HK Competition Association
10 November 2014

HONG KONG COMPETITION ASSOCIATION – RESPONSE TO THE PUBLIC CONSULTATION ON THE DRAFT PROCEDURAL GUIDELINES

INTRODUCTION

This submission has been prepared by members of the Hong Kong Competition Association (**HCA**).

The HCA is an informal group of lawyers, researchers, consultants, monitoring trustees, in-house and students based in Hong Kong, who all share a strong interest in the development of fair and efficient competition law in and outside of Hong Kong. A list of some of the members involved in the submission can be found in Annex A. The HCA was set up in October 2014 and will soon be registered under the Societies Ordinance (CAP 151 of the Laws of Hong Kong). The HCA is thankful to the Competition Commission and the Communications Authority (together, the **Competition Authorities**) to be given the opportunity to participate in the debate on the enforcement of the Competition Ordinance (CAP 619 of the Laws of Hong Kong) (**Ordinance**). Our participation in this debate is based on our members' vast and varied experience in the field of competition law in and outside of Hong Kong. We aim to share some high level and detailed comments with the Competition Authorities and third parties and thereby, contribute constructively to the debate that the Competition Authorities have initiated with HCA.

The HCA intends to organise regular events to promote competition law in Hong Kong. Based on the successful examples of the Competition Law Association (**CLA**) in London and the Association Française pour l'Etude de la Concurrence (**AFEC**) in Paris, we hope to generate more debates about the Ordinance and hope to count on the participation of the Competition Authorities and other competition authorities in its activities to the benefit of the Hong Kong community. We hope that our submission below will pave the way for our engagement with the Competition Authorities in the future.

The HCA wishes to express its deep gratitude to the Competition Authorities for its substantial efforts in preparing the following draft procedural guidelines that are required under the Ordinance:

- the Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders – 2014 (**The Draft Application Guideline**);
- the Draft Guideline on Complaints – 2014 (**The Draft Complaints Guideline**); and
- the Draft Guideline on Investigations – 2014 (**The Draft Investigations Guideline**),

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

The Draft Procedural Guidelines were clearly drafted in the spirit of the Ordinance and are aligned with international practice and standards. Drafting competition guidelines, both procedural and substantive, is a difficult exercise with deep and lasting consequences. In many places, the Draft Procedural Guidelines provide the helpful and necessary clarifications to the Ordinance that businesses, practitioners and scholars need to better understand, apply and respect the Ordinance. These clarifications are essential not only to the enforcement of the Ordinance but also to its overall success.

The HCA hopes to have produced a balanced and comprehensive submission, which aims to show that the Draft Procedural Guidelines must be welcomed but also how it can be improved. The varied examples on which we base our views reflect the variety of backgrounds of the HCA members. In doing so, we have been particularly attentive to the need to remain clear and concise when formulating proposals. We remain available to discuss our submission with the Competition Authorities should the need arise.

Our submission addresses each of the Draft Procedural Guidelines. It contains our comments on substantive issues raised in and suggested clarifications on the Draft Procedural Guidelines so to ensure they are in line with the meaning and intent of the Ordinance and to ensure clarity.

DETAILED COMMENTS

The following comments from the HCA cover the Draft Procedural Guidelines as published by the Competition Authorities on 9 October 2014. The comments are meant to further improve the Draft Procedural Guidelines and the HCA would be pleased to meet the Competition Authorities to discuss or clarify any of their comments below.

Please note that terms and expressions defined in the Draft Procedural Guidelines have the same meanings in the following comments.

