



Room 525, 5/F., Prince's Building, Central, Hong Kong
Telephone: 2521 1160, 2521 1169 Facsimile: 2868 5035
Email: info@hkab.org.hk Web: www.hkab.org.hk

香港中環太子大廈5樓525室
電話：2521 1160, 2521 1169 圖文傳真：2868 5035
電郵：info@hkab.org.hk 網址：www.hkab.org.hk

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By post and by email: submissions@compcomm.hk

Submissions on Draft Guidelines
Competition Commission
36/F, Room 3601, Wu Chung House
197-213 Queen's Road East
Wanchai
Hong Kong

Dear Sirs,

DRAFT GUIDELINES

The Hong Kong Association of Banks ("**HKAB**") writes further to the following draft procedural guidelines published by the Competition Commission (the "**Commission**") on 9 October 2014:

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

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

HKAB welcomes the Commission's Draft Guidelines and is pleased to present this submission in response to the Consultation Paper. We have adopted the definitions used in the Draft Guidelines throughout this submission. HKAB notes that the Draft Guidelines are an important step towards implementation of the Ordinance and supports the Commission's objective of providing clear and helpful practical guidance for businesses in Hong Kong ahead of full implementation of the Ordinance.

We set out below our comments in response to the Draft Guidelines and enclose a summary of our recommendations as an Annex to this submission.

Chairman Bank of China (Hong Kong) Ltd
Vice Chairmen The Hongkong and Shanghai Banking Corporation Ltd
Standard Chartered Bank (Hong Kong) Ltd
Secretary Eva Wong Mei Seong

主席 中國銀行（香港）有限公司
副主席 香港上海匯豐銀行有限公司
渣打銀行（香港）有限公司
秘書 黃美嫦

1. Draft Complaints Guideline

- 1.1 As a general comment, HKAB considers that the Draft Complaints Guideline provides clear and useful guidance on the procedures that the Commission will adopt in exercising its discretion in relation to complaints. The paragraphs on which HKAB has specific comments in respect of the Draft Complaints Guideline are set out below.

Avoid anonymous complaints (paragraph 2.1)

- 1.2 Paragraph 2.1 of the Draft Complaints Guideline states that the Commission will accept complaints and queries in any form, including those provided directly, anonymously or through an intermediary. HKAB recognises that the Commission may wish, as a matter of policy, to broaden the potential scope of complaints. However, the express statement that complaints may be made anonymously may encourage baseless, frivolous or vexatious complaints to be made given the lack of any adverse consequences to the Complainant's reputation. It is clearly against the public interest for the Commission's time and resources to be spent filtering out such complaints. Moreover, anonymous complaints may present practical difficulties for the Commission to request further information or properly assess the complaint if the anonymous Complainant is unwilling to provide their name and contact details for further correspondence.
- 1.3 **HKAB therefore recommends that anonymous complaints are accepted only where they are submitted via a named intermediary, such as a legal advisor.** This will strike a balance between allowing anonymous complaints to be made and trying to avoid encouraging vexatious, baseless or frivolous complaints by ensuring that a complaint is associated with a named contact person. Where an anonymous complaint is made through a legal advisor, the likelihood of baseless or vexatious complaints is reduced as the legal advisor should assess and advise the Complainant on the merits of the proposed complaint before the complaint is made.
- 1.4 HKAB suggests that this change be reflected by deleting paragraph 2.1(b) and amending paragraph 2.1(c) as follows: "*indirectly through an intermediary (such as a legal adviser) including on an anonymous basis where appropriate*".
- 1.5 HKAB notes that an alternative option is for the Commission to require that Complainants are identified to the Commission when they make a complaint but to provide assurance that, where a Complainant wishes to avoid having their identity revealed to the undertakings concerned by the allegations, the

Commission will respect this request unless the request is manifestly unjustified. This is consistent with the practice of the European Commission, as set out in Article 81 of the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty.¹

Commission request to keep complaints confidential (paragraph 3.2)

- 1.6 Paragraph 3.2 of the Draft Complaints Guideline requests that Complainants keep their complaint confidential. HKAB notes that Complainants may wish to consult legal advisers or other group companies, including parent companies, prior to and during the course of making a complaint. **HKAB therefore recommends that paragraph 3.2 of the Draft Complaints Guideline be amended to clarify that the Commission recognises that Complainants may need to share information regarding a complaint with its legal advisers and group companies.**

Factors to be considered in exercising the Commission's discretion (paragraph 4.3)

- 1.7 Paragraph 4.3 of the Draft Complaints Guideline lists the factors that the Commission will take into account in exercising its discretion to decide which complaints warrant further assessment. The fourth factor listed under subparagraph (d) is "*the likelihood of a successful outcome resulting from an investigation*". HKAB considers that it is currently unclear what is meant by "*likelihood of a successful outcome*". For example, does this refer to the likelihood of the Competition Tribunal finding an infringement? If so, then HKAB recommends that the wording be amended accordingly for clarity. Equally, if the intention was to confer a different meaning then HKAB recommends that the wording be amended to provide a more precise and certain description of the relevant factor.
- 1.8 Other agencies such as the Hong Kong Monetary Authority ("**HKMA**") and the Securities and Futures Commission of Hong Kong (the "**SFC**") also have significant oversight of the banking industry and play an important role in regulating the conduct of banking in Hong Kong. In the context of banking, the HKMA's role as sectoral regulator should be taken into account if the Commission were to receive a complaint regarding the banking sector. **HKAB therefore strongly recommends that the Commission expressly includes "*the existence of other regulatory regimes and the views of any concurrent regulators*" as an additional factor to be taken into consideration by the**

¹ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0065:0077:EN:PDF>.

