NORTON ROSE FULBRIGHT
諾頓羅氏富布萊特
10 November 2014

DRAFT GUIDELINE ON COMPLAINTS UNDER THE COMPETITION ORDINANCE

Comments by Norton Rose Fulbright Hong Kong

We welcome the joint publication by the Competition Commission and the Communications Authority of, and the opportunity to comment on, the Draft Guideline on Complaints released on 9 October 2014 under reference CCCAD2014004E.[1]

This submission mainly focuses on areas of concern in relation to the draft guideline, and we hope that these issues can be satisfactorily addressed as the Commission prepares to finalise the draft guideline for consultation with the Legislative Council.

While our submission relates to matters of concern, there are also many features which we hope will be retained in the final version of the guideline. Without being exhaustive, the following can be highlighted:

- the draft guideline in its English version uses very clear language and adopts a straightforward structure;
- the draft guideline usefully confirms at paragraphs 1.4 and 4.4 that the Commission's task is not to safeguard particular interests but will act in the public interest; and
- the draft guideline usefully confirms at paragraph 4.4 that the Commission has discretion to decide not to act on a complaint even if further investigation could show that a contravention of the Ordinance may be substantiated.

Our comments below generally follow the structure of the draft guideline. For ease of reference, we also include an Annex listing our proposals with references to the relevant paragraphs in the draft guideline.

1 Reference to the merger rule in the introduction

The reference to the merger rule at paragraph 1.1 of the draft guideline should indicate that the merger rule only applies in the telecommunications sector.

1.1 Paragraph 1.1 of the draft guideline states that "[t]he Ordinance also prohibits mergers which substantially lessen competition." This sentence should be amended to reflect the provisions of s 4 of Schedule 7 to the Ordinance, as follows: "The Ordinance also prohibits mergers involving telecommunications carrier licensees which substantially lessen competition."

2 Complaints made anonymously or through intermediaries

Paragraph 2.1 of the draft guideline should explain that complaints made anonymously or through an intermediary will, as a matter of policy, not be considered as a priority.

[1] Consistent with the approach adopted in the Competition Ordinance, references in this submission to the Competition Commission are to be read as including the Communications Authority when they relate to the exercise of the Commission's functions in respect of broadcasting and telecommunications licensees.

2.1 Paragraph 2.1 of the draft guideline identifies complaints as one of the sources of investigations and sets out the Commission's very open policy towards accepting complaints. It is submitted that the policy reflected at this paragraph is overly broad.

2.2 It is understood that the Commission should not as a matter of policy adopt an overly restrictive or formalistic approach. One should also acknowledge that, contrary to what is the case in other competition law regimes, the complainant is not required under the Ordinance to demonstrate a sufficient interest in the matter. These circumstances should however not lead the Commission to invite complaints made in any form and by any means. In this context, the Commission's willingness to consider anonymous complaints at paragraph 2.1(b) may lead to an expectation that the Commission will become the arbiter of any consumer or business dispute in the territory, however tenuous the relationship with competition law considerations is. While the possibility of making anonymous complaints was contemplated during the legislative process, the legislative intent was that even made anonymously, complaints should be sufficiently precise.[2]

2.3 One way to retain an open policy towards complaints while focusing on effective enforcement would be for paragraph 2.1 of the guideline to provide more guidance on how the identity of the complainant and the way a complaint is made will affect the Commission's use of its discretion to investigate under ss 37(2) and 39(1) of the Ordinance, as follows:

- the Commission may accept in exceptional cases complaints made anonymously, but it will prioritise treatment of complaints made by identified persons (the identity of the complainant could however be kept confidential in the early stages of the investigation);
- the Commission may accept in some cases complaints made through an intermediary, but it will prioritise treatment of complaints made by persons it can directly interact with;
- the identity and the interests of the complainant in the matter will be relevant; and
- the other legal recourses available to the complainant will be relevant.

3 Information to be provided by the complainant to the Commission

- Paragraph 2.4 of the guideline should be revised to clarify that general allegations will not be accepted and that precise information should be provided at the time a complaint is made;
- The list of information provided at paragraph 2.4 of the guideline should be revised in light of the existing guidance from the Office of the Communications Authority or, alternatively,

[2] See the Administration's position mentioned at p 5 of the Appendix to the Minutes of the twenty-sixth meeting of the Bills Committee on Competition Bill of 6 December 2011, LC Paper No CB(1)1654/11-12.

an information checklist on the model of the existing guidance from the Office of the Communications Authority should be added as an appendix to the guideline.

3.1 Paragraph 2.4 of the draft guideline states that "[a]t the time of making a complaint, it is not necessary to provide all details of the relevant conduct". This statement tends to suggest that the Commission may consider pursuing a complaint notwithstanding the fact that no supporting evidence has been provided and the allegation is of a general nature and is not substantiated to a requisite threshold to merit consideration. It is respectfully submitted that this policy should be reversed or at least significantly qualified. This is for the following reasons.

3.2 Under s 37(2) of the Ordinance, the Commission is not required to investigate a complaint if it does not consider it reasonable to do so and may, in particular, refuse to investigate a complaint if it is satisfied that the complaint is lacking in substance. To facilitate processing of the complaint, the complainant should therefore be required to articulate its allegations with sufficient details to enable the Commission to assess whether the complaint raises a genuine competition issue within the scope of the competition rule.

3.3 Notwithstanding the Commission's commitment at paragraph 2.6 to provide further guidance on its website with respect to information that may be sought from complainants, it is submitted that the policy expressed in the first sentence of paragraph 2.4 should be amended in line with the established policy of the Communications Authority, which clearly signals that the Authority will not entertain general allegations that are not substantiated.[3] Paragraph 2.4 should be revised to include the statement that "[a] general allegation that conduct is anti-competitive is most unlikely to be considered adequate", found at paragraph 7 of the Office of the Communications Authority's *Guide on how complaints relating to anti-competitive practices, abuse of dominant position and discriminatory practices prohibited under sections 7K, 7L and 7N of the Telecommunications Ordinance are handled by the Office of the Communications Authority.*

3.4 The list of information required in a complaint at paragraph 2.4 could also be completed by reference to the information checklist provided in Appendix B of Office of the Communications Authority's guide: a summary of the events in chronological order with relevant dates, including details of any relevant contact between the complainant and the subject of complaint (e.g. meetings, phone calls, emails) and the individuals involved, a description of the specific product(s) or service(s) in question, an analysis of the relevant market, an explanation on the effect of the practice on consumers, etc.

[3] See the Communications Authority's *Guidelines on Competition investigation procedures in the broadcasting sector,* at paragraph 91, the Communications Authority's *Guidelines to Assist Licensees to Comply with the Competition Provisions under the Telecommunications Ordinance* (GN-8/2013), at paragraph 1.25, and the Office of the Communications Authority's *Guide on how complaints relating to anti-competitive practices, abuse of dominant position and discriminatory practices prohibited under sections 7K, 7L and 7N of the Telecommunications Ordinance are handled by the Office of the Communications Authority*, at paragraphs 6 and 7.

3.5 The draft guideline would also gain in practicality if it were to include an appendix with an information checklist, again on the model of Appendix B of Office of the Communications Authority's guide.

4 Confidentiality

- The three procedural guidelines should adopt a consistent approach to the discussion of the protection of confidential information;
- New paragraphs should be added in section 3 of the draft guideline to confirm that the Commission will treat information of the type mentioned at ss 123(1)(a) and (b) of the Competition Ordinance as confidential even if no claims to that effect are made; and
- To the extent that the Commission considers that it has a discretion to reject confidentiality claims made under ss 123(1)(c) and (2) of the Competition Ordinance, the draft guideline should provide guidance on what the Commission's proposed criteria would be.

4.1 Each of the three procedural guidelines usefully discusses confidentiality in a different context. We welcome the Commission's announcement in its 2013/2014 Annual Report that it will be publishing its general policy on the collection, use and disclosure of information prior to the commencement of the Ordinance, but there is a need for a more consistent approach within the guidelines themselves.

4.2 Paragraphs 3.1 to 3.6 of the draft guideline usefully discuss the confidentiality of the fact of a complaint having been made and of the identity of the complainant. This section of the draft guideline should also discuss how the Commission will deal with confidential information contained in the complaint, and more generally, confidential information provided by the complainant. In particular, the guideline should confirm that the Commission will treat information of the type mentioned at ss 123(1)(a) and (b) of the Competition Ordinance as confidential even if no claims to that effect are being made. Also, to the extent that the Commission considers that it has discretion to reject confidentiality claims made under ss 123(1)(c) and (2) of the Ordinance, it should provide guidance on the proposed criteria it would rely on in such determination.

4.3 For the sake of clarity, the guideline should also expressly affirm at paragraph 3.6 that the Authority will also be bound by the Commission's safeguards regarding confidentiality.

5 Decisions not to act on a complaint

The Commission should consider publishing its decisions to reject complaints, at least in summary form. This could be added at paragraph 5.2 of the draft guideline.

Paragraph 5.2 of the draft guideline reflects the Commission's policy to inform complainants in writing when it decides to take no further action. This is to be welcomed. As a matter of good practice, the Commission may also consider publishing its decisions rejecting complaints, at least in summary form, on the model of the European Commission's practice in this regard.[4]

6 Contact details

- A reference to "markets" should be inserted in the first sentence under the Commission contact details; and
- Small typographical errors should be corrected.

6.1 In the preamble to the Commission's contact details, the words "that may affect Hong Kong" should be replaced by the words "that may affect markets in Hong Kong". Typographical errors (the lack of a space after the comma following the floor number) should also be corrected in the addresses of the Commission and of the Communications Authority.

We are grateful to the Competition Commission and the Competition Authority for being given the opportunity to offer our comments on the draft guideline. We hope they will be useful.

The Norton Rose Fulbright Asia competition team

[4] See the European Commission's *Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, (2011) OJ C308/6, at paragraph 150.

ANNEX
OVERVIEW OF OUR PROPOSALS

	Reference	Proposal
1.	Paragraph 1.1	The reference to the merger rule at paragraph 1.1 of the draft guideline should indicate that the merger rule only applies in the telecommunications sector.
2.	Paragraph 2.1	Paragraph 2.1 of the draft guideline should explain that complaints made anonymously or through an intermediary will, as a matter of policy, not be considered as a priority.
3.	Paragraph 2.4	Paragraph 2.4 of the guideline should be revised to clarify that general allegations will not be accepted and that precise information should be provided at the time a complaint is made.
4.	Paragraph 2.4	The list of information provided at paragraph 2.4 of the guideline should be revised in light of the existing guidance from the Office of the Communications Authority.
5.	Section 3	The three procedural guidelines should adopt a consistent approach to the discussion of the protection of confidential information.
6.	Section 3	New paragraphs should be added in section 3 of the draft guideline to confirm that the Commission will treat information of the type mentioned at ss 123(1)(a) and (b) of the Competition Ordinance as confidential even if no claims to that effect are made.
7.	Section 3	To the extent that the Commission considers that it has a discretion to reject confidentiality claims made under ss 123(1)(c) and (2) of the Competition Ordinance, the draft guideline should provide guidance in section 3 on what the Commission's proposed criteria would be.
8.	Paragraph 5.2	The Commission should consider publishing its decisions to reject complaints, at least in summary form. This could be added at paragraph 5.2 of the draft guideline.
9.	Last page	A reference to "markets" should be inserted in the first sentence under the Commission contact details.
10.	Last page	Small typographical errors should be corrected on the last page of the document.

