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Dear Sirs,

Submission on the Draft Procedural Guidelines

We enclose our submission on the Draft Procedural Guidelines issued by the Competition Commission and the Communications Authority. Please let us know if you would like us to clarify any points.

Your faithfully,

Eversheds

Encl.

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Response to Competition Commission and Communications Authority's Consultation on Draft Procedural Guidelines

1. The purpose of this submission is to set out Eversheds's key comments on the draft procedural guidelines published jointly by the Hong Kong Competition Commission (the "**Commission**") and Hong Kong Communications Authority (together referred to in this submission as the "**Procedural Guidelines**"), namely:
 - Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders – 2014;
 - Draft Guideline on Complaints - 2014; and
 - Draft Guideline on Investigations - 2014.
2. Eversheds is an international law firm operating from 52 offices in 30 countries. In Asia it has offices in Hong Kong, Singapore, Shanghai and Beijing. As well as having extensive experience of the application of competition rules in the Hong Kong communications sector, Eversheds's Competition, EU and Regulatory group is recognised as one of Europe's leading competition practices, advising on the application of EU and national competition laws across multiple jurisdictions. We are therefore well placed to comment on the Commission's guidelines having seen various approaches adopted by European competition regulators over the years.
3. As competition laws are new to the Hong Kong economy (save in relation to the telecoms and broadcasting sectors), and it is not proposed that the Competition Ordinance (the "**Ordinance**") will have any transitional periods in which businesses will have an opportunity to adapt practices which are currently lawful (but which when the Ordinance comes into force could be unlawful), it is important that businesses have clarity about what to expect from the new regime once it comes fully into force.
4. In general we welcome the approach of the Commission and the Communications Authority to publication of the Procedural Guidelines and believe businesses will value the additional clarity and transparency offered. In particular:
 - In relation to exclusions and exemptions, we welcome the additional clarity provided by the Commission on the circumstances in which parties may apply for a decision or block exemption and the factors the



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Commission will consider in deciding whether to consider an application and in determining the outcome of any such application.

- Likewise, in relation to complaints, the Commission's clarification of the information required to be provided by complainants, together with its commitment to maintain confidentiality of complaints will enable businesses to weigh up the prospects of the Commission taking up a complaint. It will also streamline the Commission's own processes and avoid prolonged interactions with complainants.
 - The stated intention of the Commission to focus its resources on pursuing the public interest when exercising its discretion to decide which complaints warrant further assessment and which investigations should be run will be reassuring to businesses, which might otherwise be concerned about the prospect of frivolous or vexatious complaints.
 - In relation to investigations, the Commission's guidance on its powers and the circumstances in which it will use them (for example, the clarification around the circumstances in which the Commission would seek a section 48 warrant) appear to us to be transparent and proportionate.
5. Nevertheless, we believe there is scope for greater clarity in a number of areas, which we have set out in the remaining paragraphs of this submission.

Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders – 2014

Possibility of multiple applications for a decision and/or very high compliance burden for businesses

6. As noted above, we are concerned that competition laws are unfamiliar to many Hong Kong businesses, as well as being notoriously difficult to apply, given the need to assess the economic effects and any countervailing benefits of a particular agreement or practice.
7. For this reason, we welcome the fact that the Ordinance gives companies an ability to apply for a decision (the "**Decision**") as to whether an exclusion or exemption is applicable to a particular agreement or practice (the "**Application**").
8. However, there is a risk that, in the absence of additional legislation specifically excluding agreements and practices which are generally non-problematic or are likely to enhance overall economic efficiency, the availability of the Application process will create a very significant workload for the Commission in dealing with requests from businesses for clarity on the legality of particular practices. This



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has the potential to divert resources from the investigation of more serious forms of anti-competitive conduct.

