Summary: Competition Commission published FAQs in February 2016

I. Overview

- The Competition Commission published new FAQs on 26 February. Among other things, some FAQs seek to "clarify" misconception as to what constitutes "anti-competitive behaviours", particularly as applied to SMEs

- With our readers being predominantly listed companies, Practising Governance's summary below will focus on what actions are likely to constitute "anti-competitive" conduct

- We also listed below some issues that management should note, in the context of the forthcoming "annual review of internal controls effectiveness". (Please refer to our Jan 16 legal update as regards disclosure of competition law compliance in the new "Business Review")

II. Potential "Anti-competitive conduct" under the "First Conduct Rule"

(1) Recap of "First Conduct Rule" (anti-competitive agreements)

(a) Catches agreements, decisions, and concerted practices among parties whose "object" or "effect" prevent, restrict or distort competition in Hong Kong;

(b) "Serious anti-competitive conduct" include a "cartel":
- Price fixing
- market sharing
- bid rigging
- output restriction

(In case of "non-serious anti-competitive conduct", the rule does not apply to an agreement between undertakings if their combined turnover does not exceed HK$200m. Most listed companies would not be able to benefit from this exemption);

(c) Some specific exclusion grounds available.

(2) Information Exchange (Q14)

(a) Prohibited where competitors exchange "commercially sensitive information" on prices, business costs, sales volume and market shares) directly or indirectly through a third party (e.g. trade associations);

(b) In particular, where competitors share information in private on their future individual intentions or plans with respect to price;

(c) The Commission will assess the "object" as well as "effect" of the actions, and (among other things) consider the type of information exchanged, the structure of the "relevant market";

(d) In most cases, exchange of "historical, aggregated and anonymized data" is unlikely to harm competition.

(3) Resale price maintenance vs recommended retail prices (Q11)

(a) "Resale price maintenance" ("RPM") may be prohibited, depending on the circumstances — ie where a supplier imposes a fixed or minimum resale price to be observed by the retailer when it resells the product;

(b) "Suggested"/ "recommended" retail prices – unlikely to lead to competition concerns, as long as they are mere recommendations, and retailers freely adjust their prices upwards or downwards to compete with each other;

(c) Where a "recommended price" may amount to RPM---if it is combined with measures that "effectively require the retailer to follow the recommendation or otherwise prevent the retailer from making its own decision on pricing" (e.g. penalty or adverse consequences);

(d) The Commission will assess the substance of the arrangements in relation to price, not merely by reference to how they are described.

III. Potential "anti-competitive" conduct under "Second Conduct Rule"

(1) Recap of "Second Conduct Rule"

Abuse of "substantial market power" involving conducts with "object" or "effect" which prevent, restricts or distorts competition.

(Note: exclusion for undertakings whose turnover does not exceed HK$40m; other specific exclusions)

(2) Example: tying and bundling (Q13)

i.e. offering products in a package

(3) Example: Exclusive Dealing? (Q12)

(a) The mere fact of appointing a sole distributor in Hong Kong does not establish anti-competitive effect;

(b) Needs to harm competition in the "relevant market", e.g. where one of the parties has substantial market power and the agreement is "likely to foreclose its rivals' access to the market";

(c) Specific exclusions, e.g. if satisfy "economic efficiency";

(d) The Commission stressed the diversity of exclusive agreements, hence the need to assess individual circumstances (including the availability of exemption). Undertakings can apply for a decision.

IV. "Annual review of internal controls effectiveness": what your directors may ask

It should be noted that "internal controls effectiveness" covers "compliance controls".

(a) identification and assessment of competition law risks

- i.e. what are the specific risks, and risk ranking of their consequence, according to your risk methodology ("high", "medium", and "low risks") ?
- ideally, recorded in risk documents (risk registers and "heat map")

(b) governance: who is taking the lead in the compliance project? Top level involvement?

(c) involvement of operating units — competition law potentially affects business practices (e.g. exchange of information discussed above). What steps have been taken to involve operating units in risk identification and assessment, and then educate them in light of the new company policies?

(d) mitigating measures: e.g. legal advice/compliance audit needed? amend potentially anti-competitive contracts; implement new company policy/ procedures (a compliance manual?); training of operating units

(e) continuing monitoring and review — given its being a new area of law

(f) in light of potential director liability, has adequate directors' briefing on key legal principles been done?

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