

SUBMISSION TO HONG KONG COMPETITION COMMISSION

in response to the

DRAFT GUIDELINE ON COMPLAINTS

DRAFT GUIDELINE ON INVESTIGATIONS

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

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Certari Consulting Limited

Provides policy advice to governments, enforcement training to regulators, and compliance training to companies in relation to competition law and economic regulation.

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This Submission

Sets out the views solely of Certari Consulting Ltd.

Confidentiality is not asserted in relation to any part of this submission.

Executive Summary

1. Certari Consulting Limited is pleased to have the opportunity to offer the following comments on the draft guidelines on procedural matters recently issued by the Competition Commission and Communications Authority.¹ We consider the development of clear, certain and economically principled guidelines a matter of vital importance to the successful implementation of the *Competition Ordinance* (Cap. 619).
2. We submit that the Draft Procedural Guidelines should each be amended and revised drafts issued, incorporating changes proposed in the following in the following paragraphs, for a further round of public consultation.
3. In particular, to clarify the status of the guidelines and to provide greater certainty for undertakings in Hong Kong, revised drafts of the guidelines should include a statement that the Commission will state its reasons for departing from its own guidelines, in any case in which it does that.

I. The Status of the Guidelines

4. The issuance of guidelines elaborating the responsible agency's approach to interpreting and applying the relevant competition laws has become a widespread practice internationally. In order to deter anti-competitive conduct effectively, it is desirable for competition legislation to give the enforcement agency considerable flexibility to respond to conduct of varying kinds. Also to ensure effective deterrence, it is desirable for guidelines to assist undertakings to understand how the agency will approach its role. This includes signaling clearly to undertakings the kinds of conduct and circumstances that are likely to attract enforcement action and those that are not. Guidelines should candidly identify conduct the agency does not consider prone to be harmful, so that undertakings are not deterred by uncertainty from engaging in that conduct.
5. For guidelines to be effective in their role, it is essential that users – i.e. Hong Kong undertakings and those that advise them – must have confidence that the

¹ Specifically, the Competition Commission and Communications Authority *Draft Guideline on Complaints -- 2014*; *Draft Guideline on Investigations -- 2014*; and *Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders – 2014*, issued in October 2014 (collectively, “Draft Procedural Guidelines”).

agency will itself adhere to its published guidelines. Guidelines generally are not legally binding and the enforcement agency issuing them must be able to revise its guidelines in light of experience over time. The agency issuing the guidelines should also be able to depart from them where circumstances require – but the agency should accept that it bears an onus of justifying any departure that it considers necessary to make.

6. The statement made by the UK communications regulator Ofcom in its guidelines has substantial merit and should be adopted in all guidelines issued by the Hong Kong Competition Commission:

These guidelines set out Ofcom’s general approach to enforcement in the areas covered by the guidelines. They do not have binding legal effect. Where we depart from the approach set out in these guidelines, we will be prepared to explain why.²

7. Such a commitment is particularly important in Hong Kong, where the business community was repeatedly reassured, during the long Bills Committee process and lengthy debates in the Legislative Council, that areas of apparent uncertainty would be resolved through guidelines to be issued by the Commission. Without such a commitment being expressed in the guidelines, it is foreseeable that the business community may feel that the proposed guidelines do not resolve the apparent uncertainties that have caused them concern.

II. Commencement of a Proceeding

8. Clarity as to the thresholds for commencement of a competition proceeding is vitally important for any competition regime, particularly in the very early days of its operation. In this context, we make two submissions.
9. First, we note that the Draft Guideline on Complaints asserts: “*Section 37(2) of the Ordinance provides the Commission with the discretion to decide which complaints may warrant investigation.*” Similarly, the Draft Guideline on Investigations asserts that: “*Under sections 37 and 39 of the Ordinance, the Commission has discretion whether to investigate a matter.*” We submit that

² See, e.g., Ofcom *Enforcement Guidelines* (2012) para 1.25; see also Ofcom *Dispute Resolution Guidelines* (2011) para 1.8.