9. The Commission has indicated that it will only consider Applications for a Decision in limited circumstances - and in particular only where the Application poses novel or unresolved questions of wider importance. It is understandable that the Commission would not wish to open the floodgates to multiple Applications.
10. However, until such time as case law emerges, it is likely there will be considerable uncertainty about how the Commission and/or the Competition Tribunal (the "**Tribunal**") is likely to approach the substantive assessment of particular conduct - at least in the absence of block exemptions and/or more detailed guidance on the application of the various exemptions. Accordingly, we would expect a substantial number of Applications to be forthcoming because, as far as Hong Kong law is concerned, such Applications could genuinely be said to pose novel or unresolved questions.
11. The Commission will need to consider whether it has sufficient resources to deal adequately with such notifications and the appropriateness of adopting alternative measures such as block exemptions (see below). If, because of a lack of resources, the Commission finds itself unable to process a substantial volume of applications, businesses will face a significant burden of ensuring that all of their existing agreements and practices do not infringe the conduct rules. It will also create a significant degree of uncertainty about the legality of certain practices which may in fact be perfectly legal. This could potentially be harmful to the economy of Hong Kong.

Scope for the Commission to issue block exemptions

12. Concerns of this type have been acknowledged by regulators elsewhere. In order to ameliorate the initial regulatory burden on businesses and to ensure they are not flooded with exemption applications, competition authorities have frequently issued blanket exclusions or exemptions. For example, in the United Kingdom, when the Competition Act 1998 came into force, all vertical agreements and agreements involving the transfer of interests in land were excluded for a period of time following the Act coming into force.
13. In addition certain categories of agreements which typically bring about efficiencies likely to outweigh any anti-competitive effects (for example many types of vertical agreement, intellectual property licences and research and development agreements), are frequently excluded or exempted from the application of prohibitions, provided certain pre-conditions are met ("**Block Exemption Orders**"). For example, the European Commission's extensive block



exemption regime covers vertical agreements, technology transfer, research and development and joint production.

14. As well as envisaging applications by undertakings for a Decision as to whether an agreement or conduct is excluded or exempt from the conduct rules, the Ordinance empowers the Commission to issue Block Exemption Orders exempting categories of agreements that enhance overall economic efficiency. The Commission may do this in response to an Application or on its own initiative.
15. Given the potential benefits for business and the Commission in exempting agreements that do not involve serious anti-competitive conduct, we would hope that the Commission would consider issuing Block Exemption Orders to provide "safe harbours" for common categories of agreements ordinarily capable of enhancing overall economic efficiency.
16. In addition, the Commission may wish to consider exempting types of agreements or conduct upon which it does not wish to focus initially. We believe this could reduce the likely burden on the Commission to consider Applications for a Decision or Block Exemption Orders relating to the same or similar agreements and conduct and enable it to focus on investigating the most serious anti-competitive behaviour in the early years of the regime.

Ensuring consistency in policy making

17. We believe Block Exemption Orders should be reserved for matters which are of cross-industry relevance and that neither single firms nor industries should be capable of driving competition policy to the potential detriment of others. We therefore welcome the Commission's statements (in paragraph 5-3 of the Exclusions and Exemptions Guidelines) that the Commission expects the application to be representative of a wider industry interest.
18. As a matter of policy, we do not believe it would be desirable for industry specific block exemptions regimes to emerge as this could result in inconsistent application of the rules across sectors, which would be unjust and potentially confusing for businesses. We suggest that the Commission should consider setting out in more detail in the Guideline :
 - (i) the situations in which a wider industry interest would be likely to exist; and
 - (ii) where it would be minded to consider applications on behalf of industries or industry bodies. We also believe the Commission should aim to ensure a consistent (economic) approach to the drafting of such Block Exemption Orders across all industries and that this should be clarified in the Guidelines.



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Need for clearer prioritisation principles

19. As explained in paragraph 5.15 of the Guideline, the Commission is not in a position to offer immunity in relation to an existing agreement or conduct in the event that it declines to consider an Application or make a Decision or issue a Block Exemption Order. From a policy perspective, we recognise the Commission would not wish to fetter its discretion in respect of enforcement. However, without clearer guidance on the circumstances in which the Commission would be minded to investigate an agreement or conduct notified to it for a Decision, the risk to business is significant and this may discourage Applications.
20. This underlines the need for the Commission to adopt clear prioritisation principles in relation to enforcement and to have detailed guidelines on the application of the various exclusions from the conduct rules.