1. DRAFT APPLICATIONS GUIDELINE

(a) Substantive issues

- Section 2.6:
    - We appreciate that the Section 3 of the Ordinance, which provides for the exclusion for statutory bodies from the scope of the Ordinance, may not extend to undertakings that might engage in anti-competitive arrangements with an excluded statutory body. However, we consider that there is a risk that those undertakings are unfairly penalised for participating in what they consider to be government supported activity. We welcome any specific engagement that the Competition Authorities may permit to limit this risk (for example, by considering specific good faith or State compulsory defence) and any steps that the Competition Authorities would be taking to ensure that statutory bodies are aware of the potential consequences of their arrangements with third parties.
    - We welcome an explanation as to why the Competition Authorities have specified in footnote 5 that statutory bodies do not include "companies" pursuant to Section 2(1) of the Ordinance. The Competition Authorities may want to clarify whether they intend to consider that affiliated companies to statutory bodies are not concerned by the Statutory Body Exclusion because of the definition of statutory body provided in Section 2(1).
- Sections 3 and 8, read in conjunction with Sections 123(1) and 126(3) of the Ordinance: it would be useful if further guidance were given as to what the Competition Authorities will consider "confidential information" for the purposes of Section 123(1) of the Ordinance, and how they will interpret their obligations under Section 126(3) of the Ordinance when assessing whether confidential information should be disclosed. In particular, it would be helpful to understand whether the Competition Authorities consider that certain information must be disclosed to the public. For example, would the Competition Authorities consider redacting the name of an applicant in circumstances where that applicant may be considering implementing a new distribution model regarding which it believes a Decision is required or where the applicant may not wish to forewarn its competitors and/or customers that it is planning to introduce such a model in order to preserve its competitive advantage.
- Sections 3.3, 3.4 and footnote 6:
    - It would be useful to split the guidance provided for in this section into two separate sections: one regarding information that an applicant must provide to the Competition Authorities (the first part of Section 3.4) and one regarding information that may be redacted from the confidential version of an Application and not disclosed to the public (a combination of Section 3.3 and the last part of Section 3.4).

- Section 3.4 suggests that all information must be disclosed in an Application to be submitted to the Competition Authorities. It may, however, be appropriate to confirm that a party submitting information to the Competition Authorities may omit, redact or withhold information which is not necessary for the Competition Authorities' assessment of an Application (for example, where price sensitive figures may be redacted from documents evidencing a certain type of business conduct). This clarification would not prevent the Competition Authorities from deciding what information is relevant or not for its assessment.

- Footnote 6 appears to suggest that in some instances, information that were considered as "confidential" may need to be submitted subsequently if required "where appropriate". In order not to deter a potential applicant, it may be useful to confirm instances where this disclosure may become "appropriate" and for the Competition Authorities to confirm that it will weigh the requirement to disclose to the public information that were previously considered as confidential with the right of confidentiality as provided for in the Ordinance.

- Section 3.6(b), read in conjunction of Section 126(1)(b) of the Ordinance: an "unnecessarily broad claim for confidentiality" in an Application may increase the risk that information the party does not want disclosed is disclosed under the provision in Section 126(1)(b) of the Ordinance and allow the Competition Authorities to disclose such information in the performance of their functions. However, it would appear contrary to the purpose of the applications process, which is a voluntary regime allowing an undertaking to apply for a decision as to whether or not certain conduct is excluded or exempt, for the Competition Authorities to exercise their powers to disclose information which an applicant considers confidential. Section 3.6(b) should therefore clarify that disclosure of the applicant's confidential information should be made with its consent. For the same reason, the Competition Authorities may want to provide examples of "unnecessarily broad claims for confidentiality" to provide some guidance to potential applicants. It may also want to further clarify that the Competition Authorities may refuse to proceed if "unnecessarily broad claims for confidentiality" are submitted by third parties who may be interested in the matter. Without these clarifications, the Competition Authorities may risk discouraging Applications by suggesting that it will disclose confidential information without the consent of third parties.

- Section 5.1, read in conjunction with Sections 9, 15 and 24 of the Ordinance: the Conduct Rules and the provisions allowing for Applications for a Decision and Applications for a Block Exemption Order apply solely to undertakings. It is unclear whether the Competition Authorities would reject Applications by an entity which is not an undertaking - that is, an entity which may not be engaged in economic activity. As drafted, the Draft Applications Guideline would appear to exclude Applications from statutory bodies which are not engaged in economic activity, although an Application by a statutory body for a decision that its agreement is excluded from the application of the Conduct Rules appears to be contemplated in Sections 9(1)(d) and 24(1)(c)) of the Ordinance. Other entities, which may have an ambiguous status in terms of their ability to make an Application, include legal entities owned or controlled by a statutory body (which may or may not be considered undertakings depending on their activities). We suggest that the Competition Authorities clarify this question.

