

# SLAUGHTER AND MAY

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Your reference 貴行檔案編號

Our reference 本行檔案編號

NZY

Direct line 直線電話

Dear Sirs,

## Consultation on Draft Procedural Guidelines: Response of Slaughter and May

This letter sets out the views of the Slaughter and May Competition Group on the following draft guidelines published by the Competition Commission (the "Commission") on 9 October 2014:

- the draft Guideline on Complaints ("**Complaints Guideline**");
- the draft Guideline on Investigations ("**Investigations Guideline**"); and
- the draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 (Block Exemption Orders) ("**Applications Guideline**"),

(together, the "**Draft Procedural Guidelines**").

Terms defined in the Draft Procedural Guidelines shall have the same meanings when used in this letter.

### 1. Overview

- 1.1 We welcome the opportunity to comment on the Draft Procedural Guidelines and fully support the Commission's aim of providing clear guidance to businesses in Hong Kong as to how it will enforce the Ordinance.
- 1.2 One of the main purposes of these guidelines is to ensure transparency in the Commission's decision-making. To that end, we commend the Commission for taking a very open and transparent approach in its Draft Procedural Guidelines. This not only offers businesses in Hong Kong a significant degree of procedural certainty, but also serves as a useful yardstick by which all cases can be treated in a consistent manner. At the same time, we recognise that the need for transparency

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must not unreasonably hinder the Commission's investigations, and that certain information must remain confidential to the relevant businesses. How the Commission addresses these issues is of critical importance to a credible and fair competition law enforcement regime.

- 1.3 As a general comment, therefore, we believe it would be helpful if the Commission could set out its policy on transparency – including how information will be obtained, handled and disclosed – in one place. We note that the UK Competition and Markets Authority has issued high level guidance as to its policy in this regard<sup>1</sup>, and suggest that a similar approach could be taken by the Commission.
- 1.4 We also suggest including in the Draft Procedural Guidelines indicative timeframes within which the Commission will endeavour to, for example, process complaints, complete investigations and consider Applications and Block Exemption Applications. Although the Commission would not be bound to these timeframes, such indications would enable parties to have a better picture of the important factors necessary to assess their preferred course of action.
- 1.5 Our views on specific issues raised in the Draft Procedural Guidelines are set out below.

## **2. Complaints Guideline**

### *Paragraph 4.3 – Factors the Commission will consider in assessing complaints*

- 2.1 Paragraph 4.3(d) provides that the Commission will take into account “the likelihood of a successful outcome resulting from an investigation” in deciding whether to pursue a complaint.
- 2.2 It would be helpful if the Commission could clarify what is meant by a “successful outcome”. For example, would all of the possible outcomes specified in the Investigations Guideline – taking no further action (where parties have addressed the issue), commencing proceedings in the Tribunal, accepting a commitment, issuing a warning or infringement notice, referral to a Government agency or conducting a market study – be considered “successful”? We suggest elaborating on the factors the Commission will take into account in assessing whether such an outcome is likely to occur. If those factors overlap with those listed in paragraph 4.2 of the Complaints Guideline (e.g. the likely veracity of the complaint), then paragraph 4.3(d) would appear to be superfluous.

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<sup>1</sup> See *Transparency and disclosure: Statement of the CMA's policy and approach* published by the UK Competition and Markets Authority in January 2014

*Paragraphs 5.1 and 5.2 – Commission takes no further action*

- 2.3 Under paragraph 5.2, where the Commission proposes to take no further action in respect of a complaint, the Commission will provide an explanation of this outcome to the Complainant. No guidance is given as to whether the Complainant may make further representations to the Commission.
- 2.4 We suggest that the Complaints Guideline provide for:
- (A) an obligation on the Commission to provide reasons why it proposes to take no further action – an “explanation” could conceivably relate only to the outcome itself (i.e. the implications of a “no further action” outcome) without providing any guidance on why the Commission chose to pursue that outcome;
  - (B) clarification as to whether the Commission’s explanation would be considered to be “confidential information” under section 123 of the Ordinance (i.e. such that the duty of confidentiality under section 128 of the Ordinance will apply); and
  - (C) an opportunity for the Complainant to respond to the Commission’s decision not to take further action, within a set time limit.
- 2.5 We note that this would be in line with the policy of the European Commission as set out in Article 7(1) of the Commission Regulation (EC) No 773/2004<sup>2</sup>.

