**Comments on the Competition Commission's draft guidelines**
**by the Association of China-Appointed Attesting Officers Limited**

Background

1. On 9 October 2014, the Competition Commission (**the "Commission"**) and the Communications Authority (**the "CA"**) released six draft guidelines under the Competition Ordinance (**the "Ordinance"**) for public comment.

2. These guidelines include the Draft Guideline on the First Conduct Rule (**the "First Conduct Rule Draft Guideline"**), the Draft Guideline on the Second Conduct Rule (**the "Second Conduct Rule Draft Guideline"**), and the Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 (Block Exemption Orders) (**the "Applications Draft Guideline"**).

3. The Association of China-Appointed Attesting Officers Limited (**the "ACAAO"**) makes this submission in relation to two specific concerns about the guidelines:

   (1) That a decision application made under section 9 or 24 of the Ordinance, or an application for a section 31 public policy exemption,[1] does not afford the undertakings concerned[2] with the application any immunity (**"Concern (1)"**); and

   (2) That the Commission may use the information provided by a decision or an exemption applicant in a related enforcement action (**"Concern (2)"**).

Concern (1)

*Decision application made under section 9 or 24 of the Ordinance*

[1] The comments relating to the section 31 public policy exemption in this submission also apply, *mutatis mutandis*, to other exemptions (including disapplications) under the Ordinance, e.g. under sections 4 and 5 (the Chief Executive in Council's power to disapply the competition rules to "specified persons" and "persons engaged in specified activities") and under section 32 (exemption to avoid conflict with international obligations).
[2] Generally, the phrase "the undertakings concerned" when used in this submission is to be read as also encompassing any associations of undertakings concerned.

4. In order to "seek greater legal certainty", an application may be made under section 9 or 24 of the Ordinance for a decision as to whether or not an agreement[3] or certain conduct is excluded or exempt from the first or the second conduct rule (First Conduct Rule Draft Guideline, Annex, paragraph 1.3; Second Conduct Rule Draft Guideline, paragraph 6.3).

5. Paragraph 5.15 of the Applications Draft Guideline states, *inter alia*, that:

   "Where an application is made in relation to an existing agreement or conduct, the Ordinance does not afford the undertakings concerned any immunity. The Commission may in its discretion, initiate enforcement action in respect of any such agreement or conduct (including proceedings before the Tribunal) if it declines to consider an application, make a Decision, or issue a Block Exemption Order."

6. For the reasons explained below, the ACAAO is of the view that paragraph 5.15 of the Applications Draft Guideline should be amended to afford the undertakings concerned with a decision application *provisional immunity* from enforcement action by the Commission.

7. <u>First, provisional immunity is important as it provides legal certainty to undertakings seeking compliance with the Ordinance.</u> According to sections 9(2) and 24(2), the Commission is only required to consider a decision application if, *inter alia*: "(a) the application <u>poses novel or unresolved questions</u> of wider importance or public interest in relation to the application of exclusions or exemptions under this Ordinance; [and] (b) the application raises a question of an exclusion or exemption under this Ordinance for which there is <u>no clarification in existing case law or decisions of the Commission</u>". As the Commission recognises in the Applications Draft Guideline, the purpose of applying for a decision is to "seek greater legal certainty" (First Conduct Rule Draft Guideline, Annex, paragraph 1.3; Second Conduct Rule Draft Guideline, paragraph 6.3). Given the lack of legal certainty and the circumstances leading to a decision application (i.e. there being "novel or unresolved questions" and "no clarification in existing case law or decisions of the Commission"), until the Commission makes a decision under section 11 or 26, it would be unfair to take enforcement action against the undertakings concerned. Regard should be had to the fact that such undertakings, by seeking legal certainty through making a decision application, are making good faith efforts to comply with the Ordinance, and accordingly, should be afforded provisional immunity for their efforts.

[3] Generally, the term "agreement" when used in this submission is to be read as also encompassing a concerted practice and a decision of an association of undertakings: see section 6(2) of the Ordinance and footnote 5 of the First Conduct Rule Draft Guideline.

8. Secondly, the undertakings concerned with an application should be afforded sufficient time to make adjustments in compliance with the Ordinance in light of a declination of the application or an adverse decision by the Commission. In the event that the Commission declines to consider an application (Applications Draft Guideline, paragraph 7.3) or makes a decision adverse to the undertakings concerned (i.e. the agreement or conduct in question is not excluded or exempt from the application of the first and/or the second conduct rule: Applications Draft Guideline, paragraph 9.1) and notifies the applicant accordingly, even assuming that the undertakings concerned do not seek to challenge the Commission's declination or decision, the undertakings concerned still need time to make adjustments (e.g. varying or abandoning the agreement or conduct in question) in order to comply with the Ordinance. It will be unfair to initiate enforcement action against the undertakings concerned shortly after the Commission declines an application or makes a decision. It is hence recommended that where a decision application is made in relation to an agreement or conduct, the applicant and other undertakings concerned with the application should be immune from enforcement action in respect of such agreement or conduct *while the application is pending* and *for a reasonable period of time after the Commission's notification of its declination to consider the application or its decision that such agreement or conduct is not excluded or exempt from the application of the first and/or the second conduct rule*. It is recommended that such reasonable period of time should be no less than 90 days. The Commission should adopt such a provisional immunity arrangement as part of its enforcement policy and have it clearly stated in its guidelines.