- Sections 5.1-5.3: it is unclear whether the Competition Authorities intend to impose prerequisite requirements additional to the Suitability Factors stated in Section 6.4 in their consideration of Applications. To the extent they do, we invite the Competition Authorities to clarify the requirements they would impose and how they would be applied. For example, the Competition Authorities should avoid discouraging the submission of meritorious Applications by expecting an

applicant to be "representative of a wider industry interest" and expecting "cooperation of all undertakings that are party to the agreements in question".

- Section 5.3: we recommend that the Competition Authorities clarify the factors that would demonstrate that an applicant represents a wider industry interest. In particular, is it sufficient if the category of agreement is widespread within the relevant industry or is something additional required? It would also be helpful for the Competition Authorities to clarify the relevance of Section 5.3 where a Block Exemption Application relates to a category of agreement which is of cross-industry relevance (for example, certain types of vertical or IP licensing agreements).

- Section 5.8: we recommend that the Competition Authorities determine independently whether they believe a Block Exemption Order to be more appropriate than a Decision. It would be unduly burdensome for businesses (and potentially contrary to the First Conduct Rule) to discuss with other undertakings, including potential competitors, whether each undertaking should apply for a Decision or whether they should together apply for a Block Exemption Order.

- Section 5.15: the Competition Authorities risk deterring potential Applications by retaining the discretion to initiate enforcement action in respect of any agreement or conduct notified to it in an Application. It is understandable that the Competition Authorities would not wish to grant immunity for historical and on-going serious anti-competitive agreements or conduct purely on the basis that it has received an Application as regards such conduct. However, we recommend that the Competition Authorities provide some comfort as regards agreements and conduct which do not fall within the definition of "serious anti-competitive conduct". This would be particularly welcomed where it is clear that there was no intention to violate the law and there is ambiguity as to whether the agreement/conduct in question may have anti-competitive effects. Similarly, the Competition Authorities may accept to engage with an applicant with a view to identifying appropriate modifications to the terms of the subject agreement or conduct. The Competition Authorities should foster a constructive working relationship where an applicant is cooperative and keen to achieve a compliant solution.

- Sections 6.2: we suggest that the Competition Authorities publish an indicative timeframe for reviewing an Application or making a Decision on an Application. This does not need to be binding but would at least give an applicant an idea of the timeframe involved and give the Competition Authorities an internal benchmark. By way of example, the UK Competition and Markets Authority operates a similar process for the granting of a 'Short Form Opinion' and its guidance specifies an indicative timeframe of two to three months from the receipt of a formal request to the publication of a Short Form Opinion.

- Sections 6.3 and 11.9: it would be helpful if the relevant contact details for initiating a potential Application were set out in the Draft Applications Guideline.

- Section 6.11: we recommend that the Competition Authorities clarify what "hypothetical question" means. For example, interested parties may need to seek guidance from the Competition Authorities about untested questions in order to assess the risk of adopting any particular conduct: these Applications should not be considered as being purely "hypothetical".

- Sections 6.16 and 11.13: we recommend that the Competition Authorities consult on the form and substance of Forms AD and BE. While an indication of the information typically required in these Forms is helpful, we recommend that the Competition Authorities do not insist on overly prescriptive requirements to avoid the process becoming a 'tick-box' exercise. For example, in some instances specific details of the corporate structure of an entity may be difficult to obtain and have little or no relevance to the issues which the Competition Authorities must consider.

- Sections 6.16 and 10.1, read in conjunction with Section 14(7) of the Ordinance: we invite the Competition Authorities to clarify that if an applicant has not identified every potential theory of harm, or the emergence of a new theory of harm to competition, or a different view of the relevant markets subsequent to a Decision, then that would not lead to a finding that the information on which a Decision was based was incomplete, false or misleading in a material particular. Furthermore, it would also not lead to the Competition Authorities backdating a rescission decision under Section 14(7) of the Ordinance and impose sanctions on an applicant for that backdated period. Given the variety of views as to what constitutes a valid theory of harm, an applicant who has provided the relevant facts to the Competition Authorities and highlighted the key and most obvious theories of harm should not be penalised for providing misleading information should the Competition Authorities subsequently arrive at a different assessment of what the theories of harm should have been.

- Sections 6.17 and 11.14: we suggest that the Competition Authorities acknowledge receipt of all Applications marked as either Form AD or Form BE with a separate notification that the Competition Authorities are satisfied the relevant requirements are met. This serves to avoid any confusion if an acknowledgement is not received and clarifies whether this is because the form has not been received, the Competition Authorities do not consider that the form complies with the relevant requirements, or the Competition Authorities have not yet determined whether the requirements are met.

