

## **Consumer Council**

### **Submission to the Competition Commission on Draft Guidelines on Complaints, Investigations and Applications (Exclusions and Exemptions)**

#### **Introduction**

1. The Consumer Council (the Council) is pleased to submit its views concerning the Draft Guidelines released by the Competition Commission (the Commission) on 9 October 2014 for public consultation.
2. This submission sets out for the Commission's consideration issues arising from the three draft procedural Guidelines (Complaints, Investigations and Applications). The Council's view on the three draft substantive Guidelines (First and Second Conduct Rules, and the Merger Rule) will be provided separately on a later date.

#### **General comments on the procedural Guidelines**

##### *Objectives of Enhancing Economic Efficiency*

3. To improve general understanding of the competition rules, which are phrased in the negative as prohibitions in the Ordinance, the Council suggests the Commission to clearly delineate the objectives of enhancing economic efficiency in Part 1 (Introduction) of the Guidelines.

##### *Commission's Objectives*

4. *Paragraph 4.3 of the Guideline on Complaints and paragraph 3.4 of the Guideline on Investigations state in sub-paragraph (b) that the Commission will consider "the Commission's current enforcement strategy, priorities and objectives" in deciding respectively whether a complaint warrants further assessment, or a matter warrants further investigation. The Council opines that the objectives of the Commission could be much more clearly stated. In view of the statutory references to consumer interests in the legislation, it*

would be appropriate for the Commission to make concrete reference to consumer welfare in the objectives of enhancing economic efficiency.

*"Public interest" and "public benefit"*

5. The terms "public interest" and "public benefit" have been employed in the Guidelines on various occasions. The Council finds it difficult to distinguish the difference between "public interest" and "public benefit". The terms "public interest" has been employed in the Ordinance but in the Guidelines, the term "public benefit" has been used in various occasions. To avoid confusing the public, it is to term any interest relating and affecting the public under "public interest" and state that the terms will be subject to a quantifiable test.
6. A particular concern is that of anticompetitive conduct that might be exempted by the Commission. For example, the first conduct rule does not apply (Schedule 1) to any agreement that contributes to improving production or distribution; or promoting technical or economic progress; while allowing consumers a fair share of the resulting benefits. Satisfying the criteria of enhancing overall economic efficiency such that consumers can enjoy a fair share of the benefits of efficiency in order to gain exemption is a common test set in competition laws in other comparable jurisdictions. Precedents have been set and there have been lessons learnt.
7. It can be expected that in Hong Kong business will devote considerable resources to try and convince the Commission of how production and distribution will be improved and that technical and economic progress resulting in benefits to the public will ensue from some forms of anticompetitive conduct. A question arises as to how expansive and forthcoming business will be when it comes to indicating public benefit, apart from suggesting a theoretical potential for those benefits to accrue. At the very least, the Competition Commission should
  - make an in-depth assessment of the consumer benefits prior to granting an exemption;

- quantify any expected claimed benefits;
  - establish a mechanism for regular checking and monitoring;
  - provide a public record of that quantification; and
  - Indicate the consequences for exemption if the claimed benefits do not arise.
8. In this connection, transparency and disclosure of all relevant information in the assessment process, for public input, is essential for consumers to have trust in the system.

### **Guideline on Complaints**

9. The Council appreciates that the Commission will encourage and welcome complaints about possible contraventions of the Ordinance, and will not require complaints to meet specific formalities to be considered.

### *Gathering Evidence*

10. *Paragraph 4.1 of the Complaints Guideline specifies the extent of the Commission's "discretion to investigate a complaint even where the Complainant no longer wishes to cooperate with the Commission."* On balance, this is to be expected, however, there are occasions where it is difficult to gather sufficient information, especially when the Complainant no longer wishes to cooperate with the Commission. The Council would suggest the Commission to state explicitly that it will use its compulsory evidence gathering powers under the Ordinance where there is reasonable cause to suspect a contravention of the Ordinance, following a complaint, to exercise those powers, rather than rely on complainants, where a complainant for one reason or another has become reluctant to proceed with the matter. If the reasonable cause threshold cannot be reached unless a complainant provides more information, and the information is being provided by a whistleblower who is concerned that further attempts to obtain information will place them in jeopardy, then the Commission should have in place some procedure to protect those persons.