	Reference	Proposal
11.	New appendix	An information checklist should be added as an appendix to the guideline, on the model of the existing guidance available from the Office of the Communications Authority.

NORTON ROSE FULBRIGHT
諾頓羅氏富布萊特
10 November 2014

DRAFT GUIDELINE ON INVESTIGATIONS UNDER THE COMPETITION ORDINANCE

Comments by Norton Rose Fulbright Hong Kong

We welcome the joint publication by the Competition Commission and the Communications Authority of, and the opportunity to comment on, the Draft Guideline on Investigations released on 9 October 2014 under reference CCCAD2014005E.[1]

This submission mainly focuses on areas of concern in relation to the draft guideline, and we hope that these issues can be satisfactorily addressed as the Commission prepares to finalise the draft guideline for consultation with the Legislative Council.

While our submission relates to matters of concern, there are also many features which we hope will be retained in the final version of the draft guideline. Without being exhaustive, the following can be highlighted:

- the draft guideline in its English version uses very clear language and adopts a straightforward structure;
- the draft guideline goes beyond the statutory requirements of ss 38 and 40 and provides guidance on possible enforcement procedures following investigations;
- the draft guideline clearly sets out the possible outcomes of an investigation;
- the policy stated at paragraphs 4.2 and 7.6 to inform the plaintiff in writing of a decision not to take further action is to be welcomed;
- paragraph 5.1 includes useful guidance on how the "reasonable cause to suspect" threshold will be interpreted in practice;
- paragraph 5.26 clearly sets out when a warrant will be sought under s 48 of the Competition Ordinance; and
- paragraph 5.32 provides initial guidance on how searches for documents will be conducted under s 48.

Our comments below generally follow the structure of the draft guideline. For ease of reference, we also include an Annex listing our proposals with references to the relevant paragraphs in the draft guideline.

[1] Consistent with the approach adopted in the Competition Ordinance, references in this submission to the Competition Commission are to be read as including the Communications Authority when they relate to the exercise of the Commission's functions in respect of broadcasting and telecommunications licensees.

1 Reference to the merger rule in the introduction

The reference to the merger rule at paragraph 1.1 of the draft guideline should indicate that the merger rule only applies in the telecommunications sector.

1.1 Paragraph 1.1 of the draft guideline states that "[t]he Ordinance also prohibits mergers which substantially lessen competition." This sentence should be amended to reflect the provisions of s 4 of Schedule 7 to the Ordinance, as follows: "The Ordinance also prohibits mergers involving telecommunications carrier licensees which substantially lessen competition."

2 Sources of investigations and interactions with other authorities

- Leniency and immunity applications should be listed as sources of investigation at paragraph 2.1; and
- More guidance should be provided at paragraph 2.1 on referrals between the Commission and other domestic and foreign authorities, including a reference to the possibility of concluding memoranda of understanding and other cooperation agreements.

2.1 Paragraph 2.1 of the draft guideline usefully supplements the text of s 39(1) of the Ordinance as regards possible sources of investigations. As with the wording of the Ordinance, it is well understood that situations described in paragraph 2.1 are not meant to be exhaustive. Still, given the importance of immunity and leniency applications to enforcement activities in foreign jurisdictions, these may be worthy of a mention.

2.2 The experience abroad shows that competition authorities increasingly co-ordinate their enforcement in respect of conduct having effect across multiple jurisdictions. The importance of investing in cross-agency cooperation and developing the necessary mechanisms to achieve a consistent approach to competition policy and law enforcement is also acknowledged in the Commission's 2013/2014 Annual Report. As a member of the International Competition Network, the Commission is likely to interact with and gather information through its foreign counterparts. Paragraph 2.1 of the draft guideline does mention "referrals" from other authorities, but it would be useful to provide more detail on how these will be handled both in a domestic and in an international context. It would be particularly useful for the guideline to cite as a possibility the conclusion of memoranda of understanding or other similar agreements between the Commission and other authorities in Hong Kong and abroad. This would also complement and give clarity to the reference made at paragraph 4.1(c)(i) regarding the possibility of referring a matter to another Government agency.

3 The initial assessment phase

- The guideline should provide at paragraph 3.2 an indicative timeframe within which the Commission will endeavour to complete its initial assessment;

- There should be a clearer acknowledgment, either in section 3 or at paragraph 6.3 of the draft guideline, that the rules of Part 8 of the Ordinance concerning the protection of confidential information also apply during the initial assessment phase; and

- The Commission should confirm at paragraph 3.3 of the guideline that the additional protections offered under ss 44 (privileges and immunities), 45 (privilege against self-incrimination), 46 (release from liability for disclosure of confidential information) and 58 (legal professional privilege) also apply during the initial assessment phase.

3.1 The draft guideline helpfully explains how the Commission will consider matters brought to its attention prior to making a decision on whether the legal standard to open an investigation under s 39 of the Ordinance has been met. These initial steps, while clearly required of the Commission to satisfy its obligations under s 39, are not formally enunciated in Part 3 of the Ordinance.

3.2 Paragraph 3.2 of the draft guideline explains that the duration of the initial assessment phase will depend on the circumstances of each case. It would however be useful for the Commission to provide target timescales, on the model of what the Competition Authority has done in its *Guidelines on competition investigation procedures in the broadcasting sector* at paragraph 46.

3.3 Part 8 of the Ordinance protects all confidential information that has been provided to or obtained by the Commission in the course of, or in connection with, the performance of its functions under the Ordinance. The same procedural safeguards also apply during the initial assessment phase, as acknowledged by the title above paragraph 6.3 of the draft guideline. The guideline could however usefully include an express acknowledgment beyond the reference included in this title, either in section 3 or at paragraph 6.3.

3.4 The Ordinance offers a number of protections to the relevant parties after an investigation has been formally initiated. These are the privileges and immunities under s 44, the protection against self-incrimination under s 45, the release from liability for disclosure of confidential information under s 46, and the protection of legal professional privilege under s 58. These protections broadly mirror those available under common law, and will in any event be available during the initial assessment phase. However, legal certainty would be enhanced if the Commission could expressly confirm in its guideline that the same protections will apply during the initial assessment phase, including when it gathers information as outlined at paragraph 3.3 of the draft guideline.

4 Decision not to open an investigation

- The guideline should include a more substantive discussion of reasons for not taking further action after receipt of a complaint or a referral. This could be included at paragraph 4.2 or at paragraph 7.6 of the guideline, and should be consistent with the discussion at paragraph 4 of the guideline on complaints; and

- The Commission should adopt formal decisions to reject complaints and publicise these decisions. This may usefully be discussed at section 5 of the draft guideline on complaints or new paragraphs could be inserted after paragraph 4.4 of the draft guideline on investigations.

4.1 Under s 39(1) of the Ordinance, the Commission "may" – but need not – investigate following the receipt of complaints and referrals. Read in isolation, s 39(1) leaves the Commission entirely free not to investigate in any circumstance. However, when deciding not to act on a complaint, the Commission must justify under s 37(2) why investigating would not be "reasonable".

4.2 We acknowledge that the Commission has already provided early indications of its prioritisation principles in *Getting Prepared for the Full Implementation of the Competition Ordinance*, released in May 2014. However it is submitted that the guideline should include a more substantive discussion of reasons for not taking further action after receipt of a complaint or a referral beyond the obvious reasons contained in s 37(2) and at paragraph 7.5 of the draft guideline as regards the prompt altering of conduct of concern. Our submission is based on three circumstances.

4.3 First, this appears justified in light of the fact that the first of the Commission's functions listed in s 130 of the Ordinance is "to investigate conduct that may contravene the competition rules and enforce the provisions of this Ordinance". The responsibility to investigate conduct that may contravene the Ordinance is discernibly a primary duty for the Commission.

4.4 Second, when exercising its discretion not to investigate under the "reasonability" test under s 37(2), the Commission should consider the fact that the Ordinance does not provide full stand-alone rights of private action. In some circumstances, lodging a complaint with the Commission will be the only way for a plaintiff to seek redress under the Ordinance.

4.5 Third, a fuller discussion of reasons not to investigate would ensure that the guideline meets the statutory requirement under s 40(a) of the Ordinance to indicate "the procedures it will follow in deciding whether or not to conduct an investigation under this Part".

4.6 The more detailed discussion could be inserted at paragraph 4.2 or at paragraph 7.5 of the draft guideline, and should be consistent with the discussion at paragraph 4.3 of the draft guideline on complaints.

4.7 At least in respect of decisions not to act on complaints, the Commission may also wish to consider adopting formal decisions to that effect and possible publicity measures. This may usefully be discussed at section 5 of the draft guideline on complaints or new paragraphs could be inserted after paragraph 4.4 of the draft guideline on investigations, as follows:

> "In exercising its discretion to refuse to act on complaints, the Commission will adopt a formal decision explaining the reasons why it has decided not to act upon a complaint. This decision will be published on the Commission's website, at least in summary form."

4.8 The policy stated at paragraph 4.2 of the draft guideline to inform the plaintiff in writing of a decision not to take further action is to be welcomed, and should be retained.

5 Decision to take enforcement action without opening an investigation

The guideline should set out the procedure which the Commission intends to follow if it is prepared to take enforcement action without formally opening an investigation. This could be added at the end of section 4.

5.1 Paragraph 5.3 of the draft guideline indicates that an investigation will *only* be opened where the Commission has reasonable cause to suspect that a contravention of a competition rule occurred and that "the matter warrants further investigation". This suggests that the Commission contemplates in some cases adopting measures without formally opening an investigation under s 39.

5.2 This possibility is consistent with the right for the Commission to accept any commitments it deems "appropriate" under s 60 of the Ordinance at any time, including prior to the opening of an investigation. Cases might thus be resolved before the Commission formally opens an investigation under s 39.

5.3 Arguably, although this is not clear from the statutory wording or the legislative history, there may also be circumstances where the Commission could meet the higher legal thresholds required to take other types of enforcement action without resorting to its investigation powers under Part 3 of the Ordinance. One may in particular consider circumstances where the Commission deems it urgent to take action, and seek to obtain interim orders under s 95(1) of the Ordinance or other orders under s 94 of the Ordinance against persons who "attempt" to contravene the competition rules.