- Section 7.3, 7.4, 12.4 and 12.5: we suggest that the Competition Authorities commit to informing an applicant of the reasons why they decline an Application or Block Exemption Application. It would also be helpful for the Competition Authorities to publish examples of instances where they have declined an Application or a Block Exemption Application in order to clarify the position for potential future applicants.

- Section 8.5: in order not to deter a potential applicant, it may be useful to confirm that the Competition Authorities will weigh the requirement of disclosing its decision with the right of confidentiality as provided for in the Ordinance.

- Section 9.5 and footnote 8: it may be appropriate to confirm that while the Competition Authorities may be "particularly likely to limit the duration of a Decision", it will take into consideration an applicant's legitimate expectations.

- Section 10.7, read in conjunction with Section 14(6) of the Ordinance: it would be useful for the Competition Authorities to provide guidance on the typical time period it is likely to allow between providing a notice of rescission and the date on which the rescission is to take effect, as well as the factors they may take into consideration in determining an appropriate time period.

- Sections 11.5 and 12: we acknowledge the Competition Authorities' concern that developing a thorough understanding of markets and potential impacts of a Block Exemption Order may take some time. Nonetheless, the Competition Authorities are able to benefit from the experience of various other mature competition regimes which have used block exemptions to provide businesses and legal advisers with an increased degree of certainty as to whether or not certain agreements or conduct would be considered anti-competitive. We consider that the generally applicable block exemptions adopted by the European Union (**EU**) (including, for example, the Guidelines on vertical restraints, horizontal agreements and technology transfer agreements) are of particular relevance in terms of providing appropriate guidance for businesses and legal advisers, given that these exemptions were adopted on the basis that they should be applicable across almost all industries and geographic markets within the EU. We submit that the Competition Authorities should commence

work on formulating, or at the very least on collecting views as to whether it should formulate, a Block Exemption order as soon as practicable, particularly as the Competition Authorities have taken a strict stance against vertical agreements under the draft Guideline for the First Conduct Rule relative to mature competition regimes.

- Section 11.13 (h): we consider that an applicants should not be required to prove "a material negative impact" should a block exemption order not be issued. This burden of proof would be practically impossible to provide. It should be sufficient to explain why the "functioning of the relevant markets" and the "interest of consumers" would benefit from a block exemption order.

- Section 14.8, read in conjunction with Section 20(5) of the Ordinance: it would be useful for the Competition Authorities to provide guidance on the typical time period they are likely to allow between providing a notice of proposed variation or revocation and the date on which the variation or revocation is to take effect, as well as the factors they may take into consideration in determining what an appropriate time period.

(b) Suggested clarifications

- Section 4.1: the circumstances in which the Competition Authorities envisage using information received for other purposes under the Ordinance should be clarified.

- Section 7.4: we suggest clarifying the wording to remove the reference to Sections 10 and 25 of the Ordinance. Sections 10 and 25 relate specifically to the process of consultation of those who might be affected by the Decision rather than referring to the Competition Authorities' decision on whether to accept an Application.

- Section 8.3: we suggest clarifying that the 30-day period is a period that would be allowed "by default" in case the Competition Authorities do not specify the period during which representations may be made.

2. DRAFT COMPLAINTS GUIDELINE

(a) Substantive issues

- Section 1.2:

    - The notion of "well-informed" complaint does not exist in the Ordinance. As this expression could be interpreted as adding an additional legal requirement for pursuing a matter, we recommend that this expression is defined by reference to the Ordinance and the Draft Complaints Guideline.

    - It is not clear on what legal basis the Competition Authorities should stipulate that they "encourage[s] inputs from the public". We recommend that reference be made to the Ordinance, to another legal source or to the general attitude that the Competition Authorities may want to adopt vis-à-vis the public to explain this sentence.

- Section 1.3, read in conjunction with Section 37(1) of the Ordinance:

    - The word "undertaking" used in Section 37 of the Ordinance is not limited to "competitor, supplier, customer or any other party". Since the word "party" is not defined (and may seem to refer only to a party in an agreement), we recommend keeping the word "undertaking" or making clear that the list of operators used in Section 1.3 is not exhaustive.