Commission in exercising its discretion to decide which complaints warrant further investigation under paragraph 4.3 of the Draft Complaints Guideline.

- 1.9 To put this into context, HKAB believes it is important that the Competition Commission, in assessing whether to take any enforcement action regarding any alleged infringement of the First or Second Conduct Rule, takes into account the following existing obligations on banks:
- (i) to comply, as authorised institutions, with the requests of other regulators and whether the conduct in question is in fact required for compliance with any requirements applicable under codes of practice, circulars, guidelines or other directions or guidance in any form issued or endorsed by a Government-approved regulatory or supervisory authority in Hong Kong (or relevant supranational body); and
 - (ii) to comply with the requests of supranational bodies or any other foreign regulatory or supervisory bodies outside Hong Kong where such bodies have jurisdiction over the bank concerned and whether the conduct in question is in fact required for compliance with directives or guidance issued by such bodies.
- 1.10 In relation to paragraphs (i) and (ii) above, HKAB strongly urges the Competition Commission to reassure the banking industry that it will not take any enforcement action in these circumstances, or that it will not do so before first: (1) commencing a dialogue with the relevant regulators in Hong Kong and, where appropriate, the banks themselves to ensure that any conflict between the banks' obligations to these regulators and the banks' compliance with the Competition Ordinance has been appropriately addressed; and (2) allowing banks a sufficient period of time in which to implement any resulting regulatory changes. This is of paramount importance to HKAB and its members.

Opportunity for further representations following decision to take no further action (paragraph 5.1)

- 1.11 Paragraph 5.1 of the Draft Complaints Guideline outlines the three options available to the Commission after its preliminary review of a Complaint. One of these is that the Commission may decide to take no further action. HKAB notes that it is unclear whether, in the event that the Commission decides to take no further action, the Complainant will be afforded any opportunities to make further representations to the Commission where it disagrees with the Commission's decision.
- 1.12 HKAB notes that the policy of the European Commission, as set out in Article 7(1) of the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82

of the EC Treaty (the “**EC Regulation on the Conduct of Proceedings**”),² is that:

“Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time limit.”

- 1.13 HKAB further notes that where the European Commission has informed a complainant of its intention to reject a complaint, the complainant may request access to the documents on which the Commission bases its provisional assessment under Article 8 of the EC Regulation on the Conduct of Proceedings.
- 1.14 In the interests of fairness and transparency, **HKAB recommends that the Commission amends paragraph 5.1 of the Draft Complaints Guideline to confirm that it will allow such further representations and specify that it will take such representations into account.**

Explanation to be provided by the Commission (paragraph 5.2)

- 1.15 Paragraph 5.2 of the Draft Complaints Guideline states that the Commission will provide an explanation to the Complainant if it proposes to take no further action or to recommend that the complaint is referred to another agency.
- 1.16 HKAB notes that, as currently drafted, it is unclear:
- (i) what the scope of the “*explanation*” to be provided by the Commission will include; and
 - (ii) whether the Complainant will be under any duty of confidentiality in respect of the explanation that it receives from the Commission (for example, whether any information included in the Commission’s explanation is likely to be classed as “*confidential information*” under section 123 of the Ordinance, to which the duty of confidentiality under section 128 of the Ordinance will apply).

² See: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0773&from=EN>.

1.17 **HKAB therefore recommends that paragraph 5.2 of the Draft Complaints Guideline (and corresponding paragraph 4.2 of the Draft Investigations Guideline) be amended to clarify that the:**

- (i) **explanation to be provided by the Commission will include the Commission's reasons for deciding to either take no further action or to recommend the Complainant refer the complaint to another agency; and**
- (ii) **Complainant will be under a duty of confidentiality in respect of the explanation provided by the Commission.**

Commission's decision to conduct an Initial Assessment (paragraph 5.4)

1.18 Paragraph 5.4 of the Draft Complaints Guideline states that, for operational reasons, a Complainant is unlikely to be advised if the Commission proceeds to conduct an Initial Assessment of a matter. HKAB notes that given the Commission's commitment to providing an explanation if it decides either to take no further action or to recommend that the complaint is referred to another agency, the Complainant will effectively be able to deduce that an Initial Assessment has been initiated if the Complainant does not hear otherwise from the Commission.

1.19 **HKAB therefore recommends that the Complainant should also be informed of the Commission's decision to open an Initial Assessment in the interests of transparency.** This will be particularly important in the circumstances described under paragraph 5.3 where the Commission initially decides to take no action (and advises the Complainant accordingly) and subsequently reconsiders as the facts or grounds for the original complaint may have changed. If the Commission does not notify the Complainant of the change in its decision to conduct an Initial Assessment then the Complainant will not be able to provide additional information or advise the Commission of changes in circumstances that may have arisen in the intervening period.

2. Draft Investigations Guideline

2.1 As a general comment, we respectfully urge the Commission to, in due course, publish guidance codifying its approach towards transparency, for example, by publishing a statement similar to that published by the UK Competition and Markets Authority in January 2014.³ HKAB notes that although the Draft

³ See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270249/CMA6_Transparency_Statement.pdf.

Investigations Guideline touches upon aspects of transparency such as the publication of Warning Notices and Commitments, and the Commission's approach to confidentiality, the guidance falls short of providing a comprehensive statement of the Commission's policy towards transparency and disclosure. **HKAB therefore recommends that the Commission issues further guidance specifically addressing its approach to transparency and disclosure.**

- 2.2 Specific comments on paragraphs in the Draft Investigations Guideline are set out below.