### *Acknowledging Receipt*

11. Paragraph 2.3 of the Draft Guideline states: "The Commission will normally acknowledge receipt of any complaint or query..." The Council requests the Commission to provide a specific timeframe in the acknowledgement of complaints or queries, for example, "within 7 working days where the complainant has provided contact details".

### *Providing a Timeframe*

12. Paragraph 5.2 of the Complaints Guideline notes that the Commission will provide an explanation of an outcome to a Complainant in writing. The Council suggests the Commission to expressly provide a timeframe within which the Complainant will be advised of the outcome, for example, either a specific number of days or "a reasonable timeframe".

### **Guideline on Investigations**

13. The Council appreciates that the draft Guideline on Investigations provides an outline of how the Commission will gather evidence to assess whether it has reasonable cause to suspect that conduct contravenes the Ordinance.

### *Categories of Documents to be sought*

14. The Guideline at paragraph 5.10 notes that pursuant to Section 2 of the Ordinance, documents that might be sought under Section 41 notices (investigative powers) include information recorded in any form. The Council would request the Commission to clarify the examples quoted in the Guideline by elaborating "correspondence" in sub-paragraph (d) as including "correspondence in any form, such as appointment diaries, letters, electronic mails, and social media comments" and adding sub-paragraph (f), for the sake of clarity, "any product associated with the Commission's investigation". The latter would catch any evidence that is not in the form commonly understood to be document, but nevertheless evidence critical to the Commission's case, for example, a piece of machinery, or saleable goods.

### *Altered Behaviour*

15. *The Guideline at paragraph 7.5 notes that "Where parties swiftly alter any conduct of concern in response to the Commission's enquiries, this will increase the likelihood of the Commission taking no further action."* To preserve the Commission's discretion in this regard, and to acknowledge the force of the legislation, the Council suggests the Commission to add at the end of the sentence: "provided that the conduct has not had a substantially detrimental effect on consumer welfare."

### *Reconsidering Commission action*

16. *The Guideline states at Paragraph 7.7 "... the Commission ... may later reconsider the issues ..., where additional evidence has been obtained or where a pattern of conduct arises warranting further consideration."* The Council would suggest the Commission to expand the scope for it to reconsider an issue, by adding a further qualification "where the behavior has not in fact been altered to the Commission's satisfaction".

### *Informing the Public*

17. *The Guideline notes at paragraph 7.11 "If proceedings are commenced in the Tribunal, the Commission will issue a press release at the relevant time."* It is unclear what "the relevant time" is. In order to clarify the situation, the Council would request the Commission to replace "at the relevant time" by "as soon as is practicable after filing an application with the Tribunal".

### **Applications Guideline**

18. The Council notes that the Commission has the power to issue Block Exemption Orders, either on application by undertakings or on the Commission's own initiative; and make decisions on the application of other statutory exclusions and exemptions according to an undertaking's specific circumstances.

### *Publishing Findings*

19. *The Council notes that the Commission is obliged to establish and maintain a register of its decisions and block exemption orders under s34 of the*

*Ordinance. But it is not required to publish findings and analyses of the cases it has investigated.* While the Annual Report could conceivably be used to provide some information on the cases investigated, there is no certainty as to the level of detail that will be provided. The Council is concerned that this approach will not adequately meet consumers' desire for full disclosure and transparency, and could set up a barrier leading to mistrust and resentment because of perceived secrecy.

### **Conclusion**

20. The Council supports the issuance of the draft Guidelines to provide general guidance on how the Commission will interpret and apply key provisions of the Ordinance, and appreciates if the Commission would take into account the Council's views stipulated above in finalizing the Guidelines.

*Consumer Council*

*November 2014*