- Section 37 of the Ordinance does not require any Complainant to first contact the Competition Authorities and then make a complaint as Section 1.3 of the Ordinance suggests. We recommend removing any reference to preliminary contacts.

- Section 1.4, read in conjunction with Section 37(2) of the Ordinance:

  - It is unclear whether the Competition Authorities indeed have "discretion" to decide "which complaints may warrant investigation". Section 37(2) of the Ordinance makes clear that complaints may be rejected if: (1) it is reasonable to conclude so, and (2) it is based on some specific criteria, of which it provides a non-exhaustive list. We are not convinced that the word "discretion" is appropriate and on the contrary, we believe that the Competition Authorities are bound by Section 37(2). We also consider that the decision of the Competition Authorities to reject a complaint should be subject to judicial review.

  - We welcome the fact that the Competition Authorities will not act "on behalf of the Complainant". It should indeed be clear that the Competition Authorities will remain neutral from the outset of any investigation. This section may also need to explicitly stipulate that the Competition Authorities will pursue any matter in reference to its own guidelines (in particular, those on investigations). ,Finally, the reference to "public interest" may need to be removed as it creates a new criterion compared to other criteria provided in the Draft Investigations Guideline and as it may be too broad to understand. A similar remark also applies to the document Overview of the Draft Guidelines under the Competition Ordinance, section "Discretion to pursue a complaint".

- Section 2.2: while we welcome the absence of formality, it is not clear whether telephone conversations may be sufficient or whether the online form will need to be completed. In any event, we recommend that the Competition Authorities require a written trace of any complaint in order to ensure the respect of the due process principle.

- Section 2.2 (reference to online form), Section 2.6 and 6.1 (additional guidance), read in conjunction with Section 38 of the Ordinance: it is unclear if the Competition Authorities will be entitled to update the list of information that would be required in a complaint without it being submitted to Legislative Council as is the case for the Draft Complaints Guideline.

- Section 2.3: we recommend that the Competition Authorities (1) confirm that the acknowledgment will be in writing, and (2) clarify the circumstances under which the Competition Authorities may consider it inappropriate to issue an acknowledgment. At an appropriate time we submit the Competition Authorities should provide the complainant with a written version of its statement.

- Section 2.4 (c) and (d): it would seem that the complaint should also include references to parties other than contraveners or affected parties. If necessary, this should include information about other competitors or trade associations.

- Section 2.4 (request for additional information), read in conjunction with Section 41 of the Ordinance: it is unclear how the Competition Authorities may "require" additional information from the complainant while no investigation is "conducted". This seems to be confirmed in Section 1.3 of the Draft Investigations Guideline. It should therefore be clarified that any information required by the Competition Authorities will be provided on a voluntary basis and that no sanction can be imposed for failing to respond. It should also be clarified that failure to respond to a request for further information may lead the Competition Authorities to not pursue an investigation.

- Section 3.1: in order to ensure due process and the respect of the obligation of confidentiality provided for in the Ordinance, we recommend that the Competition Authorities explain when they consider it necessary for them to disclose the matters they are considering investigating. In other words, we recommend that the Competition Authorities explain what "will not normally comment" means. We also recommend that the Competition Authorities clarify whether the comments that they will not normally make refer to comments to third parties or to the public.

- Section 3.2: in order to reinforce confidentiality, we suggest that the Competition Authorities add a reference to the declaration of confidentiality that is made available to the parties at Section 123(2) of the Ordinance. Such a reference is made at Section 6 of the Draft Investigations Guideline and could also be integrated in the Draft Complaints Guideline.

- Section 3.4, read in conjunction with Section 126(3) of the Ordinance: the Competition Authorities seem to set up a new legal test that is not provided for in the Ordinance regarding its decision to disclose some confidential information. Section 126(3) of the Ordinance states that in deciding whether or not to disclose confidential information, the Competition Authorities must have regard to "the extent to which the disclosure is necessary for the purpose sought to be achieved by the disclosure". However, the Draft Complaints Guideline refers to the necessity for the Competition Authorities "to make a disclosure in the performance of its function". We recommend that the Competition Authorities remove this reference and ensures consistency with Section 126(3) of the Ordinance.