5.4 Urgency or the circumstance that "the matter does not warrant further investigation" (as the Commission suggests) should however not come at the cost of legal certainty and particularly a defendant's right to be heard. Further, and in any event, any application for pecuniary penalties under s 92 of the Ordinance requires that a formal investigation be carried out. The lack of a formal investigation may allow the Commission to be nimble in its enforcement, but it is submitted that the Commission should provide more details on what procedural steps it intends to follow if it is minded to take action without opening a formal investigation. It is suggested that this should be limited to exceptional circumstances. More guidance is needed on this point, for example at the end of section 4.

6 Decision to open an investigation

The guideline should clearly state in its section 4 that decisions made under s 39 will be formally documented and made available to the persons under investigation at the latest when the Commission seeks to take enforcement action.

6.1 Paragraph 4.1 of the draft guideline helpfully identifies the possible outcomes of the initial assessment phase, and paragraphs 5.1 and 5.2 clearly set out the Commission's interpretation

of the "reasonable cause to suspect" standard under s 39 of the Ordinance. While the Commission should not be required to publicise or otherwise communicate the contents of its decision under s 39 in all cases, it is submitted that the Commission should formally adopt and document decisions to open an investigation, so as to allow affected parties to verify whether and which of the requirements under s 39 were met at the time of the Commission's decision. Legal certainty would be strengthened if the Commission were to confirm at paragraph 5.2 of the draft guideline that decisions to open an investigation under s 39 will be documented and made available to the persons under investigation within a reasonable time and in any event at the latest when the Commission seeks to take enforcement action.

7 Use of investigation powers in respect of statutory bodies

- The draft guideline should confirm in its section 5 that the Commission will make use of its investigation powers in respect of statutory bodies;
- The draft guideline should indicate at paragraphs 4.1 and 7.22 how the Commission intends to coordinate its investigations and enforcement activities with the Competition Advisory Group (COMPAG) in respect of statutory bodies;
- If the stringent approach to the exclusion for compliance with legal requirements is retained in the guideline on the first conduct rule, the guideline should indicate at the outset of its section 7 that involvement of a statutory body, while not absolving other parties, will in principle lead the Commission to seek resolution by way of commitments and bring legal proceedings in the Competition Tribunal only in exceptional cases (this could alternatively be implemented in the guidelines on the first and second conduct rules).

7.1 Paragraph 2.6 of the draft guideline on exclusions and exemptions provides clarity to the scope of the statutory body exclusion under s 3 of the Competition Ordinance. The Commission may also wish to confirm in the guideline on investigations that it plans to make use of its investigation powers in respect of statutory bodies, and refer to the possibility of coordinating with the Competition Advisory Group (COMPAG). Further, while the position of the Commission regarding exclusions for compliance with legal requirements under s 2 of Schedule 1 to the Ordinance appears very stringent, the Commission could usefully indicate that where conduct has been required, instigated, recommended or encouraged by a statutory body, this will constitute a mitigating factor that will influence the Commission's approach to enforcement. For example the Commission could indicate that in such cases it would give priority to resolving competition concerns by way of commitments or other similar resolution mechanisms, and only bring proceedings in the Competition Tribunal in exceptional circumstances.

8 Information requests

- The draft guideline should amplify its practical guidance at paragraph 5.1 on how the Commission intends to satisfy the "reasonable cause to suspect" standard so as to make it applicable to s 41 notices. Alternatively, the draft guideline could restate at paragraph

5.8 the Commission's guidance on what the legal threshold entails in practice in the context of s 41 notices; and

- It would be useful if paragraph 5.14 of the draft guideline could indicate that the Commission contemplates, at least where practicable, providing advance notice of the issuance of s 41 notices and discussing their contents ahead of their issuance with their intended recipients.

8.1 Under s 41 of the Ordinance, the Commission must meet a "reasonable cause to suspect" standard in its selection of the addressees of information requests. Paragraph 5.1 of the draft guideline already provides useful practical guidance on how the Commission will meet this standard, albeit in the context of s 39 decisions. However, it would be useful if the Commission could amplify the scope of paragraph 5.1 and expressly recognise its application as a general principle with respect to each decision where it must meet the "reasonable cause to suspect" standard. Alternatively, the draft guideline could restate at paragraph 5.8 the Commission's guidance on what the legal threshold entails in practice in the context of s 41 notices.

8.2 In its selection of matters with respect to which documents or information is required to be produced under s 41 information requests, the Commission must meet the higher "reasonable belief" standard. On the model of what it has done for the "reasonable suspicion" standard at paragraph 5.1, it would be useful for the Commission to include in its guideline some practical guidance on how the two standards differ, how it intends to satisfy this legal requirement, both in the context of s 41 information requests and more generally. This could be implemented at paragraph 5.8 of the draft guideline.

8.3 Under s 41 of the Ordinance, the Commission is not required to provide advance notice or otherwise discuss the contents of the notice with its intended recipients. As a matter of good practice, competition authorities would often discuss the contents of a draft information request with its intended recipient before formally issuing it. This is for example the practice of the UK's Competition and Markets Authority.[2] It would be useful if the Commission could indicate at paragraph 5.14 of the draft guideline that it contemplates adopting the same approach.

9 Hearings

- The draft guideline should explain at paragraph 5.17 that individuals called for questioning under s 42 shall have a "connection with a relevant undertaking";

- The draft guideline should confirm at paragraph 5.18 that questions raised during the s 42 hearings should relate to matters the Commission "reasonably believes to be relevant to the investigation"; and

[2] See paragraphs 6.8 to 6.11 of the Competition and Markets Authority's Guidance on the CMA's investigation procedures in Competition Act 1998 cases, CMA8, March 2014.

- Paragraph 5.18 should provide practical guidance on how the Commission intends to satisfy the "reasonable belief" test in s 42(1).

9.1 The wording of s 42 of the Ordinance slightly differs from the corresponding provision of the UK Competition Act 1998 (s 26A). The Commission may however find inspiration in s 26A(6) of the UK statute and explain that the persons it intends to hear shall be individuals that have a "connection with a relevant undertaking", meaning persons concerned in the management or control of the undertaking or employed by, or otherwise working for, the undertaking. This would provide a useful statement of principle prefacing the examples listed at paragraph 5.17 of the draft guideline.

9.2 As with s 41 notices, s 42(1) of the Ordinance limits the scope of the questioning to "any matter [the Commission] reasonably believes to be relevant to the investigation". It would be useful for the guideline to confirm that the Commission intends to conform with this legal threshold during s 42 hearings, to explain what this threshold entails in practice and in particular, to identify the elements necessary to satisfy the subjective and objective limbs of this test. This could be usefully inserted at paragraph 5.18.

10 On-premise documentary searches

- Guidance should be provided on how the Commission intends to satisfy the "reasonable cause to suspect" test under s 48, either at paragraph 5.1 or at paragraphs 5.23 and 5.24;
- Paragraph 5.23 of the draft guideline should explain as a matter of principle that the s 48 mechanism is limited to the conduct of documentary searches;
- Additional guidance should be provided at paragraphs 5.30 to 5.34 on matters of law and policy in relation to the Commission's exercise of its powers under s 50 of the Ordinance; and
- Guidance should be provided at paragraphs 5.30 to 5.34 on practical aspects of on-premise documentary searches.

10.1 Under s 48 of the Ordinance, the Commission must adduce sufficient evidence to demonstrate that the relatively low "reasonable cause to suspect" standard is met for the judge to grant a warrant. Paragraph 5.1 of the draft guideline already provides useful practical guidance on how the Commission will meet this standard, albeit in the context of s 39 decisions. It would be useful if the Commission were to amplify the scope of paragraph 5.1 and expressly recognise its application as a general principle with respect to each decision where it must meet the "reasonable cause to suspect" standard. Alternatively, the draft guideline could provide guidance at paragraphs 5.23 and 5.24 on what the legal threshold entails in practice in the context of s 48.

10.2 While a warrant issued under s 48 provides authority to "enter and search", the grounds for granting this authorisation relate to the likely presence of "documents". Further, the obtaining of

a warrant under s 48 opens up the various powers contained in s 50 of the Ordinance, which all relate to "documents". It would bring clarity to the draft guideline if its paragraph 5.23 could confirm as a matter of principle that s 48 is limited to the conduct of documentary searches, and that the Commission shall not conduct questioning of persons or take other investigation steps during an on-site inspection beyond those specifically listed at s 50 of the Ordinance.

10.3 The draft guideline at paragraphs 5.30 to 5.34 already includes some useful information as to how the Commission intends to make use of its powers under s 50 when conducting on-premise documentary searches. It is well understood that the Commission cannot prejudge on the conditions that will be imposed by the courts in the warrants they will issue under s 48, but there are a number of matters of law and policy on which the Commission could already provide some guidance. These include:

- in which circumstances the Commission will make use of the exceptional power under s 50(1)(d) to forcefully remove persons and things obstructing the search;
- how the Commission proposes to interpret the notion of relevant documents "in the possession of", and particularly "under the control" of a person under s 50(1)(e);
- contrary to what paragraph 5.34 of the draft guideline implies, a confirmation that documents will be in principle copied, and only seized in exceptional cases, would be consistent with the requirements of ss 50(1)(f) and (h);
- a confirmation that, as a matter of policy, given the extraordinary nature of the power to seize computers and other materials under s 50(1)(j) and the intrusive nature of this power, the Commission will only exercise this power where its powers to access the information under s 50(1)(l) are impracticable; and
- a confirmation that, as a matter of policy, when asking questions (including when exercising its power to ask questions relating to documents under s 50(1)(k)), the Commission will recognise that the privilege against self-incrimination available under common law (despite it not being expressly available under s 45 of the Ordinance to s 48 documentary searches, but well available under s 65 of the Evidence Ordinance (Cap 8)).

10.4 In addition to the matters mentioned above, the draft guideline should provide some practical information on how Commission officials will conduct on-premise documentary searches. It should provide comfort, for example at paragraph 5.34, that:

- a list of documents reviewed and copied will be established;
- minutes of questions and answers provided will be kept; and
- a particular procedure will be followed when claims of legal privilege protection are being disputed (e.g. the use of a sealed envelope and reliance on a third-party process).

11 Statutory declarations

- The Commission should expressly recognise at paragraph 5.37 of the draft guideline that, as a matter of principle, it will only seek statutory declarations in exceptional circumstances; and
- The draft guideline should acknowledge, either at paragraph 5.37 or at paragraph 5.44, that exposure to follow-on litigation would constitute a "reasonable excuse" under s 52 for a refusal by a leniency or immunity applicant to provide a statutory declaration.

11.1 Paragraph 5.37 of the draft guideline states that "in normal circumstances", the Commission will require a statutory declaration from persons providing information when making use of its investigation powers. It is respectfully submitted that this policy should be reversed, and that statutory declarations shall only be required in exceptional circumstances. This is for the following reasons.