Need for clarification on timing

21. Finally, in many cases where parties apply for a Decision, their arrangements which are the subject of the Application may be conditional on the Commission's Decision. Therefore, it would be advantageous if the Commission were able to give an indication of the likely timescales for typical milestones in its consideration of Applications.

Draft Guideline on Complaints – 2014

Need for clarification of likely timescales for handling complaints and clarification of confidentiality obligations of complainant

22. In relation to the Guideline on Complaints, we recognise the requirement to support the anonymity of complainants and the need for the complainant also to maintain confidentiality. In relation to the latter, in most circumstances it will be entirely appropriate for the complainant to keep the facts of its complaint confidential. However, the Guideline does not currently contain any indication of the timescale in which a complaint would be dealt with by the Commission.
23. There would be merit in the Commission considering additional guidance on the likely timing of complaints handling and/or indicating the circumstances in which a complainant would be able to inform the alleged infringer of its case against it and/or that it had lodged a complaint with the Commission.

Need for greater clarity about the Commission's likely prioritisation principles

24. The Commission's current enforcement strategy, priorities and objectives are one of the factors that it will take into account when deciding whether to pursue an investigation. However, the Commission's enforcement strategy has yet to



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be made public. We would encourage the Commission to provide businesses with transparency on its strategy priorities and objectives.

Draft Guideline on Investigations – 2014

Need for guidance on prioritisation principles

25. In relation to investigations, the Guideline helpfully summarises the procedures the Commission may adopt and its likely use of its investigation powers under the Ordinance. As noted above, there remains a need for the Commission to publish clear prioritisation criteria, so that businesses are aware of the types of conduct most likely to warrant investigation by the Commission. It would be beneficial for the Commission to set out its position (without fettering its discretion) on those cases where it is likely to proceed to prosecute through the Tribunal and those which it would be more likely to settle through commitments. It would also be helpful if the Commission could consider developing paragraphs 7.8 – 7.11 of the Guideline, in particular by explaining the specific information and documents which parties can expect to receive from the Commission (paragraph 7.9(a)) and specifying the timetable for making representations (paragraph 7.9(b)).

Need for development of leniency regime

26. Crucial to the success of the Commission's investigations regime is the ability to gather evidence which may be relied upon in the Tribunal to prove an infringement. In relation to cartels, as the Commission is aware, the most common source of evidence relating to serious anti-competitive conduct is the parties themselves (in the form of applications for immunity and for leniency).
27. Therefore the establishment of a credible leniency policy is, in our view, key to the Commission's ability to root out, investigate and punish serious anti-competitive conduct such as cartels.
28. Under section 80 of the Ordinance, the Commission has the power to offer a leniency agreement on any terms it considers appropriate. This gives the Commission considerable leeway to agree conditions on a case-by-case basis.
29. At this stage, the Commission has yet to provide guidance as to how its leniency programme would work – either in terms of the conditions for immunity and leniency or the reductions in tariff likely to be available. For example, in what circumstances would the Commission exercise its discretion not to prosecute parties who had provided evidence of an infringement where previously there was none? How might it incentivise other parties to provide evidence which would assist it to prove the existence of the cartel? What role will the Commission have in setting any fines, given that the level of any fine will ultimately be a matter for the Tribunal?



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30. In addition, the procedure for leniency applications is not set out in the Ordinance and will need to be clarified in order that businesses know what is expected of them.
31. In *Getting Prepared for the Full Implementation of the Competition Ordinance*, the Commission indicated that it would release leniency and co-operation policies. In our view these will be key to the success of the Commission's investigations regime and we hope that the Commission will publish them in the very near future.

Eversheds

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