Protections during the Initial Assessment Phase (paragraph 3.3)

- 2.3 Paragraph 3.3 sets out the information that the Commission may seek using voluntary means during the Initial Assessment Phase. HKAB notes that there are various protections under the Ordinance which apply in respect of the Commission's Investigation Powers once the Commission has formally commenced an investigation including for example, legal privilege (section 58 of the Ordinance, paragraph 5.38 of the Draft Investigations Guideline), immunity (section 44 of the Ordinance, paragraph 5.40 of the Draft Investigations Guideline). In the interests of certainty, **HKAB recommends that the Commission confirms in paragraph 3.3 of the Draft Investigations Guideline that the same protections apply during the Initial Assessment Phase.**

Factors to be considered for further investigations (paragraph 3.4)

- 2.4 Paragraph 3.4 of the Draft Investigations Guidelines lists the factors the Commission will consider in considering whether a matter warrants further investigation during the Initial Assessment Phase. As explained in paragraph 1.8 above, other agencies such as the HKMA and the SFC also have significant oversight of the banking industry and play an important role in regulating the conduct of banking in Hong Kong. In the context of banking, the HKMA's role as sectoral regulator should be taken into account by the Commission in considering whether a matter warrants further investigation. **HKAB therefore strongly recommends that the Commission expressly includes "*the existence of other regulatory regimes and the views of any concurrent regulators*" as an additional factor to be taken into consideration by the Commission under paragraph 3.4 of the Draft Investigations Guideline.**
- 2.5 Further, as also explained in paragraphs 1.9 and 1.10 above, HKAB believes it is important that the Competition Commission, in assessing whether to take any enforcement action regarding any alleged infringement of the First or Second Conduct Rule, takes into account existing obligations on banks to comply with the requests of existing regulators and supervisory bodies (both inside and outside Hong Kong).

- 2.6 HKAB again strongly urges the Competition Commission to offer some reassurance to the banking industry that it will not to take any enforcement action in these circumstances, or that it will not do so before first: (1) commencing a dialogue with the relevant regulators in Hong Kong and, where appropriate, the banks themselves to ensure that any conflict between the banks' obligations to these regulators and the banks' compliance with the Competition Ordinance has been appropriately addressed; and (2) allowing banks a sufficient period of time in which to implement any resulting regulatory changes. This is of paramount importance to HKAB and its members.

Reasonable cause to suspect a contravention (paragraph 5.1)

- 2.7 Under section 39(2) of the Ordinance, the Commission may open an investigation only where it has "*reasonable cause to suspect a contravention*". Paragraph 5.1 of the Draft Investigations Guideline states that the Commission considers the test for this to require: (i) a suspicion based on relevant facts and other information; and (ii) that the Commission is satisfied, at least beyond mere speculation, that there may have been a contravention of a Competition Rule.
- 2.8 HKAB notes that the legal test for "*reasonable grounds to suspect*" is a two part test requiring both a subjective element – suspicion – and an objective element – reasonable grounds (or cause) for that suspicion.⁴ In line with this, **HKAB recommends that paragraph 5.1(a) of the Draft Investigations Guideline be amended to state that the test "*requires a suspicion based on reasonable cause, including reasonable facts and any other information.*"**

Information to be included in a section 41 notice (paragraph 5.9)

- 2.9 Paragraph 5.9 of the Draft Investigations Guideline lists information that will be included in a section 41 notice pursuant to sections 41(3) and 41(4) of the Ordinance.
- 2.10 While HKAB notes that the list currently set out in paragraph 5.9 appears to reflect the minimum requirements of the Ordinance, there is scope for the Commission to provide additional detail on the information that is required under the notice, as a matter of best practice, to enable the recipient of a section 41 notice to understand better the scope and focus of the documents and information sought. In particular, consistent with the practice of other international competition agencies, including the European Commission, **HKAB recommends that a section 41 notice should also specify as a minimum:**

⁴ *Yeung May Wan and others v HKSAR* [2005] HKCU 551, *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1996] NI 8.

- (i) **the actual section of the Ordinance which the alleged conduct has contravened;**
- (ii) **details of the scope and purpose of the investigation, including a detailed description of the conduct, activities or agreement which the Commission believes contravenes the Ordinance and the time frame over which the contravention is alleged to have occurred; and**
- (iii) **a date range in the description of the documents and/or information that the Commission requires.**

Recordings, transcripts and documents (paragraph 5.22)

2.11 Paragraph 5.22 of the Draft Investigations Guideline states that recordings, transcripts and documents put to a person when they are required under section 42 of the Ordinance to appear before the Commission will be provided to that person “*upon request when practicable*”. It is HKAB’s view that such recordings, transcripts and documents should be provided to the interviewed person promptly by Commission in all cases in order to ensure that the person’s right to a fair hearing is preserved. **HKAB therefore recommends that:**

- (i) **the qualification “*upon request when practicable*” in paragraph 5.22 of the Draft Investigations Guideline be deleted altogether; and**
- (ii) **paragraph 5.22 of the Draft Investigations Guideline be amended to confirm that such recordings will be provided in a timely manner, either within a specified timeframe or more generally that they will be provided “*promptly*” or “*as soon as practicable*”.**

Information to be included in a section 48 warrant (paragraph 5.29)