11.2 Pursuant to ss 13 and 14 of the Oaths and Declarations Ordinance (Cap 11), statutory declarations must be signed and shall be made in one of the forms set out in Schedule 1 of that ordinance. These are formalistic and too onerous to be used in normal circumstances. The legislative intent was clearly to keep the use of statutory declarations under s 43 to specific circumstances, and not to make them the default policy. During the legislative process, the Administration explained that it anticipated requests for a statutory declaration to be made on a need-to basis.[3]

11.3 Further, when exercising its discretion under s 43(1) to require a statutory declaration, it is submitted that the Commission should consider the impact of any such requirement on the person making the declaration. In many cases, any inconvenience resulting from the making of a formal statutory declaration for the person who makes it may be outweighed by the interests of the Commission's investigation. This analysis could however helpfully be conducted at a later stage of the investigation, and the Commission should rely on a less formalistic and onerous process in first instance. This would not impair the effectiveness of its investigation. Instead, the Commission may opt to remind parties that it is at liberty to require a statutory declaration at any time, and that a refusal may constitute an offence under s 52 of the Ordinance.

11.4 In some cases – particularly involving leniency and immunity applicants – the Commission may wish to collect and keep its own record of oral statements since formal statutory declarations may affect a person's exposure to follow-on civil litigation, ultimately undermining the goals of the Commission's leniency and immunity policies. It is suggested that the Commission should expressly recognise this at paragraph 5.37 of the draft guideline. The Commission should further acknowledge, either at paragraph 5.37 or at paragraph 5.44, that exposure to follow-on

[3] See the Commerce and Economic Development Bureau's position mentioned at p 8 of the Appendix to the Minutes of the twenty-sixth meeting of the Bills Committee on Competition Bill of 6 December 2011, LC Paper No CB(1)1654/11-12.

litigation would in its view constitute a "reasonable excuse" for a leniency applicant to refuse providing a statutory declaration requested by the Commission, allowing the person to avoid liability under s 52.

12 Protection of the professional legal privilege

- The guideline at paragraph 5.34 should provide for a practical mechanism enabling a prompt initial resolution of disputes on the privileged nature of documents subject to on-premise searches under s 50;
- The guideline at paragraphs 3.3 and 5.38 should confirm the application of safeguards relating to professional legal privilege with respect to information and documents obtained during the initial assessment phase; and
- The Commission should expressly acknowledge as a matter of policy at paragraph 5.34 of the draft guideline that the scope of professional legal privilege will extend to advice obtained from in-house counsel.

12.1 As already mentioned in relation to on-premise documentary searches, the guideline should provide for, or at least refer to, a practical mechanism enabling a prompt initial resolution of disputes on the privileged nature of documents which Commission officials may wish to examine, copy or seize when exercising their powers under s 50. This could be usefully implemented at paragraph 5.34 for example.

12.2 As already mentioned in relation to the initial assessment phase, the guideline should expressly confirm that the protection of professional legal privilege also applies during that phase. This could be usefully implemented at paragraph 3.3 of the draft guideline. This should also be clarified at paragraph 5.38, as the Commission does not technically make use of its "Investigative Powers" under Part 3 of the Ordinance during that phase.

12.3 Finally, as the scope of legal privilege protection is left undefined in s 58 of the Ordinance, it would be useful for paragraph 5.38 of the draft guideline to expressly confirm that in the Commission's interpretation, legal advice obtained from in-house counsel will benefit from the protection of s 58.

13 Protection of the privilege against self-incrimination

- The guideline should confirm at paragraphs 5.32 and 5.41 as a matter of policy that the Commission will expressly recognise the privilege against self-incrimination available under common law and by extension, under s 65 of the Evidence Ordinance (Cap 8); and
- As a matter of policy, the Commission may wish to extend the protection of privilege against self-incrimination to other proceedings not listed in s 45(3) to align the protection available to self-incriminating statements with that available with respect to confidential

information under s 124 of the Ordinance. This could be implemented at paragraph 5.41 of the draft guideline.

13.1 As already mentioned in relation to on-premise documentary searches, the draft guideline should confirm at paragraph 5.32 that, as a matter of policy, when asking questions in any context (including relating to documents under s 50(1)(k)), the Commission will recognise the privilege against self-incrimination available under common law (despite it not being expressly available under s 45 of the Ordinance to s 48 documentary searches, but available under s 65 of the Evidence Ordinance (Cap 8)). This could also be usefully confirmed at paragraph 5.41.

13.2 The protection of the privilege against self-incrimination organised under s 45 of the Ordinance is limited to the inadmissibility of incriminating statements as evidence in the court proceedings listed under s 45(3) brought against the persons who made them. Arguably, these statements could still be relied on against the person who made them in the context of proceedings other than those listed under that subsection. As a matter of policy, the Commission may wish to provide at paragraph 5.41 assurances to respondents that it will adopt safeguards with a view to protect these statements from disclosure in any other contexts that may possibly lead to the imposition of pecuniary penalties or criminal sanctions, including in procedures not mentioned at s 45(3). This would enhance the effectiveness of the Commission's investigations in a context where the Commission is required to establish adequate procedural safeguards for the protection of confidential information under s 124 of the Ordinance, but not in relation to self-incriminating statements.

14 Managing the duration of the investigation phase

- The guideline should provide at paragraph 5.45 an indicative timeframe within which the Commission will endeavour to complete its investigation; and
- The Commission should commit at paragraph 5.45 of the guideline to organise state of play meetings.

14.1 Paragraph 5.45 of the draft guideline explains that the duration of the investigation phase will depend on the circumstances of each case. It would however be useful for the Commission to provide in the guideline a target timetable for completion of the investigation phase. It would also be useful for the Commission to commit to hold state of play meetings at key stages of the investigation with a view to provide an update on progress and timing.[4]

[4] The Commission could take inspiration in this regard from the European Commission's Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, (2011) OJ C308/6, at paragraphs 60 to 66.

15 Confidential information

- The three procedural guidelines should adopt a consistent approach to the discussion of the protection of confidential information;
- The draft guideline at paragraphs 6.4 and 6.5 should confirm that the Commission will treat information of the type mentioned at ss 123(1)(a) and (b) of the Competition Ordinance as confidential even if no claims to that effect are made;
- To the extent that the Commission considers that it has a discretion to reject confidentiality claims made under ss 123(1)(c) and (2) of the Competition Ordinance, the draft guideline at paragraph 6.5 should provide guidance on what the Commission's proposed criteria would be; and
- The guideline should elaborate at paragraph 6.8 upon how the Commission intends to interpret the s 126(3) of the Ordinance exceptions to the general duty to protect confidential information.

15.1 Each of the three procedural guidelines usefully discusses confidentiality in a different context. We welcome the Commission's announcement in its 2013/2014 Annual Report that it will be publishing its general policy on the collection, use and disclosure of information prior to the commencement of the Ordinance, but there is a need for a more consistent approach within the guidelines themselves.

15.2 Paragraphs 6.4 and 6.5 of the draft guideline discuss deemed confidentiality and confidentiality claims (contrary to the draft guideline on complaints and the draft guideline on exclusions and exemptions). These paragraphs could be improved in two ways. First, the guideline should confirm that the Commission will treat information of the type mentioned at ss 123(1)(a) and (b) as confidential even if no claims to that effect are made. Second, to the extent that the Commission considers that it has a discretion to reject confidentiality claims made under ss 123(1)(c) and (2), it should provide guidance on what its proposed criteria would be.

15.3 The broad nature of the considerations stated at s 126(3) of the Ordinance and referenced in paragraph 6.8 of the draft guideline concerning the causes for the Commission to disclose information, in spite of its confidential nature, may undermine the Commission's ability to conduct efficient investigations. It would be useful for the Commission to expand at paragraph 6.8 on the exceptions to the general duty to protect confidential information under s 125 of the Ordinance and how it will apply the considerations relevant to its practical application of s 126(3).

16 Use of information

- The draft guideline should expressly state as a matter of policy at paragraph 6.13 that it will only use information or documents obtained with respect to one case in connection with another case if it is able to satisfy the same legal standard as that applicable at the outset when gathering information for a new investigation; and

- The Commission should revise the language at paragraph 6.14 of the draft guideline and be more open to accepting restrictions to the use of information so as not to prejudice the effectiveness of alternative methods of resolving suspected contraventions of the Ordinance.

16.1 The statement at paragraph 6.13 that any information obtained by the Commission in one matter may be used by it in another matter is overly broad. The "legal requirements to the contrary" mentioned in the second sentence of that paragraph should be the rule rather than the exception. Part 3 of the Ordinance, and particularly ss 39, 41, 42 and 48, requires that specified legal standards be met before the Commission can open an investigation and gather information through the use of its investigation powers in relation to a particular case. These requirements relate to the persons that are the object of questioning, the premises to be searched, and the scope of the investigative steps. Additional requirements may well be imposed by judges of the Court of First Instance delivering s 48 warrants. Having regard to the intrusive nature of the rights conferred upon the Commission in the conduct of investigations, all of these constraints are meant to protect the integrity of the Commission's investigation in relation to a particular contravention of the Ordinance that may have occurred. In this context the Commission's reliance as a matter of principle on any information it has received in one case in the context of another case would not sit well with its legal obligations. The policy expressed at paragraph 6.13 of the draft guideline should accordingly be reversed, at least in relation to any information gathered through the use of the Commission's powers under Part 3 of the Ordinance. Moreover, when determining whether specific information or documents can be re-used in another case, the Commission should have regard to the specific purpose for which such materials were obtained in the first place, and, in any event, clearly define the scope of the investigation for which such materials are being obtained.

16.2 Paragraph 6.14 of the draft guideline states that the Commission will not "normally" accept information or documents on any condition that would limit their use by the Commission. This is well understood in the context of an authority whose task is not to safeguard the individual rights of private persons but rather to act in the public interest. There are however many instances where the Commission will want to accept the submission of documents, information and arguments subject to conditions that limit their use by the Commission. For example, the Commission may want to accept submissions made on a "without prejudice" basis when discussing the possibility of accepting commitments made under s 60, effectively granting these submissions the same protection as that offered under s 70(3) to representations made in the course of an infringement notice procedure. Another common example in overseas practice relates to the leniency and amnesty procedures, where a marker and then immunity or leniency are granted on a conditional basis, it being understood that all information and documents that were voluntarily submitted by the applicants would be returned in case of a withdrawal of the benefits, coupled with a commitment from the competition authority not to make use of it. Similar "without prejudice" submissions of arguments and evidence are also made in the context of consent orders common to foreign practice, which we understand the Commission is intent on replicating. So as not to prejudice the effectiveness of alternative methods of resolving suspected contraventions of the Ordinance, the Commission may wish to revise the language used in paragraph 6.14.

17 Commencement of proceedings in the Tribunal

- The Commission may wish to adopt at paragraph 7.9 of the draft guideline a procedure parallel to the warning notices mechanism under s 82 of the Ordinance with respect to suspected contraventions other than those for which a warning notice must be issued; and

- The Commission should explain at paragraph 7.10 the process leading to its adoption of a consent order by the Competition Tribunal.

