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Comments on the Draft IP Guidelines

Dear Sir, Madam,

The Hong Kong Competition Association (“HCA”) is honoured to present its comments on the Draft IP Guidelines of the Malaysia Competition Commission (“MyCC”).

As with the previous MyCC public consultation on which the HCA participated, the HCA wishes to thank MyCC for the opportunity to comment and to express views on the proposed guidelines.

As a general comment, the Draft IP Guidelines are well written, overall clear, and will certainly be helpful for licensors and licensees seeking to comply with the Competition Act. The intersection of IP and antitrust issues has been one of the most complicated and hotly debated aspects of antitrust law around the world. In this context, any additional guidance is welcomed by companies and antitrust professionals, and MyCC managed to clarify some of the complex questions around the application of the Competition Act to IPRs. The HCA



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notes in particular the helpful number of examples provided by MyCC, which provide helpful illustrations of how MyCC will interpret the law. The HCA wishes to encourage MyCC to provide further examples and illustrations, whose value cannot be overstated.

Our detailed comments are annexed to this letter. We identified some of the sections of the Draft IP Guidelines where we believe that the language can be improved or, more rarely, where we believe that the view taken by MyCC is not suitable.

We would be glad to continue this discussion directly with MyCC, should MyCC require additional information.

Finally, the HCA is grateful for the comments and participation of its members, including Ms. Kanni Ramaiah, Lecturer in Law at Universiti Teknologi MARA, and Mr. Anand Raj from Shearn Delamore & Co.

Kind regards,

Knut Fournier



Annex: Details comments on specific sections of the Draft IP Guidelines

(the section numbers below refer to the section numbers in the Draft IP Guidelines).

4.3 Innovation Market or Research and Development (R&D) Market

Issue

The concept of “innovation market or R&D market” does not appear to the HCA to be a necessary addition to the already available list of potential markets to be defined under the IP Guidelines. The HCA notes that such an approach does not appear to have an equivalent in other major jurisdictions.

More importantly, the situation described in the Draft Guidelines appear to be already covered by the concept of “technology market”. Another way of looking at the set of facts in “Illustration 2” is that companies Alpha and Beta entered into a cross-licensing agreement for a certain product or technology (a particular type of high-strength steel). In either case (product market or technology market), such a market definition would be able to capture the companies’ skills at that time, which is what MyCC appears to attempt to do with the concept of innovation market or R&D market.

It is not clear from the current Draft Guidelines in which situation would MyCC apply this type of market definition rather than product market or technology market. The Draft Guidelines refer to agreements for “research and development of new products”, and alternatively at advances “result in innovative products which have no actual or potential competition in the relevant market yet.” This lack of clarity could lead to uncertainty for licensees and licensors, which is precisely what the Draft Guidelines are trying to prevent.

In addition, the HCA notes that the vast majority of licensing agreements would fit into one of the two categories of situations mentioned in the Draft Guidelines, since licensors and licensees enter into agreements so that one of the two parties can develop new products, and/or with the hope that the agreement will participate in the creation of a product or technology for which there are no competitors on the market.

Finally, the concept of innovation or R&D market poses a risk for the competition analysis. By focusing on “the assets (technologies, laboratory, equipment, etc.) comprising R&D [...] and the close substitutes for that research and development.”, MyCC risks misidentifying potential competitors and substitute technology and products, thus increasing the risk of Type I errors. Furthermore, where licensors and licensees aim at developing a product for which there are few or no competitors, the likely result of the market power analysis is that they will be found to have a high degree of market power, almost every single time. The parties to such an agreement would then be under the impression that they have specific obligations



under the Competition Act - obligations which would be difficult to translate into specific conduct, the relevant product or technology having not been developed yet.

Proposed solution

The HCA respectfully submits that the concept of innovation market or R&D market should be removed from the Draft Guidelines.

In the event that MyCC is concerned about the challenges of defining markets for products and technologies which have not yet been finalised, the sections on market definition for product markets and innovation markets should reflect this. The Draft Guidelines could include, at sections 4.1 and 4.2, a note concerning yet-to-be-finalised products and technologies. This would allow licensees and licensors to anticipate the possibility that a product market or a technology market may comprise products and technologies not yet fully developed, especially when the relevant parties have entered into an agreement with a view to develop it.