Commission does not have an unfettered discretion to decide which complaints it will investigate, though it has some flexibility in deciding how deeply it will investigate a matter.

10. The Legislative Council has delegated to the Competition Commission certain statutory functions, including “*to investigate conduct that may contravene the competition rules and enforce the provisions of this Ordinance*”.³ Accordingly, the Competition Commission has a general duty to investigate complaints made to it. The effect of s 37, we submit, is to qualify the Commission’s general duty to investigate complaints, by authorizing it not to investigate “*if it does not consider it reasonable to do so*” and, in particular, where the complaint is trivial, frivolous, etc. This does not give rise to an unfettered discretion and the guideline should be amended, we submit, to state the kinds of circumstances in which the Commission is likely to consider it would not be reasonable to investigate a complaint.
11. Secondly, we note that the Draft Guideline on Applications states: “*The Commission will generally only consider applications that fulfil all the Suitability Factors*” under ss 9(2) and 24(2). We submit that this position is not required by ss 9(2) and 24(2). Those sections operate to define narrowly the circumstances in which the Commission is obligated to consider an application for decision. That is, if all three “Suitability Factors” are present the Commission must consider the application. Otherwise, where one or more of those factors is absent, the Commission nevertheless ought normally to consider the application unless resource constraints or other legally valid reasons prevent it from doing so.

III. Commission Powers in Respect of Information

12. Access to information on which it can place reliance is vital to a competition authority’s ability to perform its functions. Undertakings will more readily disclose information, in our experience, where they have confidence in the authority’s ability and willingness to protect reasonable expectations of confidentiality. The guidance offered by the Commission in relation to its

³ *Competition Ordinance* (Cap. 619) s 130(a).

information-gathering powers and its handling of confidential information, therefore, is particularly important. We offer the following submissions.

13. First, we submit that it is misleading for the Draft Guideline on Applications to state that a party submitting information to the Commission “*may request confidential treatment of that information*”⁴ and that “[*e*]ven if the Commission initially allows information to be treated as confidential”⁵ it may subsequently require the information to be publicly disclosed. The *Competition Ordinance* provides for lawful disclosure of “confidential information” in specified circumstances but the confidential status of information is not “requested” by a party and “allowed” by the Commission. Rather, s 123(2) provides that information “is also to be regarded as confidential information” under Part 8 if a person identifies it as being such and “provides a statement in writing setting out the reasons why, in that person’s opinion, the information is confidential.” Although the Ordinance provides for lawful disclosure of confidential information in specified circumstances (under s 126), the character of the information is determined by the party providing that information (under s 123(2)).
14. Secondly, we note that the Draft Guideline on Investigations asserts that “*Generally, information obtained by the Commission in one matter may be used by the Commission in another matter. This is subject to any legal requirements to the contrary.*”⁶ In many jurisdictions, common law restricts the ability of an agency to use information that has been compulsorily obtained (i.e. information obtained by the exercise of a power to compel the production of information) to the purpose for which the power was exercised. We query whether information obtained in one matter may “generally” be used in another and submit that this proposition should be qualified by referring more particularly to the relevant “legal requirements to the contrary”.
15. Thirdly, we are concerned to note that the Draft Guideline on Applications proposes that “*The onus is on the applicant to provide sufficient evidence to*

⁴ Draft Guideline on Applications, para 3.1.

⁵ Draft Guideline on Applications, footnote 6.

⁶ Draft Guideline on Investigations, para 6.13.

support its Application” for a Decision.⁷ While it is appropriate for applicants to bear the onus of providing sufficient evidence for the Commission to commence its preliminary review of the matter, it is very seldom practical for applicants to provide evidence sufficient to support a decision on the application. This sentence should be altered to clarify its intended meaning.

