in the relevant case for there to be a finding that there is a single economic unit. The HKCA believe this could be clarified by reference to common indicia of control or by the provision of an example.</p>
2	2.14	Obligation for an undertaking to distance itself from potential anti-competitive agreement	<p>The HKCA notes that the Commission is of the view that attending a meeting where an anti-competitive agreement is reached may in itself result in an undertaking being found to be party to an agreement simply because it did not object to the agreement at the time or subsequently publicly distance itself from the agreement.</p> <p>The HKCA considers that this is a relatively high standard to adopt at the outset of implementation of the Competition Ordinance when businesses may not be able to easily determine whether the object or effect of</p>

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			<p>an agreement is to harm competition. Secondly, undertakings may not be in a position to distance themselves from such conduct publicly due to obligations of confidentiality.</p> <p>If the Commission feels the need to include such language, HKCA would encourage the Commission to further emphasise the primacy of the need to demonstrate a true meeting of minds as set out in paragraph 2.13 of the Draft Guideline on the First Conduct Rule and, secondly, to adopt the approach taken by The Competition and Markets Authority in the UK which recognises that mitigation factors such as non-implementation of an agreement may be relevant to the level of any sanction.</p>
3	3.1	Application of First Conduct Rule	<p>The HKCA notes that the Commission has generally affirmed the proposition that most agreements between undertakings are unlikely to be anti-competitive and will not raise concerns under the First Conduct Rule.</p> <p>In the experience of the HKCA, many undertakings are concerned as to the extent that the application of the Competition Ordinance will undermine their individual freedom to do business with whom they chose and to make independent pricing decisions. The HKCA considers that this represents a significant concern for undertakings which could benefit from further elaboration by the Commission.</p>
4	3.12	The need for an appreciable or substantial adverse impact when assessing the competitive effect	<p>The HKCA notes that the Commission is of the view that an adverse impact on one or more of the parameters of competition is sufficient to constitute an anti-competitive effect.</p> <p>The HKCA considers that requiring an adverse impact without any modifier to signify the extent of such adverse impact is an approach that does not represent the proper approach for the Commission to adopt. For example, European Union ("EU") law requires there to be an 'appreciable' adverse impact.</p> <p>The HKCA considers that it would be conducive to the initial implementation of the Competition Ordinance in Hong Kong for the Commission to adopt the same standards that have been articulated in other leading jurisdictions in respect of the level of adverse impact required to demonstrate an anti-competitive effect. The HKCA believes that the position adopted by the EU to be the most widely representative and best understood norm in this regard.</p>
		Guidelines as to the threshold of adverse impact	<p>The HKCA notes that the Commission has not issued any guidelines which may help undertakings assess whether they are dealing with an agreement that has an adverse impact.</p> <p>The HKCA considers that guidance in this regard will be essential for undertakings to capably assess whether conduct they are engaged in has an adverse impact on competition. The approach taken by EU in</p>

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			this regard in its "Notice on Agreements of Minor Importance" (in particular paragraph 8 thereof) is suggested to be the optimal model that may be adopted by the Commission. In this regard the HKCA considers that the thresholds should be appropriately adjusted to 50% to take account of the smaller size of the relevant markets in Hong Kong as a whole compared to the EU.
5	6.5	Vertical Agreements	<p>The HKCA notes that the Commission has given some guidance on the application of the First Conduct Rule to vertical agreements. The Commission does not propose to adopt a block exemption in respect of vertical agreements as has been done, for example, in the EU.</p> <p>The HKCA considers that the application of the First Conduct Rule to vertical agreements to be a significant concern for undertakings and further detailed guidance on this area from the Commission is needed to assist undertakings in this area. The HKCA regards a block exemption as the best way of providing such guidance, as this leads to clear rules which can be applied by undertakings. In the absence of such a block exemption, the HKCA considers that the Draft Guidelines on the First Conduct Rule should address the application of the First Conduct Rule in detail to address the application of market power thresholds, treatment of serious anti-competitive conduct and application of the First Conduct Rule to vertical non-competitive agreements.</p>
6	6.20	Tendering process	<p>The HKCA notes that the Commission regards it as axiomatic that suppliers must prepare and submit their bids independently and that any form of bid-rigging is conduct that has the object of harming competition and a blatant infringement of the First Conduct Rule.</p> <p>The HKCA considers that the strong position taken by the Commission in these paragraphs may need to be appropriately adjusted to account for the nuances of the situation. For example, in the construction sector it is not uncommon for the party soliciting the bid to expressly permit joint ventures to tender for the project in question. Such a bid would be prepared jointly by the parties of the joint venture with the full knowledge of the procuring party that it had been jointly prepared. In such circumstances the procuring party is sufficiently able to safeguard its own position by deciding whether to accept or reject a tender based on how it has been prepared. Accordingly, the HKCA does not see how such conduct is in infringement of the First Conduct Rule if the affected party knows of the arrangement in question and has permitted it when it sought out or received the bids in question.</p>
7	6.38	Information Sharing	The HKCA notes that the Commission has set out some guidance in relation to non-price information sharing in the Draft Guideline on the First Conduct Rule. In general, the guidance is cautious and abstract, informing undertakings that this will be assessed on a case by case basis.

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			<p>The HKCA considers that the application of the First Conduct Rule to information sharing is a significant concern for undertakings and is an area where further guidance from the Commission would be beneficial. The HKCA considers that guidance on information sharing that is more comprehensive should discuss the sharing of non-price information such as prevailing wages, input costs, third party fees, and ancillary goods or services. There should also be some guidance as to the steps that undertakings can take to ensure that information sharing is undertaken in a manner that is compliant with the First Conduct Rule. This will help undertakings to understand the constraints applicable to information sharing that will be applicable under the First Conduct Rule.</p>
8	6.47	Standard Terms	<p>The HKCA notes that the Commission has carefully considered many aspects as to the effects of standard terms of contract in the Draft Guideline on the First Conduct Rule.</p> <p>The HKCA considers that there is one aspect of this issue which may be beneficially addressed by the Commission. In the HKCA's experience, it is not uncommon for suppliers to need to work with industry stakeholders to coordinate and develop standard terms of contract. This can also involve representations on behalf of their membership with parties who seek to impose standard terms of contract so as to ensure that fair and equitable terms are developed.</p>
9	6.81	Joint Venturing	<p>The HKCA notes that the Commission has set out a non-exhaustive list of factors that indicate whether a joint venture will comply with the First Conduct Rule.</p> <p>The HKCA considers that further elaboration of these concepts would be beneficial. This is especially the case as common reasons for the formation of a joint venture in the construction sector are based on (i) assessments of the risk represented by a new venture and whether an undertaking is capable of bearing that risk itself and (ii) ensuring that particular knowledge, skill sets, specialist experience or proprietary technology is accessible to the undertaking which it would otherwise not have access to. The HKCA considers that these are more likely to be of significant relevance to the assessment of the competitive harm caused by any joint venture and should be expressly considered by the Commission as factors mentioned in the Draft Guideline on the First Conduct Rule.</p>