9. Thirdly, the undertakings concerned with an application should be afforded sufficient time to consider whether/how to challenge a declination of the application or an adverse decision by the Commission. An application may be made to the Tribunal under section 84 of the Ordinance for a review of a decision made by the Commission under section 11 or 26. Besides, a declination by the Commission to consider an application under section 9 or 24 may possibly be challenged by judicial review. Since it takes time for the undertakings concerned with an application to decide whether/how to challenge a declination of the application or an adverse decision by the Commission, as recommended in paragraph 8 above, the undertakings concerned should be protected by provisional immunity not only while an application is pending, but also for a reasonable period of time (at least 90 days) after the Commission's notification of its declination of the application or adverse decision.

10. Fourthly, similar provisional immunity arrangements can be found in other competition law jurisdictions:

(1) Singapore: Consider Singapore, which has an economy similar to Hong Kong. Similar to section 9 of the Hong Kong Ordinance, section 44 of the Singapore Competition Act (**the "Singapore Act"**) (Cap. 50B) provides that an application may be made to the Competition Commission of Singapore (**"CCS"**) for a decision as to: "(a) whether the section 34 prohibition [(i.e. the equivalent of the first conduct rule)] has been infringed; and (b) if it has not been infringed, whether that is because of the effect of an exclusion or because the agreement is exempt from the prohibition." Importantly, section 44 of the Singapore Act further provides that:

"(3) If an agreement to which the section 34 prohibition applies has been notified to the Commission under this section, no penalty shall be imposed under this Part in respect of any infringement of the prohibition by the agreement which occurs during the period —

(a) beginning with the date on which the notification was given; and

(b) ending with such date as may be specified in a notice in writing given to the applicant by the Commission when the application has been determined.

(4) The date specified in a notice under subsection (3)(b) shall not be earlier than the date on which the notice is given."

The "provisional immunity"[4] provided for under sections 44(3) and 44(4) is effective as from "the date on which the notification [of the agreement to the CCS] was given" and until the "date … specified in a notice in writing given to the applicant by the Commission when the application has been determined"; the latter date "shall not be earlier than the date on which the notice is given". It is suggested that the purpose of such an arrangement is to enable the CCS to provide sufficient time for the undertakings concerned with an application to make adjustments in compliance with the Singapore Act in light of an adverse decision by the CCS. This is in line with the recommendation in paragraph 8 above.

(2) United Kingdom (**"UK"**): It is noteworthy that section 44 of the Singapore Act corresponds to section 14 of the UK Competition Act 1998 (**the "UK Act"**) before the latter was repealed due to abolition of the notification system in the UK.[5] Sections 14(4)

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[4] Which is a phrase used in the CCS Guidelines on Filing Notifications for Guidance or Decision: http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/NGD_Jul07FINAL(2013).pdf.

[5] Richard Whish and David Bailey, *Competition Law* 403-404 (7th ed. 2012).

and 14(5) of the UK Act provided for provisional immunity in the same manner as sections 44(3) and 44(4) of the Singapore Act.

(3) Australia: Authorisation may be sought from the Australian Competition and Consumer Commission (**the "ACCC"**) to engage in certain anti-competitive arrangements or conduct when it is satisfied that the public benefit outweighs the public detriment.[6] Authorisation provides statutory protection against legal action under certain competition provisions of the Competition and Consumer Act 2010 (Cth) (**the "Australia Act"**).[7] The ACCC may grant *interim authorisation* to allow parties to engage in the proposed practice while due consideration is given to the application for authorization *or* for the 21-day period during which applicants or interested parties may apply to the Tribunal for a review of an ACCC determination, amongst other reasons.[8] Such interim authorization arrangement in Australia is analogous to the provisional immunity in Singapore (and previously in the UK) and is consistent with the recommendation in paragraph 8 above and the rationales explained in paragraphs 7-9 above.

*Application for a section 31 exemption*[9]

11. The rationales discussed in paragraphs 7-9 above for provisional immunity in the context of a decision application apply *mutatis mutandis* to an application for a public policy exemption made by the Chief Executive in Council under section 31 of the Ordinance.