6.1.1(a) Vertical price-fixing

Issue 1

The stated relationship between the impossibility for more efficient licensees to lower prices, and the lack of price competition between licensees, fails to capture cases where a licensor and a licensee enter into an exclusive license agreement (“However, by imposing such restriction on all licensees, those who are more efficient in conducting their business would not be able to lower their prices. Hence, there would not be price competition between licensees.”).

In addition, the current wording (“there would not be price competition...”) may not accurately the competitive dynamic of the market, e.g. where there are substitutable products or technologies which are outside the scope of the licensing agreement.

Proposed solution

MyCC may want to provide examples of how it will conduct an effects analysis for price-fixing clauses in licensing agreement. In particular, the HCA respectfully submits that this section would benefit from a more detailed example, including several variations of facts, for instance incorporating scenarios where there is only one licensee under an exclusive license, and where there are substitutable products or technologies.

Based on the HCA’s experience, it may be confusing for companies to be told that an agreement will be assessed for its effects, without more details on what the effects analysis



would entail. The HCA is mindful that the Guidelines on Chapter 1 Prohibition already provide some guidance on MyCC's approach to effects analysis. However, additional guidance in the context of licensing agreements will be helpful.

Issue 2

The relationship between the payment of licensing fees as a percentage of the selling price, and price-fixing, is unclear. The Draft Guidelines indicate that “[p]rice fixing is practised because the licensing fees obtained by the licensor are normally based on a certain percentage of the selling price.” Under this wording, parties to an agreement who are not familiar with competition law or IP law may be under the impression that a royalty-type agreement amounts to price-fixing.

Proposed solution

The HCA respectfully suggest to rephrase the above-mentioned sentence, to clarify that licensors entering into an agreement including the payment of royalties will often have an incentive to practice vertical price-fixing.

Suggested wording: “When licensing agreements include the payment of a percentage of the selling price by the licensee to the licensor (royalties), the licensor will often have an incentive to attempt to fix prices.”

6.1.1(b) Territorial and Field-of-Use Restrictions

Issue

The Draft Guidelines do not provide sufficient information on MyCC will analyse each type of territorial or field-of-use restriction. The five types of restrictions mentioned in the Draft Guidelines (“(i) foreclose access to competing technology; (ii) prevent licensees from developing their own technology; (iii) facilitate market allocation; (iv) fix price for any products or service supplied by the licensee; or (v) restrict resale subsequent to the first authorised sale of the patented product (the exhaustion doctrine)”) also do not seem to be ranked in any particular order in terms of the likelihood that they will trigger competition issues.

Proposed solution

The HCA respectfully suggests that MyCC (1) clarifies whether the list of restrictions mentioned at 6.1.1(b) is exhaustive, (2) provides examples of how each of these restrictions will affect its competitive assessment, and (3) clarifies whether some of these restrictions are likely to be more harmful to competition than others.



6.1.1(d) Exclusive Dealing

Issue

The Draft Guideline, in its current wording, seem to offer a blanket clearance for exclusive dealing arrangements under vertical licenses.

However, exclusive dealing can constitute an abuse of dominance under Section 2 of the Competition Act. Outside of abuse of dominance issues, such a clause can be a factor in the assessment of anticompetitive effects, for instance where it is combined with other types of restrictions.

Proposed solution

The HCA respectfully suggests that MyCC indicates instead that, save for cases where the analysis will be conducted under Chapter 2, exclusive dealing clauses will be assessed as “effects” restrictions.

6.2 Section 4(2) Prohibition

Issue

The Draft Guidelines do not address the possibility that an agreement between non-competitors (e.g. a vertical agreement) becomes an agreement between competitors are a later point in time. This situation is likely to happen, for instance where a licensee seeks access to a technology or product, with an aim to later develop and market it. In this example, licensor and licensee are not competing with one another, but are merely “potential competitors”.

Proposed solution

The HCA respectfully suggests that the Draft Guidelines include a paragraph explaining that the competitive dynamic between parties to an agreement is likely to evolve, and that therefore the competition analysis (including whether some clauses are “deemed” anticompetitive, or may have anticompetitive effects) will evolve to capture this new situation.