2.12 Paragraph 5.29 of the Draft Investigations Guideline states that the Commission will produce upon request evidence of their identity, the section 47 authorisation and the section 48 warrant. While HKAB recognises that the obtaining of a section 48 warrant is a judicial process, in order to enable the recipient of a section 48 warrant to understand more fully the scope and focus of the search, **HKAB recommends that the Commission commits in paragraph 5.29 of the Draft Investigations Guidelines to including, as a minimum, information regarding the scope and purpose of the search and the alleged contravention when applying for a section 48 warrant.**

2.13 In particular, consistent with the practice of other international competition agencies, including the European Commission, **HKAB recommends that the Commission should specify, as a minimum:**

- (i) **the actual section of the Ordinance which the alleged conduct has contravened;**
- (ii) **details of the scope and purpose of the investigation, including a detailed description of the conduct, activities or agreement which the Commission believes contravenes the Ordinance and the time frame over which the contravention is alleged to have occurred; and**
- (iii) **a date range in the description of the documents and/or information that the Commission requires.**

2.14 Furthermore, in the interests of transparency and preserving the right to a fair hearing, and again consistent with the practice of other international competition authorities such as the European Commission, paragraph 5.29 also be amended to confirm that a certified copy of the section 48 warrant shall be provided to the person whose premises are the subject of the search for their records. The European Commission’s Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003 (the “**European Commission Explanatory Note**”)⁵ states that:

“A certified copy of the decision is to be handed to the undertaking. The minute of notification of service serves only to certify delivery and its signature by the recipient does not imply submission.”

2.15 **HKAB recommends that the above wording be mirrored in paragraph 5.29 of the Draft Investigations Guideline.**

Waiting for legal advisers before a search (paragraph 5.31)

2.16 Paragraph 5.31 of the Draft Investigations Guideline states that the Commission may wait a reasonable time to allow external legal advisers to arrive where “*there is no in-house lawyer already on the premises*”. HKAB notes that:

- (i) it may be necessary to allow time for in-house counsel to arrive (e.g. where an undertaking occupies several different premises); and
- (ii) an in-house lawyer will not necessarily have the appropriate experience of contentious matters or competition law to represent an undertaking during a dawn raid.

⁵ See: http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf.

- 2.17 HKAB notes that it is also in the Commission's interests to wait for legal advisers with relevant experience and expertise to arrive as doing so minimises the risk of subsequent challenge regarding the conduct of the search.
- 2.18 **HKAB therefore recommends that paragraph 5.31 be amended to clarify that:**
- (i) **where the in-house lawyer is located on a different part of the undertaking's premises, the Commission may wait a reasonable time to allow the in-house lawyer to arrive at the search area; and**
 - (ii) **at the very minimum, the undertaking that is the subject of the search will be given the choice of whether they are happy to be represented by the in-house lawyer available on the premises or if it would be more appropriate, in light of the in-house counsel's experience and expertise, to wait for external legal advisers.**
- 2.19 In line with the above, **HKAB further recommends that the wording "*and there is no in-house lawyer already on the premises*" be deleted from paragraph 5.31 of the Draft Investigations Guideline.**
- Providing a register and copies of all documents taken following a search (paragraph 5.35)
- 2.20 Paragraph 5.35 of the Draft Investigations Guideline notes that section 56 of the Ordinance provides that parties may request from the Commission certified copies of documents found during the search. HKAB considers that in order to protect the right of the person whose premises are searched to a fair hearing, the Commission should:
- (i) also provide a register of documents taken; and
 - (ii) provide the register and copies of all documents taken as standard procedure, rather than only upon request.
- 2.21 The provision of a register of and copies of all documents taken by the Commission to a person whose premises have been searched by the Commission is fundamental to ensuring transparency and due process as, without a complete record of all documents taken by the Commission, that person will not have a real opportunity to challenge the case against them and thus will have been denied their rights to a fair hearing.
- 2.22 It is therefore the practice of other international competition authorities, such as the European Commission, to provide a register of and copies of all documents taken during a search to the relevant person as a matter of course. This is

demonstrated for example, by paragraph 15 of the European Commission's Explanatory Note, which states that:

“The undertaking will receive a copy, in electronic or paper format, of all the documents and the data copied by the Inspectors and may request a signed list of the copies and extracts taken by the Inspectors during the inspection. Where the undertaking makes available material for making copies at the request of the Inspectors, the Commission shall, at the request of the undertaking, reimburse the cost of the material used to produce a copy for the Commission.”

- 2.23 Notwithstanding that the Ordinance states that a certified copy must be issued upon request (and that the Commission must at any time allow the person entitled to possession of the document to inspect and make copies of the document – which we note is not reflected in paragraph 5.35 of the Draft Investigations Guidelines as currently drafted), **HKAB therefore recommends that paragraph 5.35 of the Draft Investigations Guidelines be amended to confirm that the Commission shall (as a matter of best practice) in all cases provide a person whose premises have been searched with a register and copy of all documents taken away.**

Definition of legal privilege and dealing with legal privilege during a search (paragraph 5.38)

- 2.24 Consistent with section 58 of the Ordinance, paragraph 5.38 of the Draft Investigations Guideline states that none of the Commission's Investigative Powers affect any claims, rights or entitlements that would, but for these powers, arise on the ground of legal professional privilege under the laws of Hong Kong.
- 2.25 HKAB notes that the scope of legal professional privilege in Hong Kong extends to communications between in-house legal counsel and its client. In the interests of clarity and completeness, **HKAB therefore recommends that paragraph 5.38 of the Draft Investigations Guideline be amended to expressly recognise that communications between in-house counsel and its clients within the same undertaking may attract legal professional privilege.**
- 2.26 In addition, HKAB notes that the Draft Investigations Guideline does not explain how the Commission will deal with claims of privilege that arise during the course of a search. In the interests of transparency and ensuring due process during a search by the Commission, **HKAB recommends that paragraph 5.38 of the Draft Investigations Guideline be amended to clarify that the Commission shall:**
- (i) **agree a process with the person whose premises are being searched and/or its legal advisers at the outset of any search to allow the person in question or its legal advisers to assess and assert privilege**

over documents during the course of a search and to deal with any contested documents (including using best efforts to resolve any issues with the person or its legal advisers on site); and

- (ii) not read, take copies of or confiscate any documents over which a claim for legal professional privilege has been asserted – to the extent that there are any documents which are only partly covered by legal professional privilege, sections over which a claim for legal professional privilege arises may be redacted by the person or its legal advisers.