**3. Investigations Guideline**

*Paragraphs 4.1 to 4.4 – Circumstances where the Complainant will be notified*

- 3.1 Paragraph 4.1 sets out four possible outcomes of the Initial Assessment Phase. Various paragraphs in the Investigations Guideline address whether the Complainant will be notified in the event of each outcome:

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<sup>2</sup> i.e. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty



- (A) Where the Commission proposes to take no further action in relation to a complaint, an explanation will be provided - paragraphs 4.2 and 7.6;
  - (B) Where the Commission decides to proceed to the Investigation Phase, the Complainant will not be advised of the ongoing status of the investigation - paragraph 4.4; and
  - (C) Where the Commission decides to refer a complaint to a Government agency, an explanation will be provided - paragraph 7.22.
- 3.2 The Investigations Guideline is silent as to whether the Complainant will be notified if the Commission decides to conduct a market study or uses other "alternative means" of addressing the issue (paragraph 4.1(c)(ii)), or if it accepts a Commitment (paragraph 4.1(d)). Although Commitments will be published (and hence Complainants may not need to be individually notified), we recommend the Commission set out its position on notification when the complaint is addressed by "alternative means". This will help ensure consistency in the Commission's approach to disclosing information to Complainants.

*Paragraph 5.9 – Contents of a section 41 notice*

- 3.3 We note that certain items in paragraph 5.9 of the Investigations Guideline could be interpreted as being narrower than the requirements of the Ordinance. For example, section 41(3) states that a notice must indicate the "subject matter and purpose of the investigation" whereas paragraph 5.9(a) states more vaguely that the notice will indicate "what the investigation is about".
- 3.4 The requirements of the Ordinance should be taken as the minimum level of information which must be provided to the recipient of the notice. As a matter of best practice and for the sake of transparency, we would urge the Commission to commit to providing further details in a section 41 notice, which should include, at the very least:
- (A) details of the scope and purpose of the investigation; and
  - (B) a date range in the description of the documents and/or information that the Commission requires.

*Paragraph 5.22 – Provision of recordings, transcripts and documents*

- 3.5 Under paragraph 5.22, recordings, transcripts and documents put to a person served with a section 42 notice will be provided to that person "upon request when practicable".

- 3.6 For the sake of transparency and to preserve the right to a fair hearing, such recordings, transcripts and documents should be provided to the interviewed person in a timely manner, in all cases. We therefore urge the Commission to remove the words “when practicable” and either specify a timeframe within which it will provide such recordings and documents, or state that this will take place “promptly” or “as soon as practicable” upon request.

*Paragraph 5.29 – Information to be provided with a section 48 warrant*

- 3.7 Paragraph 5.29 provides that Commission officers attending a search under a section 48 warrant will, upon request, produce evidence of their identity, the section 47 authorisation and the warrant.
- 3.8 In addition to the producing the documents currently specified in paragraph 5.29, we recommend that the Commission endeavour to provide information which would allow the parties involved to understand the ambit of the search. As with our comments on the section 41 notice, this should include, at minimum:
- (A) details of the scope and purpose of the investigation; and
  - (B) a date range in the description of the documents and/or information that the Commission requires.
- 3.9 We further recommend that, consistent with the practice of the European Commission<sup>3</sup>, the Commission should provide a certified copy of the section 48 warrant to the person whose premises are the subject of the search for that person’s records.

*Paragraph 5.31 – Presence of legal advisers*

- 3.10 Paragraph 5.31 notes, among other things, that the Commission may, at their sole discretion, wait a reasonable time for external legal advisers to arrive where parties have requested their legal advisers be present during its search and there is no in-house lawyer already on the premises.
- 3.11 We suggest that the Commission should wait a reasonable time notwithstanding the presence of an in-house lawyer. Parties under investigation should be entitled to the assistance of their chosen

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<sup>3</sup> See European Commission’s Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003

external legal advisers and for such advisers to be present at all stages of the investigation, subject only to the need to prevent tampering with evidence or undue delays.