17.1 Paragraphs 7.8 to 7.11 of the draft guideline usefully provide initial guidance on the steps which the Commission intends to take prior to bringing proceedings in the Competition Tribunal. The stated policy at paragraph 7.9 to "usually" advise the parties also in cases of serious anti-competitive conduct of the Commission's concerns and to provide them with an opportunity to address them is to be welcomed. The draft guideline could however already include additional practical guidance on such matters as access to the file, the possibility to present submissions and any other steps which the Commission contemplates taking. This appears particularly relevant in a context where the parties should be in a position to understand the extent of their procedural rights and obligations in a process distinct from the infringement notice procedure under s 67 of the Ordinance. It is submitted that the Commission could achieve this by adopting similar procedures both for warning notices under s 82 of the Ordinance and for "notices of concern" referred to at paragraph 7.9 of the draft guideline. While s 82 warning notices are required to be used for matters not involving serious anti-competitive conduct, it is submitted that the Commission could also use the same or a similar mechanism for matters involving serious anti-competitive conduct or involving practices caught under the second conduct rule. The policy intent for the introduction of the warning notice mechanism in the Ordinance was that it be used for practices for which "there is no hard and fast rule as to whether they may or may not give rise to competition concerns".[5] This may well be the case for several practices that fall within a literal reading of the notion of "serious anti-competitive conduct" and for many practices under the second conduct rule.

17.2 The process leading to the parties under investigation and the Commission agreeing on the terms of a proposed consent before the Competition Tribunal should also be explained at paragraph 7.10 of the draft guideline.

18 Commitments

At paragraphs 7.12 to 7.15 the draft guideline should provide specific guidance with respect to how the Commission intends to give effect to the commitments procedure under s 60 of the Ordinance and the process leading up to the acceptance of a commitment under this procedure.

[5] See Commerce and Economic Development Bureau's Responses to Concerns on the Competition Bill, LC Paper No CB(1)91/11-12(01), at paragraph 7.

18.1 It is suggested that commitments procedures should be explained in more detail in the draft guideline than in the current paragraphs 7.12 to 7.15.

18.2 Guidance could for example be usefully provided on the following matters:

- which cases lend themselves to the acceptance of commitments. In the UK for example, the Competition and Markets Authority is likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.[6]

- whether and at what stage of the procedure the Commission would provide a preliminary assessment or otherwise make its concerns known to the parties under investigation.[7]

- whether and at what stage of the procedure parties wishing to make commitments would have access to the Commission's file.[8]

- whether the Commission would be prepared to entertain submissions on a "without prejudice" basis. When the Commission decides not to accept commitments, the Ordinance does not prevent it from using the offer for commitments as evidence in subsequent proceedings. The Commission may however commit not to do so as a matter of policy, on the model of the UK Competition and Markets Authority's Guidance on enforcement,[9] or at least confirm that it would entertain submissions on a "without prejudice" basis.

- what types of limitations and conditions the Commission would contemplate in commitments, both in terms of duration of the commitments and of market circumstances (for example, commitments would apply for a particular duration or as long as the relevant undertaking has a market share above a particular threshold).

- whether and at what stage of the process proposed commitments would be subject to consultation of the market.

- in what circumstances the Commission would require an admission that a competition law infringement has occurred.

---

6 See paragraphs 10.16 and 10.17 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA 8, 2014) and paragraph 4.3 of the Guidance on enforcement (OFT 407, 2004, re-adopted by the CMA in 2014). Broadly similar principles apply in proceedings before the European Commission (see paragraph 115 of the Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, (2011) OJ C308/6).

7 This is the practice of the European Commission. See paragraphs 121 to 125 of the European Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, (2011) OJ C308/6.

8 This is the practice from the European Commission in similar procedures. See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ (2008) C167/1, at paragraph 15. In the UK, the CMA has adopted a similar practice, also in the context of commitment procedures. See paragraph 10.19 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA 8, 2014) and paragraph 4.17 of the Guidance on enforcement (OFT 407, 2004, re-adopted by the CMA in 2014).

9 See paragraph 4.20 of the Guidance on enforcement (OFT 407, 2004, re-adopted by the CMA in 2014).

- the types of commitments which the Commission would favour for resolving certain categories of issues (for example, commitment to grant access on a non-discriminatory basis, or commitment to waive enforcement of exclusivity requirements, etc.).

19 Warning notices

- The draft guideline should provide at paragraphs 7.16 to 7.18 details as to the process relevant to the Commission's issuance of a warning notice under s 82 of the Ordinance; and

- The draft guideline should provide guidance at paragraph 7.18 on the publicity aspects relating to a warning notice issued under s 82 of the Ordinance.

19.1 The warning notice procedure is a novel mechanism with very limited overseas or Hong Kong experience on which parties and counsel can rely. The Competition Ordinance provides very few details in terms of procedure in s 82, particularly when compared with the procedural provisions in the commitments and infringement notice regimes. It makes for instance no provisions in respect of the possibility for the Commission to withdraw or vary the contents of a warning notice. The Ordinance is also silent in respect of the publicity given to the procedure. There is no public register, and nothing is said about the Commission's right to disclose the notice's contents before the expiry of the warning period or if the recipient chooses to persist in the conduct. This again is different from the detailed rules on these matters in respect of infringement notices.

19.2 Accordingly, while there is no statutory requirement for the Commission to do so, it would be very useful for the Commission to provide more detailed guidance than that included in paragraphs 7.16 to 7.18 of the draft guideline.

19.3 In addition to the statement about publicity at paragraph 7.18, guidance could be usefully provided on the following matters:

- whether and at what stage of the procedure the Commission would provide a preliminary assessment or otherwise make its concerns known to the parties under investigation, prior to the issuance of a warning notice;

- whether recipients of a notice will have the possibility of making representations on a draft of the notice (on the model of s 70 for infringement notices);

- whether and at what stage of the procedure warning notice recipients would have access to the Commission's file;

- whether the Commission would indicate in the notice any amount of penalty or orders it would be seeking from the Competition Tribunal under s 92 if legal proceedings were brought;

- whether the Commission will clarify in the notice that its recipient is not compelled to agree with its contents and remains free to rely on its own analysis – although it would expose itself to legal proceedings in that case; and

- whether the Commission intends to follow a similar procedure when it contacts the parties prior to bringing proceedings in the Competition Tribunal, as suggested in paragraph 7.9 of the draft guideline.

20 Infringement notices

The draft guideline should provide at paragraphs 7.19 to 7.21 details as to the process relevant to the Commission's issuance of infringement notices.

20.1 The infringement notice procedure is also a novel mechanism with very limited overseas or Hong Kong experience on which parties and counsel can rely. While the Competition Ordinance does provide more details on the infringement notice procedure than for the warning notice procedure, there remain a number of important matters which are left open and which may merit the issuance of guidance by the Commission. The guidance included at paragraphs 7.19 to 7.21 of the draft guideline appears too limited.

20.2 In particular, guidance could be usefully provided on the following matters:

- how the Commission contemplates meeting in practice the "reasonable cause to believe" standard in s 67 of the Ordinance and in particular, to identify the elements necessary to satisfy the subjective and objective limbs of this test;

- which factors will guide the Commission in the use of its discretion to choose between the issuance of an infringement notice and bringing legal proceedings;

- whether and at what stage of the procedure infringement notice recipients would have access to the Commission's file;

- whether the Commission would indicate in the notice any amount of penalty or orders it would be seeking from the Competition Tribunal under s 92 if legal proceedings were brought.

21 Referral to a Government agency

The draft guideline should provide at paragraphs 2.1, 4.1 or 7.22 details as to how the Commission intends to coordinate its investigations and enforcement activities with other Government agencies.

21.1 Paragraphs 2.1 and 7.22 of the draft guideline mention "referrals" to and from other Hong Kong government agencies. It would be useful to provide more details on how these will be handled. It would be particularly useful for the draft guideline to cite as a possibility the conclusion of memoranda of understanding or other similar agreements between the Commission and other

authorities in Hong Kong. This would be particularly welcome in regulated sectors of the Hong Kong economy, where the Commission could understand and rely on the expertise developed by sector regulators.

21.2 As already mentioned above, this could be implemented at paragraphs 2.1 or 4.1, but could be repeated or amplified at paragraph 7.22.

We are grateful to the Competition Commission and the Competition Authority for being given the opportunity to offer our comments on the draft guideline. We hope they will be useful.

The Norton Rose Fulbright Asia competition team

ANNEX
OVERVIEW OF OUR PROPOSALS

	Reference	Proposal
1.	Paragraph 1.1	The reference to the merger rule at paragraph 1.1 of the draft guideline should indicate that the merger rule only applies in the telecommunications sector.
2.	Paragraph 2.1	Leniency and immunity applications should be listed as sources of investigation at paragraph 2.1.
3.	Paragraph 2.1	More guidance should be provided at paragraph 2.1 on referrals between the Commission and other domestic and foreign authorities, including a reference to the possibility of concluding memoranda of understanding and other cooperation agreements.
4.	Paragraphs 2.1, 4.1 or 7.22	The draft guideline should provide at paragraphs 2.1, 4.1 or 7.22 details as to how the Commission intends to coordinate its investigations and enforcement activities with other Government agencies.
5.	Paragraph 3.2	The guideline should provide at paragraph 3.2 an indicative timeframe within which the Commission will endeavour to complete its initial assessment.
6.	Section 3 or paragraph 6.3	There should be a clearer acknowledgment, either in section 3 or at paragraph 6.3 of the draft guideline, that the rules of Part 8 of the Ordinance concerning the protection of confidential information also apply during the initial assessment phase.
7.	Paragraphs 3.3 and 5.38	The guideline at paragraphs 3.3 and 5.38 should confirm the application of safeguards relating to professional legal privilege with respect to information and documents obtained during the initial assessment phase.
8.	Paragraph 3.3	The Commission should confirm at paragraph 3.3 of the guideline that the additional protections offered under ss 44 (privileges and immunities), 45 (privilege against self-incrimination), 46 (release from liability for disclosure of confidential information) and 58 (legal professional privilege) also apply during the initial assessment phase.
9.	Section 4	The guideline should clearly state in its section 4 that decisions made under s 39 will be formally documented and made available to the persons under investigation at the latest when the Commission seeks to take enforcement action.
10.	Paragraph 4.2 or 7.6	The guideline should include a more substantive discussion of reasons for not taking further action after receipt of a complaint or a referral. This could be included at paragraph 4.2 or at paragraph 7.6 of the guideline, and should be consistent with the

	Reference	Proposal
		discussion at paragraph 4 of the guideline on complaints.
11.	After paragraph 4.4	The Commission should adopt formal decisions to reject complaints and publicise these decisions. This may usefully be discussed at section 5 of the draft guideline on complaints or new paragraphs could be inserted after paragraph 4.4 of the draft guideline on investigations.
12.	After paragraph 4.4	The guideline should set out the procedure which the Commission intends to follow where it will take enforcement action without formally opening an investigation. This could be added at the end of section 4.
13.	Section 4	The guideline should clearly state in its section 4 that decisions made under s 39 will be formally documented and made available to the persons under investigation at the latest when the Commission seeks to take enforcement action.
14.	Section 5	The draft guideline should confirm in its section 5 that the Commission will make use of its investigation powers in respect of statutory bodies.
15.	Paragraphs 4.1 and 7.22	The draft guideline should indicate at paragraphs 4.1 and 7.22 how the Commission intends to coordinate its investigations and enforcement activities with the Competition Advisory Group (COMPAG) in respect of statutory bodies.
16.	Paragraph 5.1 or 5.8	The draft guideline should amplify its practical guidance at paragraph 5.1 on how the Commission intends to satisfy the "reasonable cause to suspect" standard so as to make it applicable to s 41 notices. Alternatively, the draft guideline could restate at paragraph 5.8 the Commission's guidance on what the legal threshold entails in practice in the context of s 41 notices.
17.	Paragraph 5.14	It would be useful if paragraph 5.14 of the draft guideline could indicate that the Commission contemplates, at least where practicable, providing advance notice of the issuance of a s 41 notices and discussing its contents ahead of their issuance with their intended recipients.
18.	Paragraph 5.17	The draft guideline should explain at paragraph 5.17 that individuals called for questioning under s 42 shall have a "connection with a relevant undertaking".
19.	Paragraph 5.18	The draft guideline should confirm at paragraph 5.18 that questions raised during the s 42 hearings should relate to matters the Commission "reasonably believes to be relevant to the investigation".