Access to file (section 6)

- 2.27 Section 6 of the Draft Investigations Guideline sets out guidance on confidentiality, including the disclosure of information and documents during the Initial Assessment and Investigation Phases. However, HKAB notes that the Draft Investigations Guideline is currently silent regarding the Commission's policy on access to its files, including leniency applications. While HKAB recognises that this may be a topic to be addressed in more detail in the Commission's future guideline(s), HKAB submits that it would be appropriate for the Commission to reflect at least its position on access to file in the Draft Investigations Guideline.
- 2.28 The protection of confidential information is of vital importance to businesses – in some cases confidential information can comprise a valuable business asset or otherwise harm the legitimate business interests of the undertaking concerned. The disclosure of confidential information is therefore likely to be of key concern to businesses in Hong Kong that are investigated by the Commission.
- 2.29 In fulfilling its obligation under section 126(3) of the Ordinance when deciding whether to disclose confidential information, HKAB recommends that the Commission should take a conservative approach and exercise with caution its right to disclose confidential information. This will be important in order to build confidence among businesses in Hong Kong in the Commission's procedures as regards the protection of confidentiality, particularly in the early stages of implementation.
- 2.30 **HKAB therefore recommends that, at least in the early stages of implementation, documents that are provided to the Commission during the course of an investigation should benefit from a blanket protection against disclosure to third parties, for example, in the context of follow-on actions.** This is particularly true in the context of leniency applications and discussions regarding settlement through Commitments, where it will be important to protect the confidentiality of documents in order to preserve the incentive for businesses to come forward under the leniency regime or to offer Commitments.

Commission's treatment of confidential information (paragraph 6.3)

- 2.31 Paragraph 6.3 of the Draft Investigations Guideline refers to the general obligation under section 125 of the Ordinance to preserve the confidentiality of any confidential information provided to the Commission and the exceptions to this obligation under section 126 of the Ordinance (one exception under section 126(1)(a) is disclosure with consent).
- 2.32 As noted above, the protection of confidential information is of vital importance to businesses and will likely to be of key concern to businesses in Hong Kong. It is therefore very important that businesses are informed and their consent is sought when the Commission proposes to disclose confidential information so that they have an opportunity to make representations to the Commission where they object to a disclosure of confidential information.
- 2.33 While section 126(1) of the Ordinance allows the Commission to disclose confidential information without consent in specific circumstances, HKAB recommends that this should only be relied upon in exceptional circumstances. The Commission's starting point should always be to seek consent pursuant to section 126(1)(a). If the Commission is unable to seek such consent, the Commission should, in all cases, notify the person from whom the confidential information was originally obtained or to whom the confidential information belongs as soon as practicable.
- 2.34 **HKAB therefore recommends that paragraph 6.3 of the Draft Investigations Guideline be amended to provide assurance that, where the Commission proposes to disclose or reasonably expects that it may need to disclose confidential information, the Commission will:**
- (i) seek disclosure without consent only in exceptional circumstances; and**
 - (ii) notify the person from whom the confidential information was originally obtained or to whom the confidential information belongs as soon as practicable in all cases of a proposed disclosure; and**
 - (iii) allow a reasonable period for that person to make representations in respect of the proposed disclosure.**

Third parties' obligation not to disclose confidential information (paragraphs 6.11 and 6.12)

- 2.35 Paragraphs 6.11 and 6.12 of the Draft Investigations Guideline refer to the obligation of third parties not to disclose confidential information under section 128 of the Ordinance. Section 128 of the Ordinance appears to be broadly drafted such that an employee of an undertaking being investigated by the



Commission is arguably prohibited from sharing confidential information (e.g. information that it has provided the Commission about the undertaking's commercial activities) with other employees of that undertaking.

2.36 However, it is vital that employees of an undertaking who provide information to the Commission in an investigation, including during the course of a search, are able to share this information with other employees (e.g. senior managers, in-house lawyers or other individuals involved in representing the undertaking in relation to the Commission's investigation) both:

- (i) to preserve the undertaking's right to a fair hearing by enabling individuals representing the undertaking to obtain as much information as possible regarding the investigation (such communications would not necessarily be fully covered by the narrow exemption for disclosures made for the purpose of obtaining advice from counsel, a solicitor or other professional adviser); and
- (ii) to allow individuals involved in the management of the undertaking to receive information regarding the investigation that may be relevant to commercial and management decisions.

2.37 HKAB also notes that it is unclear whether a subsidiary that is being investigated by the Commission could arguably be prohibited from sharing confidential information with its parent company or other group companies. HKAB notes that the definition of a "*person*" under the Ordinance includes "*undertakings*", the interpretation of which includes a group. Applying this interpretation, the duty of confidentiality should not apply to prevent disclosures within a corporate group. However, it would be helpful for the Commission to clarify this point as it is similarly vital that subsidiaries are able to share information about an investigation with their parents or other group companies, particularly as the investigation or liability for infringements may extend beyond the subsidiary.