*Paragraph 5.32 – Guidance on electronic searches*

- 3.12 Paragraph 5.32(a) provides that, during a search under a section 48 warrant, Commission officers will “search, copy and/or confiscate relevant documents and equipment (such as a computer or other device) that might reasonably evidence a contravention of a Competition Rule”.
- 3.13 Our experience in other jurisdictions suggests that electronic documents are becoming increasingly important in the context of investigations. We therefore recommend the Commission provide further guidance on how it will carry out searches of computers and other devices, and the extent to which these devices will be confiscated or their information copied. Given that electronic searches may affect the integrity of the systems and data of the parties under investigation, it is important that the Commission sets out a clear policy which will allow it to act consistently and with due regard for the security of the parties’ data.

*Paragraphs 5.34 and 5.35 – List of items and documents obtained by the Commission*

- 3.14 Paragraph 5.34 provides that Commission officers may take away anything which might be or contain relevant evidence. The collected evidence will be returned by the Commission following their review if it is outside the scope of the investigation or clearly duplicates other relevant documents. Paragraph 5.35 adds that parties may request certified copies of documents retained by the Commission, pursuant to section 56 of the Ordinance.
- 3.15 In order for parties under investigation to properly prepare their defence against allegations made against them, it is important for them to know what evidence may form the basis of such allegations. Beyond a party’s right to inspect and make copies of documents under section 56 (provided they are entitled to possession of such documents), the Commission should, as a matter of best practice, provide a complete inventory of all items and documents, and copies of all documents, they have obtained. This would best ensure that parties are fully informed of what the Commission has obtained from them, and so protect their right to a fair hearing and due process. This would also be consistent with the practice of the European Commission<sup>4</sup>.

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<sup>4</sup> *Ibid.*



*Paragraph 5.38 – Dealing with claims of legal privilege*

- 3.16 Paragraph 5.38 of the Investigations Guideline states that none of the Commission's Investigative Powers affect any claims, rights or entitlements that would, but for those powers, arise on the ground of legal professional privilege under the laws of Hong Kong.
- 3.17 However, we note that the Investigations Guideline is silent on how the Commission will deal with claims of privilege that arise during a search. This is of crucial importance to businesses in Hong Kong who may be subject to an investigation, as legal privilege is central to ensuring that their rights are sufficiently and appropriately protected. We recommend inserting guidance to clarify that the Commission will:
- (A) at the outset of any search, agree a process with the person whose premises are being searched and/or its legal advisers to allow the person in question or its legal advisers to assess and assert privilege over documents during the course of a search and to deal with any contested documents (including using best efforts to resolve any issues with the person or its legal advisers on site);
  - (B) not read, take copies of or confiscate any documents over which a claim for legal professional privilege has been asserted; and
  - (C) to the extent that there are any documents which are only partly covered by legal professional privilege, allow the person or its legal advisers to redact sections over which a claim for legal professional privilege arises before such documents are read, copied or confiscated by the Commission.

*Paragraph 5.43 – Drafting comment*

- 3.18 Paragraph 5.43 begins by stating that "[a]s noted above, section 52 of the Ordinance provides...".
- 3.19 We suggest the Commission clarify this paragraph as section 52 does not appear to have been previously discussed in the Investigations Guideline.

*Paragraph 6.2 – Confidentiality*

- 3.20 Paragraph 6.2 emphasises the potentially adverse effects of publicising an investigation and notes that the Commission will typically request that Complainants keep their complaint confidential. It

describes the circumstances in which the Commission may acknowledge that it is reviewing a matter – i.e. in appropriate cases, where the matter is public.

