

REVISED DRAFT GUIDELINES UNDER THE COMPETITION ORDINANCE ISSUED BY THE COMPETITION COMMISSION

SUBMISSIONS

Introduction

1. The Law Society has considered the Revised Draft Guidelines under the Competition Ordinance (the "Ordinance") issued by the Competition Commission (the "Commission") on 30 March 2015, and the Commission's Guide to the Revised Draft Guidelines Issued under the Competition Ordinance (the "Guide"). We note that extensive amendments and additions to the various Guidelines have been made and appreciate the work of the Commission in seeking to provide further clarification. Whilst in the absence of tracked changes we have not in the time available been able to review all the revisions, we present below our comments on some of our major concerns in relation to the Revised Draft Guidelines for the Commission's consideration.

Decision by an association of undertakings: Recommendations/fee scales

2. The Commission has clarified in paragraph 28 of the Guide that "recommendations, whether binding or not, can constitute a decision of an association of undertakings. This may include recommended fee scales and 'reference' prices..." However, the Commission has not mentioned recommended fee scales as a form of conduct it considers to have the object of harming competition in paragraph 30 of the Guide. It therefore remains unclear (despite the existence of "guidelines") to what extent and how readily the Commission would condemn such conduct as having the object or effect of preventing, restricting or distorting competition in Hong Kong.
3. Further, some fees are set pursuant to a legal requirement and are therefore excluded from the Conduct Rules pursuant to paragraph 2 of Schedule 1 to the Ordinance, for instance, the Solicitors (General) Costs Rules and the Solicitors (Trade Marks and Patents) Costs Rules under the Legal Practitioners Ordinance

(Cap.159). These rules are made by the Costs Committee rather than by the Law Society. These exclusions from the Conduct Rules should be specified in the Guidelines.

4. We also remind the Commission that recommended fee scales may in certain circumstances be capable of having a positive effect on competition. It has been suggested that recommended fee scales by professional bodies may force undertakings to compete on quality, rather than price, depending on market conditions. We suggest that this may be an appropriate assessment in relation to Hong Kong, which has large, open and competitive bodies of professionals across a number of professions. This is also supported by the robust market for information on the quality of professional services in Hong Kong.
5. Further, the anti-competitive effects of recommended fee scales should be considered on a case-by-case basis, taking into account whether there is a rational relationship between the level of recommended fees and the type of work to be performed and the relationship between the fee scale and the quality of work performed.

Attendance by legal advisers at premises that are the subject of a section 48 warrant

6. We are most concerned that the Commission has maintained its position that it is not required to wait any period for a person's legal advisers to attend the premises before commencing a search under a section 48 warrant. The Commission justifies this position by repeating the assertion that the Ordinance itself does not impose any such time period. We regret this self-serving justification, noting that the relevant provisions of the Ordinance do not purport to address the issue of legal representation in any event. Accordingly, the issue is one which must properly be considered in light of overriding constitutional considerations.
7. The Commission is aware that Article 35 of the Basic Law enshrines the right to confidential legal advice and choice of lawyers. The Commission will also be aware that the execution of a search under a section 48 warrant will inevitably raise issues of privilege, relevancy and liability. The interests of the person being searched will inevitably be seriously affected if their legal advisers are not given an appropriate opportunity to be present at the search.
8. In light of the above, we again strongly urge in the interests of constitutional correctness and public perception that paragraph 5.32 of the Revised Draft Guideline on Investigations be amended by deleting the words "and there is no in-house lawyer already on the premises" and by amending the words "may at their sole discretion" to read "will". The relevant sentence will then read "However, where parties have requested that their legal advisers be present

during a search, Commission officers will wait a reasonable time for external legal advisers to arrive."

9. The above proposal would maintain the Commission's discretion as to the "reasonable time" that must be allowed for legal advisers to arrive, which we expect will depend on the relevant circumstances of the search. We would therefore wish to see guidance on what will constitute a "reasonable time".

Information obtained in an investigation which is subject to legal professional privilege

10. We understand that the Commission intends to establish and publish a procedure for dealing with disputes arising from claims of legal professional privilege in relation to the Commission's execution of its investigation powers, including the execution of searches under section 48 warrants.
11. We will no doubt provide our comments on the procedure once it is published by the Commission. We would however expect that the procedure would indicate whether the Commission's proposed practice will be to remove only those documents which are clearly free from privilege, or whether documents which are potentially privileged will also be removed and the procedure for assessing or claiming privilege if the latter approach is taken.
12. In any event, we believe that the most effective way of reducing the number of disputes over claims of privilege clearly would be to ensure that the legal representatives are present during the search, in order to resolve such disputes before the disputed documents are themselves removed by the Commission.

Self-incrimination

13. We note with concern that the Commission has made no amendments in the Revised Draft Guideline on Investigations to correct its statement of the law regarding the right against self-incrimination. In particular, it should be clarified that the statutory abrogation of the right against self-incrimination in section 45 of the Ordinance only applies to the Commission's investigation powers under Part 3 Division 2 of the Ordinance, and not to searches under section 48 warrants. Further (as noted in paragraph 15 below), the revision to paragraph 5.43 of the Guideline has compounded the error and made the statement even more misleading.
14. As the Commission will be aware, a section 48 warrant empowers the persons specified on the warrant to require a person on the premises being searched to give an explanation regarding documents. It is therefore highly misleading to

state in Paragraph 5.42 of the Guideline as currently drafted that "a person is not excused from giving any explanation or further particulars about a document", as it may give the impression that the statement also refers to searches under section 48 warrants.

15. Further, paragraph 5.43 of the Revised Draft Guideline on Investigations has been amended such that the prior reference to "Part 3 Division 2" of the Ordinance is now a general reference to "Part 3" of the Ordinance. The paragraph as currently drafted suggests that statements made during a search under a section 48 warrant would also be non-admissible in the relevant penalty or criminal proceedings. This is not only clearly misleading but erroneous in law, as section 45(2) of the Ordinance only applies to statements made by a person under Part 3 Division 2 of the Ordinance, and not to search and seizure under Part 3 Division 3 of the Ordinance which is not covered by section 45 of the Ordinance.
16. Clearly this issue is of serious concern, noting the Court of Final Appeal's recognition of the importance limiting the use of statutory provisions to abrogate the common law privilege against self-incrimination under Hong Kong's constitutional framework.¹ Clearly, the extraordinary powers of investigation bestowed upon the Commission must be used within the statutory limits. The misleading and erroneous statements in paragraphs 5.42 and 5.43 of the Revised Draft Guideline on Investigations should be clarified and amended accordingly, as indicated below as underlined:

"5.42 Section 45 of the Ordinance (which applies to the Commission's investigation powers under Part 3 Division 2 of the Ordinance, but not to search warrants under section 48) provides that a person is not excused..."

"5.43 No statement made under compulsionor in answering any question pursuant to Part 3 Division 2 of the Ordinance....."

Disclaimer and further consultation

17. As with the prior consultation exercise, we have no doubt that many other related organizations and bar associations will be providing extensive comments. Some Law Society members are already involved in such submissions. Any views expressed here are not to be taken as the views of any particular member of the Law Society (or clients of the member).

¹ See *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362

18. Likewise, any failure to comment on any particular provision in the Revised Draft Guidelines or on any other aspect of the process is not to be taken as tacit approval. We would indeed welcome opportunities to be further consulted on any specific procedural/legal issues that might come up.

The Law Society of Hong Kong
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