6.2.1.(b) Any Other Trading Conditions

Issue



The example (Illustration 5) used in the Draft Guidelines could be improved. The current proposed set of facts may be confusing to businesses, as it involves two levels of agreements. In Illustration 5, the two companies enter into an agreement, and the terms of this agreement is that they will only license to third parties at certain conditions. There are several issues with this.

First, the Draft Guidelines do not envisage the possibility that the joint venture agreement between the two companies may be considered a merger. As there is currently no general merger control regime under the Competition Act, there is a chance that such an agreement is treated differently if it is considered a merger. In the given example, the obligation for the parties to license at some conditions is ancillary to the merger, and therefore also only partially subject to competition rules.

Second, the Draft Guidelines do not clarify whether the joint venture agreement, or the subsequent licensing agreements, would be targeted by MyCC in this case.

Third, the example do not clarify what is the legal test applicable to this situation, i.e. whether the joint venture is anticompetitive by object or effect, and whether the licensing agreements are anticompetitive by object or effect.

Proposed solution

The HCA suggests, respectfully, to amend the Draft Guidelines to simplify the example so as not to confuse companies, to clarify which agreement would be targeted by MyCC in such a case, and to clarify what the applicable test would be. In particular, where the Draft Guidelines mention that “[t]he conduct of Alpha and Beta could be caught by sections 4(1) and also 4(2)(a)”, it may be useful for companies to better understand when would such a conduct fall under section 4(1), versus when would it fall under section 4(2)(a).

6.2.1.(c) Sharing Market or Sources of Supply - Section 4(2)(b)

Issue

The example do not clarify what is the legal test applicable to this situation, i.e. whether the agreement between the companies is anticompetitive by object or effect, and whether the agreements with members are anticompetitive by object or effect.

Proposed solution

The HCA suggests, respectfully, to amend the Draft Guidelines to clarify what the applicable test would be. In particular, where the Draft Guidelines mention that “[t]he conduct of Alpha and Beta could be caught by sections 4(1) and also 4(2)(a)”, it may be useful for companies



to better understand when would such a conduct fall under section 4(1), versus when would it fall under section 4(2)(a).

6.2.1.(d)(i) Production

Issue

The example (Illustration 7) seems to indicate that pay-for-delay agreements such as the one described here will be analysed under their effects. If that is the case, the Draft Guidelines could say so clearly.

Proposed solution

The HCA submits that the Draft Guidelines should clearly state that pay-for-delay agreements are “effects” agreements, and do not in themselves have the object of restricting competition.

The same comment, on the need to clarify whether object or effects analysis applies, is also made by the HCA with regard to:

- *6.2.1.(d)(ii) Market Outlets or Market Access;*
- *6.2.1.(d)(iii) Parallel Imports*
- *6.2.1.(e) Technical or Technological Development*
- *6.2.1.(f) Investment*

7 Section 5 - Relief of Liability

Issue

The mention of Section 5 is a welcome clarification with regards to potential economic benefits. However, this paragraph comes immediately after 6.3, which strictly refers to Section 5 in the context of the deeming provision. Therefore it may be confusing for companies, who may be under the impression that Section 5 is only available for agreements falling under the deeming provision. In addition, the paragraph on Section 5 does not provide examples of how MyCC will assess economic benefits in the context of IPRs.

Proposed solution

The HCA respectfully suggests that the Section 5 paragraph is amended to (1) clarify the scope of Section 5 availability, and (2) provide at least one example of how economic benefits can emerge from an IP agreement, and how this would be assessed by MyCC.



8 - Chapter 2 Prohibition – Abuse of Dominance

Issue

The HCA notes that this is the first time that MyCC mentions tacit collusion in relation to the Competition Act. Tacit collusion is not mentioned in the Chapter 1 Prohibition Guidelines, and does not seem to have been an issue in any MyCC enforcement case.

The current Draft Guidelines appear to include a short discussion on tacit collusion (Explanation 2). However this discussion at the end of a section on collective dominance. There are several issues with this.

First, whilst collective dominance stems from the Competition Act, whilst there is no such basis for tacit collusion.

Second, tacit collusion is far from established under EU law, and remains subject to debates and controversies.

Third, it is unclear whether the Draft Guidelines are the best place to introduce the concept of tacit collusion in Malaysian competition law. Including tacit collusion in relation to IPRs, whilst the other guidelines are silent on the topic, could give the impression that the concept is specific to IPRs. If that is the case (i.e. if MyCC intends to pursue tacit collusion cases in relation to IPRs only), it is not clear what the rationale is for such a limitation.