- 3.21 The Ordinance does not impose an obligation on an undertaking under investigation to keep the fact of that investigation secret. Part 8 of the Ordinance in relation to “confidential information”, for example, would appear not to be applicable to such a situation – the fact that an investigation is taking place would arguably not be considered “confidential information” within the meaning set out in section 123, given that it is not information obtained by, or provided or given to, the Commission.
- 3.22 In certain circumstances, an undertaking under investigation may feel it is appropriate, or it may be under a legal obligation to, disclose the fact that it is being investigated or any other relevant information. For example, such disclosure may be made to a regulatory body or other governmental authority, to a stock exchange and/or publicly in Hong Kong or elsewhere. As the Investigations Guideline is currently silent on this, we would suggest making it clear that an undertaking under investigation may disclose information, publicly and/or to any other regulatory or governmental authority, where that undertaking believes it is appropriate or it is under a legal or regulatory obligation to do so.

*Paragraph 6.9 – Disclosures made in accordance with a court order or by law*

- 3.23 Paragraph 6.9 notes that the Commission may be legally required to produce confidential information and states that “[i]n most cases, the Commission will endeavour to notify and consult the person who provided confidential information prior to making such a disclosure”.
- 3.24 We suggest either removing the words “[i]n most cases” or clarifying when the Commission will not endeavour to notify and consult the person involved. A commitment to “endeavour” to notify and consult is not a particularly strict one – if the Commission envisages situations where it might not make reasonable efforts to so notify or consult, then such situations should be set out in paragraph 6.9.

*Paragraph 7.5 – Possibility of informal settlement*

- 3.25 Paragraph 7.5 states that the Commission may, during an investigation, decide to take no further action in a matter, and that the likelihood of this outcome will be increased if parties swiftly alter any conduct of concern in response to the Commission’s enquiries.



- 3.26 This paragraph appears to provide for the possibility of informal settlement between the Commission and the parties. So that undertakings can better understand the possible options open to them, it would be helpful if the Commission could provide guidance on how the informal settlement procedure (if any) would operate, including whether it would be possible to reach a conclusion with the Commission without this being publicised and if not, to what extent this would be publicised and through what means.

*Paragraph 7.10 – Circumstances where a consent order would be appropriate*

- 3.27 Paragraph 7.10 notes that the Commission's concerns (as to a suspected contravention not requiring the issuance of a Warning Notice) may "in some cases" only be satisfactorily addressed if the parties seek a consent order on specific terms before the Tribunal.
- 3.28 We recommend the Commission provide examples of when a consent order would be considered appropriate. This will allow parties to better understand the ways in which they may address the concerns of the Commission.

**4. Applications Guideline**

*Paragraph 3.6(b) – Broad claims for confidentiality resulting in unwanted disclosure*

- 4.1 Paragraph 3.6(b) provides that unnecessarily broad claims for confidentiality may increase the risk that information a party does not want to be disclosed will be disclosed under section 126(1)(b) of the Ordinance.
- 4.2 The Commission's guidance seems to suggest that information provided for the purposes of an Application or Block Exemption Application may be disclosed against the applicant's will if the applicant makes an unnecessarily broad claim for confidentiality. Given that the making of an Applications or a Block Exemption Application is a voluntary process intended mainly to be for the benefit of the applicant (in providing them with legal certainty), we see no justifiable reason why it should result in unwanted disclosure. If a claim for confidentiality is so broad that the Commission cannot realistically proceed with the Application or Block Exemption Application process, a better approach would be for the Commission to inform the applicant that this is the case. The applicant should then have the option of either narrowing the scope of its claim or (if it refuses to do so) not pursuing the Application or Block Exemption Application, without this resulting in unwanted disclosure.

- 4.3 It would therefore be helpful if the Commission could clarify the specific steps it would take when faced with a broad claim for confidentiality, and examples of when unwanted disclosure may occur.