2.38 **HKAB therefore recommends that the Commission clarifies in either paragraph 6.11 or 6.12 of the Draft Investigations Guideline that, as a general rule:**

- (i) employees of a person are allowed to disclose or report confidential information regarding that person to other employees of the person; and**
- (ii) undertakings are allowed to disclose or report confidential information to their parent or other group companies,**

where reasonably necessary in connection with any matter arising under the Ordinance, provided that a recipient of such confidential information is

subject to the same duty of confidentiality under section 128 of the Ordinance.

- 2.39 Paragraph 6.12(a) of the Draft Investigations Guideline sets out certain exceptions in section 128(2) of the Ordinance to the duty of confidentiality in section 128 of the Ordinance. However, HKAB notes that the Commission has not elaborated on how it will interpret these exceptions.

HKAB therefore recommends, in the interests of clarity and transparency, that the Commission provides further explanation of how it will interpret these exceptions and, in particular, the factors that it will consider before giving consent to disclosure by a third party under paragraph 6.12(a) of the Draft Investigations Guideline/section 128(2)(a) of the Ordinance.

Opportunity for further representations following decision to take no further action (paragraph 7.1)

- 2.40 Paragraph 7.1 of the Draft Investigations Guideline states that where the Commission considers it unlikely that a contravention of a Competition Rule has occurred, it will take no further action regarding the matter and that, where a Complainant is involved, it will notify the Complainant of the outcome. As noted above in relation to the Draft Complaints Guidelines, **HKAB recommends that the Commission clarifies:**

- (i) **that the explanation of the outcome will include the Commission's reasons for its decision to take no further action (see paragraphs 1.15 to 1.17 above); and**
- (ii) **whether the Commission will offer the Complainant any subsequent opportunities to make further representations to the Commission where the Complainant disagrees with the Commission's decision to take no further action and, if so, what the procedures for this would be (see paragraphs 1.11 to 1.14 above).**

Informal settlement route (paragraph 7.5)

- 2.41 Paragraph 7.5 of the Draft Investigations Guideline states that the Commission may in some cases, having regard to its resources and priorities, simply decide to take no further action in a matter, and that the likelihood of such a decision will be increased if the parties swiftly alter their conduct in response to the Commission's enquiries. This would appear to open the door to an informal settlement route – if so, to ensure transparency and legal certainty for businesses in Hong Kong, **HKAB recommends that the Commission provides additional guidance on how such an informal settlement route would operate and the likely outcome of the informal route as opposed to more formal settlement (e.g. through Commitments), including whether any information or decision**

would be publicised by the Commission in these circumstances. Such guidance would be particularly appropriate given that the Draft Investigations Guideline confirms elsewhere that the Commission will publish both any Warning Notice issued by the Commission (paragraph 7.18) and Commitments accepted to resolve concerns (paragraph 7.14).

- 2.42 An informal settlement route may be attractive to businesses in Hong Kong if it offers, for example, a lower risk of reputational damage. It is therefore important that further guidance is provided by the Commission in order to ensure that businesses in Hong Kong are fully informed of the options available to them when assessing potential competition risks under the Ordinance.

Circumstances warranting a consent order (paragraph 7.10)

- 2.43 Paragraph 7.10 of the Draft Investigations Guideline states that in some cases the Commission’s concerns may only be satisfactorily addressed if the parties seek a consent order on specific terms before the Tribunal. However, as currently drafted, the Draft Investigation Guideline does not provide any guidance on what these circumstances may be. Such guidance is necessary in order to enable businesses in Hong Kong to seek advice on and make an informed decision regarding competition risks and likely outcomes of an investigation under the Ordinance. **HKAB therefore recommends that paragraph 7.10 of the Draft Investigations Guideline be expanded to clarify the circumstances in which a consent order may be required to remedy the Commission’s concerns and that the Commission supports this with practical examples.**

Warning notice (paragraphs 7.16 and 7.17)

- 2.44 Paragraph 7.16 of the Draft Investigations Guideline states that where a suspected contravention of the First Conduct Rule does not involve Serious Anti-competitive Conduct, the Commission must issue a Warning Notice under section 82(1) of the Ordinance and that the Warning Notice will provide the parties under investigation with an opportunity to cease the conduct in question within a specified period. Paragraph 7.17 of the Draft Investigations Guidelines goes on to refer to the requirement that the Warning Notice sets out the alleged contravening conduct under section 82(2) of the Ordinance and that if parties continue to engage in the conduct after the expiry of the warning period, the Commission may commence proceedings in the Tribunal under section 82(4) of the Ordinance. HKAB notes however that no confirmation is included in the guidance how the warning period will be determined.
- 2.45 Section 82(3) of the Ordinance requires that in determining the warning period, *“the Commission must have regard to the amount of time which the contravening undertaking is likely to require to cease the contravening conduct”*. Further, under section 82(6) of the Ordinance, *“the Commission may, either of its own volition or on application made to it in writing, extend the warning period*

specified in a warning notice if it considers that there is a good reason for doing so". The lack of guidance in the current Draft Investigations Guidelines on these issues leaves considerable uncertainty for Hong Kong businesses on the likely duration of warning periods and the factors or evidence that are likely to be taken into account by the Commission in determining the initial warning period and any subsequent extensions.