	Reference	Proposal
20.	Paragraph 5.18	Paragraph 5.18 should provide practical guidance on how the Commission intends to satisfy the "reasonable belief" test in s 42(1).
21.	Paragraph 5.1 or paragraphs 5.23 and 5.24	Guidance should be provided on how the Commission intends to satisfy the "reasonable cause to suspect" test under s 48, either at paragraph 5.1 or at paragraphs 5.23 and 5.24.
22.	Paragraph 5.23	Paragraph 5.23 of the draft guideline should explain as a matter of principle that the s 48 mechanism is limited to the conduct of documentary searches.
23.	Paragraphs 5.30 to 5.34	Additional guidance should be provided at paragraphs 5.30 to 5.34 on matters of law and policy in relation to the Commission's exercise of its powers under s 50 of the Ordinance.
24.	Paragraphs 5.30 to 5.34	Guidance should be provided at paragraphs 5.30 to 5.34 on practical aspects of on-premise documentary searches.
25.	Paragraphs 5.32 and 5.41	The guideline should confirm at paragraphs 5.32 and 5.41 as a matter of policy that the Commission will expressly recognise the privilege against self-incrimination available under common law and by extension, under s 65 of the Evidence Ordinance (Cap 8).
26.	Paragraph 5.34	The Commission should expressly acknowledge as a matter of policy at paragraph 5.34 of the draft guideline that the scope of professional legal privilege will extend to advice obtained from in-house counsel.
27.	Paragraph 5.34	The guideline at paragraph 5.34 should provide for a practical mechanism enabling a prompt initial resolution of disputes on the privileged nature of documents subject to on-premise searches under s 50.
28.	Paragraph 5.37	The Commission should expressly recognise at paragraph 5.37 of the draft guideline that, as a matter of principle. it will only seek statutory declarations in exceptional circumstances.
29.	Paragraph 5.37 or 5.44	The draft guideline should acknowledge, either at paragraph 5.37 or at paragraph 5.44, that exposure to follow-on litigation would constitute a "reasonable excuse" under s 52 for a refusal by a leniency or immunity applicant to provide a statutory declaration.

	Reference	Proposal
30.	Paragraph 5.41	As a matter of policy, the Commission may wish to extend the protection of privilege against self-incrimination to other proceedings not listed in s 45(3) to align the protection available to self-incriminating statements with that available with respect to confidential information under s 124 of the Ordinance. This could be implemented at paragraph 5.41 of the draft guideline.
31.	Paragraph 5.45	The guideline should provide at paragraph 5.45 an indicative timeframe within which the Commission will endeavour to complete its investigation.
32.	Paragraph 5.45	The Commission should commit at paragraph 5.45 of the guideline to organize state of play meetings.
33.	Section 6	The three procedural guidelines should adopt a consistent approach to the discussion of the protection of confidential information.
34.	Paragraphs 6.4 and 6.5	The draft guideline at paragraphs 6.4 and 6.5 should confirm that the Commission will treat information of the type mentioned at ss 123(1)(a) and (b) of the Competition Ordinance as confidential even if no claims to that effect are made.
35.	Paragraph 6.5	To the extent that the Commission considers that it has a discretion to reject confidentiality claims made under ss 123(1)(c) and (2) of the Competition Ordinance, the draft guideline at paragraph 6.5 should provide guidance on what the Commission's proposed criteria would be.
36.	Paragraph 6.8	The guideline should elaborate at paragraph 6.8 upon how the Commission intends to interpret the s 126(3) of the Ordinance exceptions to the general duty to protect confidential information.
37.	Paragraph 6.13	The draft guideline should expressly state as a matter of policy at paragraph 6.13 that it will only use information or documents obtained with respect to one case in connection with another case if it is able to satisfy the same legal standard as that applicable at the outset when gathering information for a new investigation.
38.	Paragraph 6.14	The Commission should revise the language at paragraph 6.14 of the draft guideline and be more open to accepting restrictions to the use of information so as not to prejudice the effectiveness of alternative methods of resolving suspected contraventions of the Ordinance.
39.	Section 7	If the stringent approach to the exclusion for compliance with legal requirements is retained in the guideline on the first conduct rule, the guideline should indicate at the outset of its section 7 that involvement of a statutory body, while not absolving other

	Reference	Proposal
		parties, will in principle lead the Commission to seek resolution by way of commitments and bring legal proceedings in the Competition Tribunal only in exceptional cases (this could alternatively be implemented in the guidelines on the first and second conduct rules).
40.	Paragraph 7.9	The Commission may wish to adopt at paragraph 7.9 of the draft guideline a procedure parallel to the warning notices mechanism under s 82 of the Ordinance with respect to suspected contraventions other than those for which a warning notice must be issued.
41.	Paragraph 7.10	The Commission should explain at paragraph 7.10 the process leading to its adoption of a consent order by the Competition Tribunal.
42.	Paragraphs 7.12 to 7.15	At paragraphs 7.12 to 7.15 the draft guideline should provide specific guidance with respect to how the Commission intends to give effect to the commitments procedures under s 60 of the Ordinance and the process leading up to the acceptance of a commitment under this procedure.
43.	Paragraphs 7.16 to 7.18	The draft guideline should provide at paragraphs 7.16 to 7.18 details as to the process relevant to the Commission's issuance of a warning notice under s 82 of the Ordinance.
44.	Paragraph 7.18	The draft guideline should provide guidance at paragraph 7.18 on the publicity aspects relating to a warning notice issued under s 82 of the Ordinance.
45.	Paragraphs 7.19 to 7.21	The draft guideline should provide at paragraphs 7.19 to 7.21 details as to the process relevant to the Commission's issuance of infringement notices.

NORTON ROSE FULBRIGHT
諾頓羅氏富布萊特
10 November 2014

DRAFT GUIDELINE ON APPLICATIONS FOR A DECISION UNDER SECTIONS 9 AND 24 (EXCLUSIONS AND EXEMPTIONS) AND SECTION 15 BLOCK EXEMPTION ORDERS UNDER THE COMPETITION ORDINANCE

Comments by Norton Rose Fulbright Hong Kong

We welcome the joint publication by the Competition Commission and the Communications Authority of, and the opportunity to comment on, the Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders released on 9 October 2014 under reference CCCAD2014006E.[1]

This submission mainly focuses on areas of concern in relation to the draft guideline, and we hope that these issues can be satisfactorily addressed as the Commission prepares to finalise the guideline for consultation with the Legislative Council.

While our submission relates to matters of concern, there are also many features which we hope will be retained in the final version of the guideline. Without being exhaustive, the following can be highlighted:

- the draft guideline in its English version uses very clear language and adopts a straightforward structure;
- paragraph 1.5 usefully confirms that exclusions are available by operation of the Ordinance and do not require a decision from the Commission;
- paragraph 2.6 provides clarity as regards the scope of the statutory body exclusion;
- paragraphs 6.14 and 6.15 encourage timely engagement of the Commission by potential applicants through an initial consultation with a view to assist timely preparation and processing of an application and, where relevant, identification of an alternative procedural route;
- paragraph 7.5 confirms that an applicant that engages the Commission in an initial consultation and provides an application consistent with issues discussed during that consultation may expect the preliminary assessment to be conducted within a shorter time frame; and
- figures 2 and 3 clearly set out the stages involved in the review of an application for decisions under ss 11, 15 and 26.

Our comments below generally follow the structure of the draft guideline. For ease of reference, we also include an Annex listing our proposals with references to the relevant paragraphs in the draft guideline.

[1] Consistent with the approach adopted in the Competition Ordinance, references in this submission to the Competition Commission are to be read as including the Communications Authority when they relate to the exercise of the Commission's functions in respect of broadcasting and telecommunications licensees.

1 Reference to the merger rule in the introduction

The reference to the merger rule at paragraph 1.1 of the draft guideline should indicate that the merger rule only applies in the telecommunications sector.

1.1 Paragraph 1.1 of the draft guideline states that "[t]he Ordinance also prohibits mergers which substantially lessen competition." This sentence should be amended to reflect the provisions of s 4 of Schedule 7 to the Ordinance, as follows: "The Ordinance also prohibits mergers involving telecommunications carrier licensees which substantially lessen competition."

2 Concerted practices and decisions of associations

Footnote 3 under paragraph 1.6 of the draft guideline should confirm that the notion of "agreements" also includes concerted practices and decisions of associations of undertakings.

2.1 Footnote 3 under paragraph 1.6 expands on the notion of "agreements" in the context of ss 9 and 11 of the Competition Ordinance. For the sake of clarity, and consistent with the provisions of s 6(2) of the Ordinance, this footnote should confirm that while s 9(1) refers only to "agreements", it also applies to concerted practices and decisions of associations of undertakings.

3 Exclusions and exemptions

The words "Agreements enhancing overall economic efficiency" should be added in the second column next to "Block Exemption Orders" in the table in Figure 1.

3.1 The useful table in Figure 1 could be read as suggesting that block exemption orders are available for different causes of exclusion. Adding the words "Agreements enhancing overall economic efficiency" in the second column next to "Block Exemption Orders" may better reflect the provisions of s 15(5) of the Competition Ordinance.

4 Confidentiality

- The three procedural guidelines should adopt a consistent approach to the discussion of the protection of confidential information;
- The guideline at paragraph 3.4 should confirm that the Commission will treat information of the type mentioned at ss 123(1)(a) and (b) of the Ordinance as confidential even if no claims to that effect are made; and
- To the extent that the Commission considers that it has a discretion to reject confidentiality claims made under ss 123(1)(c) and (2) of the Ordinance, the guideline at paragraph 3.4 should provide guidance on what the Commission's proposed criteria would be.