16. Normally, it will also not be practical for an applicant to provide “*market share data (including for competitors)*”.⁸ An applicant will usually possess information about its own value or volume of sales but will not usually know the size of the market overall, so will not know its share of the market, and it ought not to know its competitors’ shares of the market. In addition, as the Commission will be aware, a businessperson’s conception of the “market” in which he or she trades and the “relevant market” for purposes of competition law analysis are often very different things. The guideline should be amended to make clear that applicants need only provide such sales or market share data as may reasonably be available to them. The Commission must exercise its information-gathering powers to acquire from other market participants the data that will enable it to calculate market shares.

IV. Availability of Block Exemptions

17. The Block Exemption Order (“**BEO**”) procedure under the *Competition Ordinance* provides a valuable mechanism to provide certainty for multiple undertakings that a particular category of agreement is “excluded” and that entering into or giving effect to such an agreement will not attract liability under the Ordinance. As this procedure provides an important avenue for undertakings to obtain increased certainty as to the status of agreements they commonly use, it is regrettable, we submit, that the Draft Guideline on Applications appears to raise barriers to its use.
18. First, the Draft Guideline on Applications states that “*The Commission may in its discretion, initiate enforcement action...*” in respect of any agreement if it declines to consider an application or issue a BEO. This stance is not conducive to legal certainty or to fostering compliance, in the early days of the

⁷ Draft Guideline on Applications, para 6.8.

⁸ Draft Guideline on Applications, paras 6.16(d) and 11.13(d).

Competition Ordinance regime, we submit. A more constructive approach, in our view, would be for the relevant guideline to confirm that the Commission will not initiate enforcement action in such circumstances, provided that the applicant(s) promptly take steps to terminate the offending agreement or parts of it.

19. Secondly, we query whether there is a proper statutory basis for the proposed requirement that “*the resources required for considering whether to issue a Block Exemption Order are likely to be proportionate to the expected public benefit of issuing such an order*”. We note that this test is not stated in the *Competition Ordinance*. We submit that the Draft Guideline on Applications should be amended to omit this requirement. The preferable approach, we submit, is that the relevant guideline confirm that the Commission will examine any properly made applications for BEO, subject to any statutory grounds for not doing so or resource constraints that prevent the Commission from doing so.
20. Thirdly, we note with concern the observations that sector specific BEOs “*should be seen as an exceptional measure*” and that similar processes overseas “*take several years*”. We submit that it is important under the Hong Kong competition regime for BEOs to be readily available. It appears that the policy and scheme of the Ordinance is for undertakings to self-assess the exclusion or exemption of their arrangements or conduct if they wish, and obtain the Commission’s confirmation by way of Decision or BEO if they prefer. Undertakings ought not to be compelled to self-assess whether exclusions or exemptions apply.
21. If agreements of a particular kind are in common use in a sector, or by a group of undertakings, then we submit that the Commission must expeditiously consider any properly made application for a BEO. It is apparent that the sector or group of undertakings may be precluded from obtaining successive Decisions, because the agreements raise “novel or unresolved questions” only at the first application, yet a single Decision on the particular facts of the first such application may not realistically provide legal certainty on which the whole sector can rely.
22. Fourthly, we query the statutory basis for the proposition that the applicant for a

BEO “*must demonstrate*” that the applicant is “*representative of a wider industry interest*”.⁹ As a matter of practice, BEOs are likely to be sought by an entity that represents the industry but that does not appear to be required by the Ordinance nor should it be necessary to prove at the application stage.