- Section 4.1, read in conjunction with Section 37(2) of the Ordinance: it is unclear whether the Competition Authorities have "discretion" to decide which complaints may warrant investigation. We refer to our comments on Section 1.4 above.

- Sections 4.2 and 4.3, read in conjunction with Section 37(2) of the Ordinance: these sections are most useful. We would, however, suggest that the Competition Authorities clarify the criteria referred to under these sections by reference to those used in Section 37(2) of the Ordinance. It would be helpful if the Competition Authorities could state in the Draft Complaints Guideline how they intend to apply the "trivial, frivolous or vexatious", and "misconceived or lacking in substance" standards. We invite the Competition Authorities to consider the relevance of the standard applied under Order 18 rule 9 of the Rules of High Court (Cap. 4A), with appropriate adjustments to take into account that a complainant under the Ordinance is subject to a lower burden of proof than a claimant in a civil action.

- Sections 5.4: it is unclear why a Complainant would "unlikely" be informed of whether the matter will proceed into an initial assessment or not. It is our position that any decision to not pursue the matter should be subject to judicial review. We also recommend that the expression "the matter is complete" be clarified. A similar remark should also apply to Section 4.2 of the Draft Investigations Guideline.

(b) <u>Suggested clarifications</u>

- Section 2.1: we recommend that the Competition Authorities clarify what "directly" and "anonymously" mean in the sentence "the Commission will accept complaints and queries in any form including […] directly [or] anonymously", as well as confirms whether "and" between item (b) and (c) should read "or".

- Section 3.6: we recommend repeating that the Communication Authority and other "specified persons" (see Section 122 of the Ordinance) are also bound by the confidentiality rules.

- Sections 5.1 and 5.4: the words “Initial Assessment” should be defined in the Draft Complaints Guideline.

3. DRAFT INVESTIGATIONS GUIDELINE

(a) Substantive issues

- Sections 1.2 and 1.3: as mentioned regarding Section 1.4 of the Draft Complaints Guideline, we do not believe that it is correct to state that the Competition Authorities have “discretion” to decide “which complaints may warrant investigation”.

- Section 2.1:

    - Contrary to what Sections 2.1 and 6.13 suggest, we consider that based on Section 41 of the Ordinance, the Competition Authorities may only use data or information collected in the course of a specific investigation for the purpose of conducting the same investigation. It would therefore seem that the Competition Authorities should not be able to rely on information obtained during one investigation for initiating another one, although the Competition Authorities would arguably be allowed to use, pursuant to Section 41 of the Ordinance, the same data collected previously in order to launch a new investigation.

    - We suggest adding that the Competition Authorities may launch a new investigation based on information collected in the course of a leniency application pursuant to Sections 79 *et seq* of the Ordinance.

    - We submit the Commission should clarify what "subsequent investigation" refers to. It is unclear to us whether this is within the Initial Assessment Phase or Investigation Phase.

- Section 3.1(a): we recommend that the Competition Authorities provide details about the notion of “sufficient evidence”. This could be done by analogy to Section 37 of the Ordinance (complaints) or to other sections of the Draft Investigations Guideline.

- Section 3.3(a) and (b): in order to ensure due process, the Competition Authorities should provide that any oral discussions or interviews be documented in due course, or within a reasonable period.

- Section 4.2: we refer to our remark above on Sections 5.4 of the Draft Complaints Guideline regarding the absence of right to be informed if an investigation is pursued. For the rest, Section 4.4 adds the expression “due to *operational reasons*” (emphasis added), which may need to be clarified.

- Section 5.15: although it would seem adequate for the Competition Authorities to require parties to answer to its section 41 notice in a promptly manner, time extension should be considered on a case-by-case basis. It would therefore not seem adequate to state that time extension would only be granted “in *limited* circumstances” (emphasis added) but rather “where circumstances require it”.

- Section 5.18: we submit the Competition Authorities should state in the Guideline that the section 42 notice should identify the person(s) requested to appear with as much specificity as possible. A request for a loosely described category of persons (e.g. “current employees with discretion on price”) to appear would be unduly broad.

- Section 5.20: please clarify whether "qualified legal adviser" would include in-house counsel or foreign registered lawyers.

- Section 5.31: we submit the waiting time for legal advisers should be subject to reasonableness, and not the Competition Authorities' sole discretion. The Competition Authorities should define what it considers a reasonable time to wait for legal advisers to arrive.