4.1 Each of the three procedural guidelines usefully discusses confidentiality in a different context. We welcome the Commission's announcement in its 2013/2014 Annual Report that it will be publishing its general policy on the collection, use and disclosure of information prior to the commencement of the Ordinance, but there is a need for a more consistent approach within the guidelines themselves.

4.2 Under s 123 of the Ordinance, information should be considered as confidential in two circumstances. Information shall be confidential by operation of the statute if it meets the conditions set forth at ss 123(1)(a) and (b), irrespective of whether a confidentiality claim is made. In addition, under ss 123(1)(c) and (2), information shall be confidential if a claim is made to that effect and reasons provided. For that second type of confidential information, a literal reading of the statutory text does not appear to give room for the Commission to reject a party's claim to confidentiality. The Ordinance imposes a duty to preserve confidentiality at ss 124 and 125. There are however relatively broad exceptions for authorised disclosures under s 126.

4.3 While the draft guideline seeks to establish an effective mechanism to facilitate the protection of confidential information, its paragraph 3.4 could be usefully improved in two ways. First, the guideline should confirm that the Commission will treat information of the type mentioned in ss 123(1)(a) and (b) as confidential even if no claims to that effect are made. Second, to the extent that the Commission considers that it has discretion to reject confidentiality claims made under ss 123(1)(c) and (2), it should provide guidance on what proposed criteria it would rely in such determination.

5 Use of information

- The guideline should expressly state at paragraph 4.1 that, as a matter of policy, the Commission will consider submissions on a "without prejudice" basis and accept that the use of certain information should be limited for the purpose of assessing the application; and

- The guideline should provide at paragraph 5.15 that where the Commission either declines to consider an application under ss 9, 15 or 24 or agrees to consider such application but finds that the agreement or conduct to which it relates does not benefit from an exclusion or exemption, it will refrain from bringing proceedings in the Competition Tribunal. Instead, the Commission would prioritise the use of commitments or other similar resolution mechanisms, and only bring proceedings in the Competition Tribunal in exceptional circumstances.

5.1 Paragraphs 4.1 and 5.15 of the draft guideline indicate that the Commission reserves the right to use information submitted as part of procedures following applications for individual decisions or for block exemptions in other contexts, including in support of any enforcement action the Commission may take. This principle also applies to information submitted in the context of the initial consultations described at paragraphs 5.8 and 6.13 of the draft guideline. Yet the draft guideline confirms the principle that applications made under ss 9, 15 and 24 of the Ordinance are not meant to confer immunity. The position of principle set out in these paragraphs appears

to be overly broad, and the Commission may wish to provide for exceptions that would facilitate its handling of these applications.

5.2 In practice, as acknowledged at paragraph 9.5 of the draft guideline, the Commission will often consider including conditions or limitations to its individual decisions or block exemption orders (under ss 11(2), 15(3) and 26(2) of the Ordinance). These often result from discussions between the Commission and the applicants in the course of the procedure. In this context, it would be useful to provide in the guideline (for example at paragraph 4.1) the possibility for the Commission to consider submissions on a "without prejudice" basis and to accept that the use of certain information should be limited for the purpose of assessing the application. This would foster a more open and effective engagement during the whole process.

5.3 Further, the guideline could indicate at paragraph 5.15 that if the Commission finds that the agreement or conduct that is the object of an application does not benefit from an exclusion or exemption, it would generally refrain from bringing proceedings in the Tribunal. The guideline would commit the Commission to seek to resolve concerns through commitments or a similar resolution mechanism, and to only bring proceedings in the Competition Tribunal in exceptional circumstances. This would make paragraph 5.15 of the draft guideline consistent with the policy expressed at its paragraph 6.15.

6 Block exemption applications

- The guideline at paragraph 5.3 should indicate how the Commission intends to determine whether applicants qualify to represent the "wider industry interest" threshold; and
- The guideline at paragraph 5.8 should express the Commission's willingness to adopt block exemption orders on its own initiative where certain agreements enhance "overall economic efficiency" and are "commonly used by undertakings throughout a market".

6.1 The draft guideline at paragraph 5.3 usefully indicates that applicants for block exemption orders should in principle be representative of "a wider industry interest". Without binding itself, the Commission could provide examples of such applicants, including professional bodies or trade associations or indicate threshold requirements above which applicants may qualify as being representative of such interest.

6.2 The draft guideline at paragraph 5.8 suggests that persons considering an application for an individual decision should discuss with the Commission about the possibility of applying for a block exemption where certain agreements enhance "overall economic efficiency" and are "commonly used by undertakings throughout a market". It may be useful to indicate in the guideline that the Commission would also consider adopting a block exemption order of its own initiative in such circumstances.

6.3 With reference to overseas experience, where the use of block exemptions have been commonplace in specific industry sectors, we would also encourage the Commission to look to these jurisdictions for guidance.

7 Lodging applications - Form AD and Form BE

The Commission should consult on the template Form AD and Form BE prior to their finalisation and annex them to the guideline.

7.1 As we understand that the lists of information contained in paragraphs 6.16 and 11.11 are not exhaustive, it would be useful for the Commission to consult the public on the template Form AD and Form BE prior to their finalisation.

8 Timeframe of the Commission's review of applications

The guideline should provide at paragraphs 6.2 and 11.9 a timeframe within which the Commission will endeavour to complete its review of applications made under ss 9, 15 and 24 of the Ordinance.

8.1 Notwithstanding the fact that the Commission has no statutory obligation to consider applications made under ss 9, 15 and 24 of the Ordinance and that the time required to consider such applications will depend on a number of factors, the Commission should remain mindful of commercial realities and implications of prolonged uncertainties for businesses when considering these applications. Therefore, the Commission should indicate in the guideline its commitment to review an application and to deliver a decision within a fixed time frame, failing which it should at least commit to review an application and deliver a decision within a reasonable time. This approach would also encourage and facilitate timely compliance by businesses with the Ordinance.

9 Novel or unresolved questions of wider importance

- The guideline should clarify at paragraph 6.6 to what extent goods or services concerned by an agreement or conduct must be of economic importance in order to merit consideration as an application that "poses a novel or unresolved question of wider importance" and specify the factors relevant to this assessment;

- The guideline should clarify at paragraph 6.6 to what extent agreements or conduct must be in widespread usage in the marketplace to merit consideration as an application that "poses a novel or unresolved question of wider importance" and specify the factors relevant to this assessment;

- The guideline should clarify at paragraph 6.6(b) that the meaning of "marketplace" should depend on market context and the nature of the industry with which the agreement or conduct is concerned; and

- Paragraph 6.7 of the draft guideline should refer to the possibility of relying on the significant existing guidance under overseas precedents and case law when determining whether a question is "novel" or "unresolved".

9.1 The guideline usefully provides at paragraph 6.6 the considerations that may be relevant to the Commission's assessment of whether an application under s 9 of the Ordinance concerns "a novel or unresolved questions of wider importance" by making reference to the economic importance of goods or services concerned by an agreement or conduct, and to the extent to which such agreement or conduct is in widespread usage in the marketplace. However, the guideline fails to specify the factors relevant to this assessment. Without binding itself to strict threshold requirements, the Commission should, as a first step, give indications of how it will assess economic importance and the criteria relevant to determining when an agreement or conduct will having sufficient economic importance to warrant consideration under s 9 of the Ordinance.

9.2 Similarly, the Commission should also introduce criteria or benchmarks against which parties are able to measure when determining whether an agreement or conduct is in widespread usage in the marketplace. In this regard, the Commission should clarify the meaning of "marketplace" and recognise that it may be much broader than the Hong Kong marketplace depending on market context and the nature of the industry with which the agreement or conduct is concerned.

9.3 Finally, in its appreciation of whether requirements under s 9(2)(a) and (b) (and the corresponding requirements under s 24(2)) are met, the Commission may also wish to refer in paragraph 6.7 of the draft guideline to the possibility of relying on the significant existing guidance under overseas precedents and case law. This is particularly relevant where conduct has effect in several jurisdicitions and has already been exempted or approved by foreign authorities making application of legislation similar to the Competition Ordinance.

10 Decisions not to consider applications

- The guideline should provide at paragraphs 7.3, 12.5 and 13.6 that where it declines to consider an application or to issue a block exemption order, it will not only inform the applicant of this decision, but also substantiate how the applicant has failed to meet the grounds set out in ss 9(2), 15(1) or 24(2) of the Ordinance; and

- Paragraphs 7.3, 12.5 and 13.6 should also provide for the possibility for the Commission to publish its decision to decline an application or a summary thereof.

10.1 It is submitted that paragraphs 7.3, 12.5 and 13.6 of the guideline should not only require the Commission to inform the applicant of a decision declining to consider its application but also to provide precise reasons explaining why it has declined to consider such application, including (in the case of individual applications) how the suitability factors were applied. The Commission should also consider to adopt publicity measures in respect of such decisions.

10.2 This approach would enhance transparency behind the Commission's decision-making process and offer additional legal comfort to applicants and third parties. While it is well understood that decisions not to consider individual applications do not constitute decisions under ss 11 or 26, and that the immunity under ss 12 and 27 would not apply, as a matter of good practice the Commission could seize the opportunity of applications for individual decisions to explain its

views on the application of the conduct rules to the relevant agreements or conduct. This would be particularly relevant where the Commission considers that causes for exclusion under Schedule 1 should not be considered – and a decision under ss 11 or 26 should therefore not be adopted – because the notified practices do not contravene the conduct rules.

10.3 The effect of decisions not to consider applications for individual decisions or for block exemption orders would be further enhanced if the Commission were to decide to publish them, in all or in part. In respect of block exemptions in particular, considering the Commission's very careful approach stated at paragraph 11.3, added transparency and publicity would be welcome as to why the conditions of s 15(1) of the Competition Ordinance are not met in a particular case or as to why the Commission does not see it opportune to issue a block exemption order.

11 Consideration of applications for individual decisions

- At paragraphs 8.9 and 8.10, the Commission should commit as a matter of principle to seek the applicant's views on a proposed decision and to organise access to the Commission's file in the event that the Commission were intent on applying conditions or limitations to its decision, or to adopt a decision that no cause for exclusion or exemption applies; and

- The guideline should clarify at paragraph 8.10 the circumstances in which a propsed decision will be published for public comment and clarify the factors relevant to determining whether a decision will likely be of "wider relevance" for the market.