Fourth, Explanation 2 clearly refers to concerted practices. Without additional guidance on the relevance of this point, this is likely to be confusing for companies.

Fifth, the mention of tacit collusion (a Chapter 1 prohibition issue) in the context of oligopolies (a Chapter 2 prohibition issue) may lead to confusion.

Proposed solution

The HCA respectfully suggests to remove the reference to tacit collusion altogether, so as to ensure consistency and clarity throughout the Draft Guidelines' section on Chapter 2 Prohibition. In the event that MyCC does not envisage removing the section on tacit collusion, the HCA respectfully suggests to cross-reference it with the part on Chapter 1 Prohibition, and to add additional details and guidance on how MyCC will assess suspected cases of tacit collusion.

8.1.1.(a) Excessive Pricing



Issue

The HCA is concerned that the discussion of excessive prices in relation to abuse of dominance does not reflect the current best practices and international standard of competition law enforcement.

Illustration 13 appears to discuss a case where a drug originator has acquired market power by purchasing its closest competitor. The HCA is mindful that there is currently no cross-section competition law in Malaysia. However it is unclear whether a dramatic expansion of the concept of abuse is the best way to address the lack of merger control.

The discussion of excessive prices in the Draft Guidelines also seem to ignore, if not to contradict, MyCC's own guidance on abuse of dominance. In the Chapter 2 Prohibition Guidelines, MyCC states that "[t]he MyCC may only be concerned with excessive pricing where there is no likelihood that market forces will reduce dominance in a market. This situation is not likely to be common and there are some sectors which are covered by price control legislation." Yet, in Illustration 13, MyCC did not discuss the possibility that market forces may intervene to balance the IP owner's price increase. There also does not seem to be any reference to existing price controls for drugs under Malaysian law.

Proposed solution

The HCA suggests that MyCC cross references this section with its own guidance on abuse of dominance and to align its language with that of the Chapter 2 Prohibition Guidelines, so as to offer a clear and cohesive picture of how MyCC will interpret the law in Chapter 2 violations.

8.1.2.(a) Refusal to License Intellectual Property Rights

Issue

The HCA notes that MyCC has adopted the international standard developed by European courts in the *Magill* case to determine whether a refusal to license IPRs can amount to an abuse.

However, the test is currently laid out in the example provided (Illustration 17) rather than in the body of the guidelines itself. This may be confusing to companies, who may not realise that the core of the refusal to supply analysis lies in the three-part test, and that this test applies regardless of the set of facts.



In addition, the HCA notes that the *Magill* test was developed and applied by European institutions with a view to determine the exceptional circumstances under which the owner of IPRs may abuse its dominant position simply by refusing to grant a license.

Finally, the Draft Guidelines do not seem to distinguish between refusals which would prevent a competitor from entering the primary market, versus refusals which prevent the emergence of a new product in the secondary market. The HCA notes that the international practice, on which MyCC appear to rely for the refusal to supply part, favours enforcement against refusals affecting the secondary market, but not the primary.

Proposed solution

The HCA respectfully suggests to move the lay out the three-part test prior to offering a practical example. The HCA also suggests to make clear that this test, if met, constitutes exceptional circumstances under which a refusal to supply can be abusive.

Finally, the reference in the example of a refusal which “prevents the emergence of a new product” may need to include a mention that this is only likely to trigger competition concerns where the new product in question is in the secondary market.¹

8.1.6.(b)(i) and (ii) SEP - Fair, Reasonable and Non Discriminatory (FRAND) Terms

Issue

The paragraphs on SEP and FRAND do not clarify whether the owner of an SEP can seek injunctive relief against perceived infringers. This topic has been the subject of a considerable amount of litigation and debates in other jurisdictions (e.g. the EC enforcement action against Samsung and Motorola, and the ECJ’s guidance in the *Huawei / ZTE* preliminary reference case).

Proposed solution

The HCA respectfully suggests that MyCC clarifies whether owners of SEPs and licensors signing agreements on FRAND terms are still able to seek injunctive relief.

¹ Case T-184/01 R II, *IMS Health Inc. v Commission* [2002] 4 CMLR 2