

BY EMAIL (submissions@compcomm.hk)

Submissions on Draft Guidelines
Competition Commission
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Dear Sirs

Submission regarding the Hong Kong Competition Commission and Communications Authority's Draft Guidelines on Procedural Rules

Allen & Overy is a leading global law firm spanning 43 offices around the world, including a substantial presence in Hong Kong. We have actively followed and participated in the development of competition law in Hong Kong, and many of our clients have a strong interest.

Allen & Overy sets out below its key submissions on the Hong Kong Competition Commission and the Communications Authority (together **Commission**) jointly issued draft Guidelines on:

- (1) the manner and form in which complaints are to be made (**Draft Guideline on Complaints**);
- (2) the procedures the Commission will follow in deciding whether or not to conduct an investigation and the procedures it will follow in conducting an investigation (**Draft Guideline on Investigations**); and
- (3) the manner and form in which the Commission will receive applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders (Draft Applications Guideline),

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

Allen & Overy appreciates the opportunity to comment on the Draft Procedural Guidelines and welcomes the Commission's willingness to seek comments and suggestions.

1. EXECUTIVE SUMMARY

Allen & Overy wishes to commend the Commission on issuing the Draft Procedural Guidelines. The Draft Procedural Guidelines are extensive, user friendly and reflect an approach that is overall consistent with the text and spirit of the Competition Ordinance (Chapter 619) (**Ordinance**), and with international practice. However, we believe there could be further clarifications which would be helpful to provide the Hong Kong business community with the certainty needed to allow for effective planning, a measured approach to reviewing current business arrangements, and implementation of compliance programmes in readiness for the full implementation of the Ordinance in 2015. We have set out our recommendations below.

2. DRAFT GUIDELINE ON COMPLAINTS

Hong Kong's enforcement regime in relation to possible contraventions of the Ordinance is unique. Unlike many other jurisdictions, private enforcement actions are generally limited to 'follow on' actions only once the Competition Tribunal has issued an infringement decision. Individuals and businesses in Hong Kong may be unable to otherwise privately enforce an alleged breach of the Ordinance in court. Instead, aggrieved parties are limited to filing complaints with the Commission, who has a discretion whether or not to investigate complaints. The practical effect is that the Commission has very significant power over enforcement of the Ordinance.

In these circumstances, we would recommend that the Draft Guideline on Complaints provide more detailed guidance on the types of complaints the Commission will investigate and those it will not.

We note in particular the very broad discretion that the Commission suggests that it has in paragraph 4 of the Draft Guideline on Complaints. The Ordinance itself provides criteria in Section 37(2) that are relevant. We recommend that the Commission clarifies how it intends to interpret these criteria and how the criteria fit within the Commission's discretion over which complaints it investigates and which it does not.

In practice it may also be helpful for the Commission to explain to private parties in some detail the reasons for not taking action in particular cases and how this has been considered in the context of Section 37(2) of the Ordinance.

3. DRAFT GUIDELINE ON INVESTIGATIONS

The Ordinance provides the Commission with a broad range of extensive information gathering powers – including through dawn raids, document and information requests, and formal interviews.

These are strong powers. Section 39(2) of the Ordinance provides that the Commission must have 'reasonable cause to suspect' a contravention before conducting an investigation. The power to request documents and information in Section 41 of the Ordinance also links use of the power to issue a 'matter that constitutes or may constitute a contravention of a competition rule'.

The Draft Guideline on Investigations indicates the Commission considers this investigation threshold only requires that it is satisfied 'beyond mere speculation' that there may have been a contravention (see for example paragraph 5.1(b) of the Draft Guideline on Investigations).

In our view, this way of rephrasing the 'reasonable cause to suspect' test may not be appropriate and may be lower than what the Ordinance intended. We suggest the person authorising the notice must have the necessary suspicion, and that suspicion must be based on a reasonable and objective assessment of all the available information, documents and other evidence.

We also believe the Draft Guideline on Investigations would benefit from further clarity with respect to limits and controls on the Commission's use of these powers. For example:

- Notices to produce documents and information, pursuant to Section 41 of the Ordinance, can be extremely costly and burdensome exercises for respondents. We would recommend that the final version of the Guideline on Investigations requires that the Commission have regard to the burden the issue of notices will impose on the respondent, and that the burden must be proportionate to the potential value of the information sought.
- We suggest that all notices, warrants, and Commission practices include the following: an accurate and complete description of the matter under investigation (and how it relates to the Ordinance); a clear specification of what is required of the respondent; a clear understanding that the person under investigation only has the obligation to provide information and documents that are relevant to the matter under investigation.
- We welcome the confirmation in the Draft Guideline on Investigations that the Commission's information gathering powers do not affect the rights of legal professional privilege. However, the Draft Guideline on Investigations is silent as to the process the Commission will undertake to handle claims of privilege. This should be clarified. In particular, we recommend that the final version of the Guideline on Investigations provides for a specific procedure to be followed in case of disagreement regarding the legally privileged status of a given document that is collected or sought during any on-the-spot investigation ('dawn raid'), including in relation to electronic documents stored on a computer or server that would be searched. This procedure should allow the Commission to confirm certain features of the document (including, for example, its author) but should not allow the investigators to look at documents that are potentially covered by privilege.
- The Draft Guideline on Investigations states that the Commission may decide to disclose the existence of on-going investigations (see for example, paragraph 6.1). We recommend that the final version of the Guideline on Investigations clarifies the limited types of circumstances where this would be considered appropriate and how such a decision would be balanced with the presumption of innocence of the defendants.

4. DRAFT APPLICATIONS GUIDELINE

Sections 11 and 26 of the Ordinance empower the Commission to make decisions as to whether or not an agreement or conduct is excluded from the conduct rules, as provided for in Schedule 1 to the Ordinance. The Draft Applications Guideline confirms there is no requirement for the Commission to adopt any Decision or issue any Block Exemption Order before undertakings or associations may rely on applicable exclusions and exemptions via a process of self-assessment. This is consistent with international practice.

Paragraph 6.4 and 6.5 of the Draft Applications Guideline confirms the Commission is only required to consider an Application if all of the suitability criteria under Section 9(2) or 24(2) (as applicable) of the Ordinance are satisfied. We would make the general observation that the Commission could, and perhaps should state in the Draft Applications Guideline its policy to, exercise its discretion to consider Applications more broadly in the first few years of the full operation of the Ordinance, as initially there will be many scenarios raised where there is no local precedent. Furthermore, the publication of Decisions will also assist in providing the Hong Kong business community with clarity as to the Commission's approach to particular types of agreements and conduct.

As stated in paragraph 1.7 of the Draft Applications Guideline, the Commission may issue a Block Exemption Order, not just in response to an application, but also on its own initiative.

In our view, it may be appropriate for the Commission to issue a Block Exemption Order for ordinary vertical arrangements which are not considered to amount to 'serious anti-competitive conduct' in a timely

manner. We consider that the Commission should (and state in the Draft Applications Guideline that it will) make it a priority to seek to understand what an appropriate safe-harbour for ordinary vertical arrangements might be in the context of the Hong Kong's business environment. This would help create business certainty and would reduce compliance costs. Based on international experience, we consider that vertical arrangements will very rarely raise any issues where they impact less than around 30-40% of relevant supply or acquisition in the markets concerned.

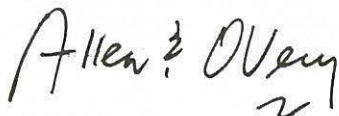
In relation to Block Exemption Orders which may be initiated by private parties, we are concerned that the Commission may have set too high a hurdle in its suggestion that an applicant is to be 'representative of a wider industry interest' or that there is to be 'cooperation of all undertakings that are party to the agreements in question' (see paragraph 5.3 of the Draft Applications Guideline). We would recommend that the Commission instead lists the key criteria for reviewing these Block Exemption Applications.

Paragraph 6.2 of the Draft Applications Guideline confirms that the Ordinance does not provide any timeframe for the Commission's review of an Application, or prescribe any deadline for making a Decision. However, to assist businesses in their commercial planning, we recommend that the Commission specifies a target period within which the Commission will make a Decision. We suggest an appropriate maximum target period should be six months.

Paragraph 7.3 of the Draft Applications Guideline notes that the Commission will inform an applicant if it declines to consider an application. We recommend the Commission informs the applicant in a reasonable amount of detail of the reasons for declining the Application at the same time.

Finally, in paragraphs 3 and 8 of the Draft Applications Guideline, the Commission states that confidential information may need to be disclosed in certain circumstances. We understand that exclusions from the law should be granted in a transparent way. However, we recommend that the final version of the Applications Guideline give examples of the type of information that it intends to disclose to the public as part of these processes. We also recommend that the final version of the Applications Guideline provides examples of what the Commission would consider to be 'unnecessarily broad claims for confidentiality'. Finally, we think it would be appropriate in the context of a proposed (or on-going) Application or Block Exemption Application, for the Commission to confirm that such a disclosure will only be made with the applicant's consent (the alternative being that Commission will not progress the Application or Block Exemption Application, rather than that the Commission will unilaterally publish the information of concern).

Yours faithfully



Allen & Overy