12. It is hence recommended that where a section 31 exemption application is made in relation to an agreement or conduct (or a class of agreement or conduct), the applicant and other undertakings concerned with the application should be immune from enforcement action in respect of such agreement or conduct (or such class of agreement or conduct) *while the application is pending* and *for a reasonable period of time (at least 90 days) after the Commission's notification of its decision not to make an exemption order under section 31*. The Commission should adopt such a provisional immunity arrangement as part of its enforcement policy and have it clearly stated in its guidelines.

Concern (2)

13. Paragraph 5.15 of the Applications Draft Guideline states that:

[6] https://www.accc.gov.au/business/applying-for-exemptions/authorisation
[7] Paragraph 1.4 of the ACCC's Authorisation Guidelines 2013: https://www.accc.gov.au/system/files/Authorisation%20guidelines.pdf.
[8] Paragraph 8.3 of the ACCC's Authorisation Guidelines 2013, citing sections 91(2)(a) to 91(2)(c) of the Australia Act.
[9] See footnote 1 above.

"Where an application is made in relation to an existing agreement or conduct, the Ordinance does not afford the undertakings concerned any immunity. The Commission may in its discretion, initiate enforcement action in respect of any such agreement or conduct (including proceedings before the Tribunal) if it declines to consider an application, make a Decision, or issue a Block Exemption Order. In any such case, the Commission may use information provided by the applicant in the relevant enforcement action".

14. As mentioned above, regard should be had to the fact that undertakings may be seeking a decision in a good faith effort to comply with the Ordinance. It appears unfair if, on the one hand, an applicant is encouraged to make full and frank disclosure of circumstances pertaining to the agreement or conduct in question, but, on the other hand, all of the information disclosed may be used against the applicant and other undertakings concerned when the Commission takes enforcement action against them in respect of such agreement or conduct. The same considerations apply to a section 31 exemption application. Accordingly, the ACAAO makes the below recommendations.

15. First, confidential information provided as part of a decision application under section 9 or 24 or a section 31 exemption application should not be used by the Commission in a relevant enforcement action against the applicant and other undertakings concerned with the application.

(1) Paragraph 4.1 of the Applications Draft Guideline makes no distinction between confidential and non-confidential information when it states that:

"Information received by the Commission from applicants or other parties cannot be confined for use only in the Commission's processes for making a Decision or issuing a Block Exemption Order. The Commission can use any information received, with or without notice, for other purposes under the Ordinance."

(2) However, a decision applicant may make a claim for confidentiality in respect of information in its application form (i.e. Form AD) so long as a non-confidential version of the decision application is also submitted for publication on the Commission's website (paragraphs 3.4 and 8.2 of the Applications Draft Guideline; section 34(2) of the Ordinance).

(3) While it may be difficult to prevent the Commission from using the publicly available information contained in the non-confidential version of the decision application in a related enforcement action, the Commission should be prevented from exploiting confidential information it receives for one purpose (i.e. for a decision application) for a wholly different purpose (i.e. for taking enforcement action) which is prejudicial to the applicant and other undertakings concerned with the application. Not only is such exploitation of confidential information unfair to undertakings seeking a decision in a good faith effort to comply with the Ordinance, but it also facilitates the disclosure of confidential information pursuant to section 126(1) of the Ordinance (e.g. during enforcement or judicial proceedings) which may be prejudicial to the undertakings/ persons to whom the information relates as well as contrary to public interest.

(4) The above arguments apply *mutatis mutandis* to the exploitation or disclosure of confidential information provided by a section 31 exemption applicant for the purpose of taking enforcement action against the applicant and other undertakings concerned with the exemption application.

(5) Accordingly, it is recommended that information barriers be established within the Commission to prevent the exchange of information between the staff responsible for handling decision applications (**the "Applications Division"**) and the staff responsible for enforcement (**the "Enforcement Division"**). In particular, the Applications Division should be prohibited from passing on any confidential information obtained from a decision application to the Enforcement Division.

(6) Likewise, the Chief Executive in Council and the HKSAR Government should be prohibited from passing on any confidential information obtained from a section 31 exemption application to the Commission (or at least, the Enforcement Division of the Commission).

(7) It is recommended that the information barrier policy described in paragraphs 15(5) and 15(6) above be adopted and clearly set out in the Commission's guidelines.

16. Secondly, in any event, any information (confidential or non-confidential) obtained from a decision application under section 9 or 24 or a section 31 exemption application should

not be used for taking enforcement action against the applicant and other undertakings concerned with the application during the period of provisional immunity proposed above (see paragraphs 8 and 12 above). Reference should be made to the reasons provided in paragraphs 7-11 above.

Conclusion

17. It is sincerely hoped that the Commission will give due consideration to this submission and amend its guidelines in light of the comments and recommendations in this submission.

18. Should you have any questions arising from this submission, please do not hesitate to contact Mr. Edward Mok

Secretariat of Association of China-Appointed Attesting Officers Limited

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