2.46 **HKAB therefore recommends that paragraphs 7.16 and 7.17 of the Draft Investigations Guideline be expanded to include:**

- (i) **assurance from the Commission that any warning period or extension to a warning period will be reasonable and practicable taking into account the relevant circumstances;**
- (ii) **confirmation that the Commission will have regard to the amount of time that the contravening undertaking is likely to require to cease the contravening conduct, in accordance with section 82(3) of the Ordinance;**
- (iii) **an explanation of the procedures to be adopted by the Commission and the factors or evidence that the Commission will take into consideration when assessing the amount of time that the contravening undertaking is likely to require to cease the contravening conduct, including for example:**
 - (a) **whether the contravening undertaking will be given a reasonable opportunity to make representations and provide evidence to the Commission;**
 - (b) **what information or factors will be taken into account by the Commission in its assessment; and**
 - (c) **whether the Commission will accept or proactively seek views from third parties; and**
- (iv) **in relation to any extension of the warning period under section 82(6) of the Ordinance, an explanation of:**
 - (a) **the procedures that the Commission will adopt in reviewing whether an extension should be granted, including the circumstances in which the Commission may grant an extension of its own volition;**
 - (b) **the factors or evidence that the Commission will take into account when assessing whether an extension should be granted**

(or, the information that should be included in an application for extension); and

- (c) what the Commission will consider to be a “good reason” for granting an extension to a warning period.

3. Draft Applications Guideline

- 3.1 HKAB welcomes the provision of helpful guidance in the Commission’s Draft Applications Guideline on how to apply for a Decision or Block Exemption and how these applications will be assessed.
- 3.2 HKAB’s comments on specific paragraphs within the Draft Applications Guideline are set out below.

Fair procedure in dealing with applications that are not considered by the Commission (paragraph 5.15)

- 3.3 Paragraph 5.15 of the Draft Applications Guideline provides that the Commission may initiate enforcement action using information provided by an applicant for an Application or a Block Exemption Application, even if the Commission declines to consider the application. In reality, this is likely to deter undertakings from approaching the Commission for an Application or Block Exemption Application. In order to avoid this deterrent effect on potential applicants, **HKAB recommends that information provided to the Commission as part of a Block Exemption Application should not be used against the applicant.**
- 3.4 If the Commission chooses to maintain the position as currently drafted under paragraph 5.15 of the Draft Applications Guideline, **HKAB recommends that the Commission considers whether there are alternative ways to provide comfort or protection to potential applicants regarding the potentially self-incriminating nature of an Application or Block Exemption Application. These could include one or more of the following:**
- (i) **Allowing potential applicants to engage in an Initial Consultation with the Commission on an anonymous basis.**
 - (ii) **Amending the information required in an Application and a Block Exemption Application under paragraphs 6.16 and 11.13 of the Draft Applications Guideline respectively. While HKAB recognises that the Commission needs to strike a balance against ensuring that it has sufficient information to come to a decision on any Application or Block Exemption Application, the requirements to provide, amongst other things, detailed information regarding the potential competition concerns (including possible theories of harm)**

significantly increase the potential exposure of potential applicants to enforcement action if the Commission does not grant the Application or Block Exemption Application. Decreasing the level of information required will assist in minimising the risk to potential applicants. HKAB suggests that paragraphs 6.16 and 11.13 of the Draft Applications Guideline are amended to say that potential applicants may provide only such information as is required to make their case in the first instance without the need to submit all supporting documents, and that such supporting documents may be provided subsequently once the Commission has agreed to consider the Application or Block Exemption Application.

- (iii) Providing assurances, for example in the Commission's enforcement priorities, that the Commission will not prioritise enforcement actions against applicants in the early stages of full implementation of the Ordinance and/or that where an Application or Block Exemption Application has been made in good faith that the Commission will not commence an investigation into the agreements which were the subject of the Application or Block Exemption Application, should such application be unsuccessful without giving the parties an opportunity for further assessment.
- (iv) Including provision in the Commission's Leniency Agreements Policy for a reduction to be provided where an enforcement action is initiated following an Application or Block Exemption Application and the applicant subsequently co-operates with the Commission's investigation.

3.5 HKAB further notes that it is not clear from the current drafting of paragraph 5.15 of the Draft Applications Guideline whether the Commission may seek to use information provided by a potential applicant for the purpose of taking enforcement actions unrelated to conduct or agreements in respect of which the Application or Block Exemption Application was made. For example, could the Commission seek to use information provided in an Application by Company A in relation to Agreement 1 to build a case against Company B (or even Company A itself) in respect of another form of conduct or agreement within the industry? Such a policy would significantly increase the risk to businesses in Hong Kong of making an Application or Block Exemption Application. **HKAB therefore recommends that the Commission clarifies that it will not use information provided in an application for any purpose other than considering the conduct that is the subject of the application.**

3.6 HKAB notes that paragraph 5.15 of the Draft Applications Guideline includes a reference to Part 12 of the Draft Applications Guideline in the context of using information provided by the applicant in a relevant enforcement action.