V. Criteria for Decisionmaking

23. Guidelines should state, so far as possible, the kinds of criteria, information or indicia to which the Commission will have regard when exercising a discretion or making a decision on a particular matter. To the extent that the Draft Procedural Guidelines do this, we welcome that. We submit, however, that additional criteria should be set out in the draft Guidelines in relation to certain important Commission decisions.
24. First, the Draft Guideline on Complaints and Draft Guideline on Investigations do not fit seamlessly together. As a consequence, we submit, when a complaint will proceed from “preliminary review” to “initial assessment,” and from “initial assessment” to “investigation” is not as clear as it could be. Identical criteria are indicated for deciding “*which complaints warrant further assessment*” (apparently prior to “Initial Assessment”) and later for deciding “*whether a matter warrants further investigation during the Initial Assessment Phase*”.¹⁰ We submit that Hong Kong undertakings are likely to find more detailed criteria and a clearer description of the phases of investigation of complaints to be helpful.
25. Secondly, the Draft Procedural Guidelines do not sufficiently indicate the criteria by which the Commission will determine the enforcement response that is appropriate in each case. A particular virtue of the *Competition Ordinance* is that it provides the Commission with a range of possible enforcement responses to choose between, including issuing an Infringement Notice, seeking a Commitment, and bringing proceedings before the Competition Tribunal. We submit that it would be appropriate, and useful to Hong Kong undertakings, for the Commission to set out the factors to which it will have regard in selecting the appropriate enforcement response in a particular case.

⁹ Draft Guideline on Applications, para 5.3.

¹⁰ Compare *Draft Guideline on Complaints* para 4.3 and *Draft Guideline on Investigations* para 3.4.

26. Thirdly, when it seeks information from a third party, the Commission will be able to choose between addressing a request to that third party to voluntarily provide the information, and exercising the Commission's powers under the *Competition Ordinance* to compel the party to provide the information. The Draft Guideline on Investigations usefully outlines "*types of situations in which [the Commission] may seek a section 48 warrant*" to search premises. It is also desirable, we submit, for the same Guideline to state the circumstances in which the Commission will elect to exercise its section 41 and 42 powers, rather than request information be voluntarily provided.

V. Consultation and Transparency

27. The Draft Procedural Guidelines quite properly indicate a range of circumstances in which the Commission will consult with interested parties. We submit, however, that the public interest in transparency of Commission operations would be served by the Commission committing to additional disclosures, as set out below.
28. First, the Draft Guideline on Investigations states: "*If the Commission proceeds to the Investigation Phase, for operational reasons the Complainant will not be advised of the ongoing status of the investigation.*"¹¹ We submit that "operational reasons" will sometimes, but only occasionally, require secrecy. Better guidance, in our submission, would be provided by stating that: 'If the Commission proceeds to the Investigation Phase, the Commission normally will inform the Complainant of that fact and will keep the Complainant reasonably apprised of progress in the investigation, subject to the operational requirements of the particular case.'
29. Secondly, the Draft Guideline on Applications indicates that: "*The Commission will acknowledge receipt of all Applications it receives which comply with the requirements of Form AD.*"¹² We submit that the Commission should acknowledge the receipt of every application it receives for a Decision or Block Exemption, whether or not it complies with the requirements of the prescribed form. If an application does not comply, the Commission should take steps to

¹¹ Draft Guideline on Investigations, para 4.4.

¹² Draft Guideline on Applications, paras 6.17 and 11.14.

assist the intending applicant in making its application.

30. Thirdly, the Draft Guideline on Applications indicates that: “*Generally, the Commission will not publish a draft of its proposed Decision for public comment. However, the Commission may choose in certain cases to publish a draft when the Decision is likely to be of wider relevance for the market.*” We submit that the public interest in transparency of the Commission’s processes and information regarding the grounds for exemption requires a different guideline, to the following effect: ‘The Commission will publish a draft of its proposed Decision for public comment and allow a reasonable period for interested persons to submit comments on it.’
31. This is essential because other parties who may be affected by the Decision confirming the applicant’s exemption from the relevant conduct rule (e.g. competitors, suppliers or customers of the applicant) are entitled to comment not only on the application but also on the Commission’s analysis of that application and any conditions or limitations¹³ the Commission is proposing to attach to its Decision.

VI. Conclusion

32. In conclusion, we submit that Competition Commission and Communications Authority should proceed to reissue each of the Draft Procedural Guidelines for a further round of consultation, incorporating in revised drafts for comment changes that address the concerns identified above.

Submitted for Certari Consulting Limited

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¹³ See, *Competition Ordinance* ss 11(2) and 26(2).