*Paragraphs 6.13 to 6.15 and 11.10 to 11.12 – Procedures for Initial Consultations*

- 4.4 The Applications Guideline provides that potential applicants may approach the Commission for an Initial Consultation regarding an Application or a Block Exemption Application. Paragraph 11.12 states that an Initial Consultation for a Block Exemption Application may allow the Commission to "indicate to the applicant whether it is likely to consider the Block Exemption Application". Paragraph 6.15 on Applications is silent as to whether the Commission may be able to give a similar indication in respect of an Application.
- 4.5 We suggest that paragraph 6.15 should be amended to confirm that the Commission may also provide an indication of whether it will consider an Application based on an Initial Consultation, consistent with the procedure for a Block Exemption Application. As there will likely be considerable uncertainty as to how the Suitability Factors will apply in practice (at least in the early stages of implementation), insight into the Commission's tentative views on an Application will be invaluable to an applicant. Indications (whether in relation to an Application or Block Exemption Application) should be provided to the potential applicant in writing, as this will reduce the risk of misinterpretation or future procedural challenges.
- 4.6 In addition, we recommend the Commission provide further guidance on the internal procedures it will adopt in respect of Initial Consultations, such as its policies regarding the assignment of case teams. Parties would likely be interested to know whether the same team that undertook the Initial Consultation will also consider the Application or Block Exemption Application, such that the parties can reasonably rely on indications provided in the Initial Consultation in assessing whether to take their case further.

*Paragraph 6.16 and 11.13 – Forms AD and BE*

- 4.7 Paragraphs 6.16 and 11.13 set out non-exhaustive lists of what information will be required in Forms AD and BE respectively.
- 4.8 We urge the Commission to publish draft Forms for consultation, particularly if the Forms will require substantive information or data other than what is currently set out in the Applications Guideline. It is important that only information which is relevant to the Commission's consideration of an Application or Block Exemption Application be required under the two Forms.

*Paragraph 6.16 – Submissions to other authorities as an application requirement*

- 4.9 Paragraph 6.16(g) requires, as part of an Application, the provision of an overview of submissions made to competition authorities in other jurisdiction with respect to the same agreement or conduct (if any).
- 4.10 We recommend removing this requirement as it is the specific circumstances in Hong Kong which will be relevant to the Commission in considering the Application. Decisions made by competition authorities in other jurisdictions, which are based on the facts existing in those jurisdictions and may apply different analyses, should not affect the Commission's decision.

*Paragraph 8.2 – Publicising the Application*

- 4.11 Paragraph 8.2 provides that the Commission will publicise an Application in accordance with sections 10(1) or 25(1) of the Ordinance, including by posting a non-confidential version of the Application on the Commission's website.
- 4.12 We note that sections 10(1) and 25(1) of the Ordinance provide only that the Commission should publish "notice" of the application through the Internet or other means. Publication of the Application itself (even a non-confidential version) may discourage Applicants from being forthcoming in their Applications, especially in describing potential competition concerns and possible theories of harm, as is required in the Applications Guideline under paragraph 6.16. The requirement goes beyond what is necessary for the purposes of bringing the application to the attention of those likely to be affected, and is inconsistent with the practice in many other jurisdictions. We therefore suggest that the non-confidential version of the Application should not be published.

*Paragraph 12.1 – Publicising a Block Exemption Application*

- 4.13 Paragraph 12.1 provides that in considering whether to issue a Block Exemption Order, the Commission will, among other things, publicise the Commission Initiated Process or Block Exemption Application.
- 4.14 It would be helpful if the Applications Guideline could specify how the Commission Initiated Process or Block Exemption Application will be publicised. We note that guidance to this effect has been included for Applications in paragraph 8.2.



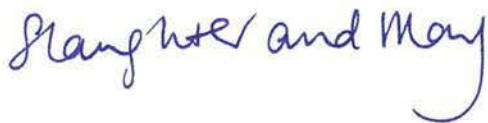
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- 4.15 Consistent with our comments above on paragraph 8.2 in relation to not publishing the non-confidential version of the Application, we would urge the Commission not to publish the Block Exemption Application. Given the extensive information required to be in the Block Exemption Application (including potentially self-incriminating information on competition concerns), the publication of such information could prejudice not only the applicant, but also other undertakings in the same sector.

We appreciate the opportunity to participate in this important milestone in the development of Hong Kong's competition law. We are available to discuss our views further if this would be useful to the Commission.

Yours faithfully,

A handwritten signature in blue ink that reads "Slaughter and May". The signature is written in a cursive, flowing style.

Slaughter and May