- Section 5.35: as is the practice in other jurisdictions, we encourage the Competition Authorities to confirm that at the end of a search, the Competition Authorities and the parties under investigation will ensure that they both have the same copies of the documents searched or copied.

- Section 5.38: the Draft Investigations Guideline should provide for a specific proceeding to be followed in case of disagreement regarding the legally privileged status of a given document during any on-spot investigation. This proceeding should allow the Competition Authorities to confirm the key feature of the document (including its author) but it should not allow the investigators any cursory look at specific documents allegedly privileged should this inevitably lead to the disclosure of the contents of the disputed documents. The person under investigation should provide the Competition Authorities with a sufficient statement of the grounds of the privilege, and should there be any dispute left afterwards about the legally status of the document, the Competition Authorities should require the document to be produced allowing the undertaking concerned to refer the matter to Court.

- Section 6.1: we refer to our comments above about due process and confidentiality in relation to Section 3.1 of the Draft Complaints Guideline.

- Section 6.5: we recommend that a meaningful non-confidential version of the confidential documents be submitted to the Competition Authorities. This non-confidential version could then be disclosed to third parties which should enable them to properly comment on the content of, and the claims contained in, the documents in question.

- Section 6.6: we refer to our comments about disclosure of confidential information in relation to Section 3.4 of the Draft Complaints Guideline.

- Section 6.13: we refer to our comments about the use of data and information collected in the course of one investigation in relation to Section 2.1 of the Draft Investigations Guideline. Information collected in respect of one investigation should be limited for use in that investigation, unless the Competition Authorities give notice to the affected parties and provide them with the time and opportunity to respond.

- Section 7.5-7.7: all documents collected for the purpose of investigation should be returned to the relevant parties in the event of a no further action decision.

- Section 7.18: please refer to the mechanism under which the affected parties may request for confidential information to be redacted prior to the publication of a Warning Notice.

(b) <u>Suggested clarifications</u>

- Section 2.1, read in conjunction with Section 39(1) of the Ordinance: the Competition Authorities rightly state that they can start an investigation on their own initiative including after receiving a complaint or query. Section 39(1) of the Ordinance, however, seems to distinguish investigations initiated based on its "own volition" and those resulting from a complaint. We wonder whether this distinction should be maintained in Section 2.1 of the Draft Investigations Guideline.

- Section 3.3: the expression "using voluntary means" is unclear. We recommend that the Competition Authorities clarify that this expression means that parties can answer these requests on a voluntary basis.

- Section 5.1(a): the Competition Authorities may decide to launch an investigation if they have a "suspicion based on relevant facts and ***any other information***" (emphasis added). In order to avoid this reference to "***other information***" being opposed to "relevant facts" and interpreted to refer to facts that are not relevant to the investigation, and in order to make clear that the Competition Authorities will remain neutral in their investigations, we recommend deleting this reference to "other information".

- Section 5.2: we agree that it should not be required that the Competition Authorities have evidence that a contravention has occurred at the initial stage of the investigation. However, the wording used in this section may be confusing. We recommend replacing it for example by "at this stage, the Commission would not need to have in its possession any evidence that a contravention has occurred".

- Section 5.9, read in conjunction with Sections 41(3) and 41(4) of the Ordinance: we note that Section 5.9 suggests that any section 41 notice ***will*** include the elements listed in that section. We note, however, that Section 41(4) of the Ordinance provides that the Competition Authorities "may" specify some additional elements in its section 41 notice. The Competition Authorities may want to confirm that they have taken the decision that each of its Section 41 notice ***will*** indeed include all information listed in Section 5.9, which we support.

- Section 5.24, read in conjunction with Section 48 of the Ordinance: the Section 48 warrant will be delivered by a judge based on a specific criterion expressly mentioned in the Ordinance: "the judge must be satisfied, on application made on oath by an authorized officer, that there are reasonable grounds to suspect that there are or are likely to be, on the premises, documents that may be relevant to the investigation by the Commission". The wording used in Section 5.24 is slightly different from the wording of the Ordinance. We recommend keeping the same wording for consistency purposes.

- Section 6.10: we refer to our comments about confidentiality rules in relation to Section 3.6 of the Draft Complaints Guideline.

Annex A

The following people actively participated in this submission:

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