11.1 The consultation procedure organised under ss 10 and 25 of the Competition Ordinance differs from corresponding procedures overseas in that there is no formal right for the applicant to comment on the Commission's proposed decision or to respond to representations made by third parties following the public notice.[2] In this context the Commission's policy expressed at paragraphs 8.8 and 8.9 to engage with applicants and to allow them to comment on third-party submissions and on the Commission's views is to be welcomed. However, it is submitted that this policy should be expanded and that the Commission should commit as a matter of principle to seek the applicant's views on a proposed decision and to organise access to the Commission's file in the event that the Commission were intent on applying conditions or limitations to its decision, or to adopt a decision that no cause for exclusion or exemption applies.

11.2 Further, as the Commission will only publish draft decisions that are likely to be of "wider relevance" for the market, the Commission should specify at paragraph 8.10 the factors relevant to this assessment and provide examples of when a decision will be considered to be of "wider relevance".

[2] See for example, in the UK, the (now repealed) s 3 of Schedule 5 to the Competition Act 1998, and in Singapore, ss 10 and 11 of the Competition (Notification) Regulations 2007.

12 Rescission of an individual decision

The guideline should clarify factors relevant to an assessment of whether there has been "a material change of circumstances" within paragraph 10.1, and give examples of what constitutes a material change of circumstances.

12.1 Paragraph 10.1 of the draft guideline provides that the Commission may rescind a decision where there is a material change of circumstances since the decision was made. This language simply echoes the text of the Ordinance, and fails to provide guidance on what constitutes a material change of circumstances. It is important for the Commission to clarify the meaning of this expression. At a minimum, the guidelines ought to give examples of material changes of circumstances. Without these clarifications, the Commission will be conferred an unduly broad discretion in pursuing its enforcement options.

13 Consideration of applications for block exemptions

A new paragraph should be inserted after paragraph 13.5, providing that where an application for an order was made, the Commission will seek the applicant's views on the text of a proposed block exemption order and will organise access to the Commission's file in the event that the Commission were intent on applying conditions or limitations to its order, or to adopt a decision not to issue a block exemption order.

13.1 The consultation procedure organised under s 16 of the Ordinance does not provide a formal right for person that has applied for an order under s 15(2) to comment on the text of the Commission's proposed order or to respond to representations made by third parties following the public notice. It is however submitted that the Commission should, consistent with the policy underlying paragraphs 8.9 and 8.10 in the case of applications for individual decisions, engage with the applicant and grant the applicant a right to be heard if the Commission is intent on applying conditions or limitations to its order or on deciding not to issue a block exemption order. This right to be heard should take the form of an opportunity to comment on a draft of the proposed decision and an opportunity to access the Commission's file.

14 Duration of block exemption orders

The guideline should clarify the factors that would influence the duration of block exemption orders further to the provisions contained in paragraphs 13.10 and 13.11.

14.1 Paragraphs 13.10 and 13.11 of the guideline require the Commission to specify the date on which a block exemption order will cease to have effect and a review will be undertaken. It would be helpful to include in the guideline the factors that would influence the duration of a block exemption order. In some cases, the existence of a block exemption is only meaningful as long as certain factors are satisfied. For example, block exemption orders relating to technology licensing may apply so long as the licensed property right has yet to lapse, expire or be declared invalid. In the case of know-how, the block exemption may apply as long as the licensed know-how remains secret.

15 Review of block exemption orders

- Paragraph 14.2 should give precisions on how the Commission intends to interpret the grounds set out in s 19(3) when considering whether to review a block exemption order; and
- In considering the influence of developments outside of Hong Kong, the Commission should only consider places with an economy comparable to that of Hong Kong.

15.1 Paragraph 14.2 of the guideline provides for a list of factors the Commission must consider in reviewing a block exemption order prior to the specified review date. While it can be appreciated that the Commission should retain some discretion in such reviews, these factors call for specifications on how they should be assessed. More specifically, when read in combination, these factors appear to call for a balancing test. In the event of conflict between the different elements of this test, it is unclear how they will be weighed and which of the matters specified will prevail in the Commission's assessment.

15.2 Specifically as regards the discretion to consider developments in "any place outside of Hong Kong" that affect a category of agreement, the Commission should remain mindful that any developments should be viewed in light of their market context. The Commission should take care not to transpose or import policy considerations and value judgments that are not suited to the Hong Kong context. Therefore, we would encourage the Commission to consider developments in only those economies with a market context comparable to that of Hong Kong.

16 Variation or revocation of a block exemption order

- The guideline should provide explanations on the reasons prompting a variation or revocation of a block exemption order within the meaning of paragraph 14.4; and
- The guideline should commit the Commission to provide reasons with respect to decisions to vary or revoke a block exemption order.

16.1 The grounds specified in s 19(3) of the Ordinance suggest a balancing test in the review of a block exemption order. However, concrete guidance in paragraph 14.2 of the draft guideline on the interpretation of these grounds remains absent. To enhance transparency behind the Commission's decision-making process and as a matter of good practice, the guideline should not only require the Commission to provide precise reasons motivating a proposal to vary or revoke a block exemption order but also to explain how the three grounds specified contained in s 19(3) were considered in this arriving at its determination to vary or revoke a block exemption order.

We are grateful to the Competition Commission and the Competition Authority for being given the opportunity to offer our comments on the draft guideline. We hope they will be useful.

The Norton Rose Fulbright Asia competition team

ANNEX
OVERVIEW OF OUR PROPOSALS

	Reference	Proposal
1.	Paragraph 1.1	The reference to the merger rule at paragraph 1.1 of the draft guideline should indicate that the merger rule only applies in the telecommunications sector.
2.	Paragraph 1.6	Footnote 3 under paragraph 1.6 of the draft guideline should confirm that the notion of "agreements" also includes concerted practices and decisions of associations of undertakings.
3.	Figure 1 under paragraph 2.7	The words "Agreements enhancing overall economic efficiency" should be added in the second column next to "Block Exemption Orders" in the table in Figure 1.
4.	Section 3	The three procedural guidelines should adopt a consistent approach to the discussion of the protection of confidential information.
5.	Paragraph 3.4	The guideline at paragraph 3.4 should confirm that the Commission will treat information of the type mentioned at ss 123(1)(a) and (b) of the Ordinance as confidential even if no claims to that effect are made.
6.	Paragraph 3.4	To the extent that the Commission considers that it has a discretion to reject confidentiality claims made under ss 123(1)(c) and (2) of the Ordinance, the guideline at paragraph 3.4 should provide guidance on what the Commission's proposed criteria would be.
7.	Paragraph 4.1	The guideline should expressly state at paragraph 4.1 that, as a matter of policy, the Commission will consider submissions on a "without prejudice" basis and accept that the use of certain information should be limited for the purpose of assessing the application.
8.	Paragraph 5.3	The guideline at paragraph 5.3 should indicate how the Commission intends to determine whether applicants qualify to represent the "wider industry interest" threshold.
9.	Paragraph 5.8	The guideline at paragraph 5.8 should express the Commission's willingness to adopt block exemption orders on its own initiative where certain agreements enhance "overall economic efficiency" and are "commonly used by undertakings throughout a market".

	Reference	Proposal
10.	Paragraph 5.15	The guideline should provide at paragraph 5.15 that where the Commission either declines to consider an application under ss 9, 15 or 24 or agrees to consider such application but finds that the agreement or conduct to which it relates does not benefit from an exclusion or exemption, it will refrain from bringing proceedings in the Competition Tribunal. Instead, the Commission would prioritise the use of commitments or other similar resolution mechanisms, and only bring proceedings in the Competition Tribunal in exceptional circumstances.
11.	Paragraphs 6.2 and 11.9	The guideline should provide at paragraphs 6.2 and 11.9 a timeframe within which the Commission will endeavour to complete its review of applications made under ss 9, 15 and 24 of the Ordinance.
12.	Paragraph 6.6	The guideline should clarify at paragraph 6.6 to what extent goods or services concerned by an agreement or conduct must be of economic importance in order to merit consideration as an application that "poses a novel or unresolved question of wider importance" and specify the factors relevant to this assessment.
13.	Paragraph 6.6	The guideline should clarify at paragraph 6.6 to what extent agreements or conduct must be in widespread usage in the marketplace to merit consideration as an application that "poses a novel or unresolved question of wider importance" and specify the factors relevant to this assessment.
14.	Paragraph 6.6	The guideline should clarify at paragraph 6.6(b) that the meaning of "marketplace" should depend on market context and the nature of the industry with which the agreement or conduct is concerned.
15.	Paragraph 6.7	Paragraph 6.7 of the draft guideline should refer to the possibility of relying on the significant existing guidance under overseas precedents and case law when determining whether a question is "novel" or "unresolved".
16.	Paragraphs 7.3, 12.5 and 13.6	The guideline should provide at paragraphs 7.3, 12.5 and 13.6 that where the Commission declines to consider an application or to issue a block exemption order, it will not only inform the applicant of this decision, but also substantiate how the applicant has failed to meet the grounds set out in ss 9(2), 15(1) or 24(2) of the Ordinance.
17.	Paragraphs 7.3, 12.5 and 13.6	Paragraphs 7.3, 12.5 and 13.6 should also provide for the possibility for the Commission to publish its decision to decline an application or a summary thereof.
18.	Paragraphs 8.9 and 8.10	At paragraphs 8.9 and 8.10, the Commission should commit as a matter of principle to seek the applicant's views on a proposed decision and to organise access to the Commission's file in the event that the Commission were intent on applying conditions or limitations to its decision, or to adopt a decision that no cause for exclusion or exemption applies.

	Reference	Proposal
19.	Paragraph 8.10	The guideline should clarify at paragraph 8.10 the circumstances in which a propsed decision will be published for public comment and clarify the factors relevant to determining whether a decision will likely be of "wider relevance" for the market
20.	Paragraph 10.1	The guideline at paragraph 10.1 should clarify factors relevant to an assessment of whether there has been "a material change of circumstances", and give examples of what constitutes a material change of circumstances.
21.	After paragraph 13.5	A new paragraph should be inserted after paragraph 13.5, providing that where an application for an order was made, the Commission will seek the applicant's views on the text of a proposed block exemption order and will organise access to the Commission's file in the event that the Commission were intent on applying conditions or limitations to its order, or to adopt a decision not to issue a block exemption order.
22.	Paragraphs 13.10 and 13.11	The guideline should clarify the factors that would influence the duration of block exemption orders further to the provisions contained in paragraphs 13.10 and 13.11.
23.	Paragraph 14.2	Paragraph 14.2 should give precisions on how the Commission intends to interpret the grounds set out in s 19(3) when considering whether to review a block exemption order.
24.	Paragraph 14.2	In considering the influence of developments outside of Hong Kong mentioned at paragraph 14.2, the Commission should only consider places with an economy comparable to that of Hong Kong.
25.	Paragraph 14.4	The guideline should provide precisions on the reasons prompting a variation or revocation of a block exemption order within the meaning of paragraph 14.4.
26.	Paragraph 14.8	The guideline at paragraph 14.8 should commit the Commission to provide reasons with respect to decisions to vary or revoke a block exemption order.
27.	New appendix	The Commission should consult on the template Form AD and Form BE prior to their finalisation and annex them to the guideline.