However, Part 12 does not appear to deal with or expand on this issue. **HKAB recommends that this be amended as appropriate.**

Initial Consultations (paragraphs 6.13 to 6.15 and 11.10 to 11.12)

- 3.7 Paragraphs 6.13 to 6.15 and 11.10 to 11.12 of the Draft Applications Guideline provide that potential applicants may approach the Commission for an Initial Consultation regarding an Application or a Block Exemption Application respectively and explains the purpose of such Initial Consultations.
- 3.8 HKAB considers that, in the interests of transparency and legal certainty, it would be helpful for the Commission to provide further explanation of the internal procedures that the Commission will adopt for, and potential outcomes of, such Initial Consultations. For example, it is currently unclear whether the Initial Consultation will be undertaken by the same members of the Commission who will go on to consider an Application or Block Exemption Application, such that any indications provided in the Initial Consultation can reasonably be relied upon by potential applicants in assessing whether to proceed.
- 3.9 As currently drafted, HKAB also notes that paragraph 11.12 of the Draft Applications Guideline states that an Initial Consultation for a Block Exemption Application may allow it to “*indicate to the applicant whether it is likely to consider the Block Exemption Application*”. However, paragraph 6.15 of the Draft Applications Guideline is silent on whether the Commission may be able to give a similar indication as a result of an Initial Consultation for an Application. Under sections 9(2) and 24(2) of the Ordinance, the Commission is only required to consider an Application if the Suitability Factors are met. Particularly in the early stages of implementation, there is likely to be a degree of uncertainty regarding when the Commission will consider the Suitability Factors to be satisfied – particularly, the circumstances in which questions will be considered to be of “*wider importance or public interest*” and the Commission will consider that “*it is possible to make a decision on the basis of the information provided*”. **HKAB therefore recommends that paragraph 6.15 of the Draft Applications Guideline be amended to confirm that the Commission may also provide an indication of whether it will consider an Application based on an Initial Consultation, consistent with a Block Exemption Application.**
- 3.10 More generally, **HKAB further recommends that in respect of both Applications and Block Exemption Applications, the Commission clarifies that any “*indication*” provided based on an Initial Consultation will be issued in writing to the potential applicant and, where appropriate, may also highlight any additional information required by the Commission to consider the Application or Block Exemption Application.** The provision of a written record of any indication given by the Commission is in the interests of

the both Commission and the potential applicant to ensure transparency and avoid any risk of misinterpretation or procedural challenge.

Information required in an Application or Block Exemption Application (paragraphs 6.16 and 11.13)

3.11 Paragraphs 6.16(e) and 11.13(e) of the Draft Applications Guideline require the provision of contact details regarding affected suppliers and customers. In the banking context, this could include personal data. However as this information is not expressly required under the Ordinance, it appears that an applicant who provides such information would not be protected by the exemption under s.60B of the Personal Data (Privacy) Ordinance. **HKAB therefore recommends that the Commission considers this point and provides further clarification to deal with this issue.**

3.12 **HKAB also recommends that the requirement for an overview of submissions made to competition authorities in other jurisdiction with respect to the same agreement or conduct (if any) in paragraph 6.16(g) of the Draft Applications Guideline be deleted.** The Commission should consider Applications made to it under the Ordinance on the basis of the factual background and effects in Hong Kong alone, rather than based on previous decisions made by authorities in other jurisdictions where a different analysis may apply.

Publication of Applications and Block Exemption Applications (paragraphs 8.2 and 12.1)

3.13 Paragraph 8.2 of the Draft Applications Guideline states that, where the Commission decides to consider an Application, it will publicise an Application, including by posting a non-confidential version of the Application on the Commission's website.

3.14 HKAB notes that in publishing a non-confidential version of the Application, the Commission appears to be going beyond the requirements under sections 10(1) and 25(1) of the Ordinance. The Ordinance requires only that the Commission publishes notice of the Application.

3.15 Given that the Commission will require Applications to include detailed information regarding the provisions or elements of the agreement/conduct which might give rise to competition concerns and the nature of those concerns (including possible theories of harm), the Application is likely to include self-incriminating information that could be used against the applicant by third parties (for example, in follow-on actions) in the event that the Commission declines to issue a Decision or subsequently takes enforcement action against the applicant. **HKAB therefore recommends that paragraph 8.2 be amended to**

remove the wording “*together with a non-confidential version of the Application*”.

3.16 Paragraph 12.1 of the Draft Applications Guideline similarly states that, where the Commission is considering whether to issue a Block Exemption Order, it will publicise the Commission Initiated Process or Block Exemption Application. Again, HKAB notes that this goes beyond the requirements of the Ordinance, which require only that:

- (i) the Commission publishes a notice of the proposed Block Exemption Order under section 16 of the Ordinance; and
- (ii) such notice is published “*before issuing a block exemption order*”, implying that a notice does not need to be published upon receipt of a Block Exemption Application or declines to issue a Block Exemption Order.

3.17 As currently drafted, the meaning of “*publicise*” in paragraph 12.1 of the Draft Applications Guideline, including whether this would involve the Commission publishing a non-confidential version of the Block Exemption Application with the notice, is unclear.

3.18 HKAB notes that according to Figure 3 of the Draft Applications Guideline, the Commission will publish a Notice of Block Exemption Application in cases where it proceeds to consider a Block Exemption Application. As explained in paragraph 3.16, this is not a requirement under the Ordinance, although it is consistent with the process for Applications, for which a notice of an Application must be published by the Commission under section 25 of the Ordinance. It would be helpful to understand why the Commission has chosen to go beyond the requirements in the Ordinance as HKAB considers that the publication of even a Notice of Block Exemption Application in cases where the Commission declines to issue a Block Exemption Application, could potentially be prejudicial to the applicant(s) and other undertakings, especially if, for example, it covers an entire sector.

3.19 **HKAB therefore recommends that paragraph 12.1 of the Draft Applications Guideline is amended to clarify the meaning of “*publicise*” and, for the same reasons as set out in paragraph 3.15 above, to confirm that the Commission will not publish a non-confidential version of Block Exemption Applications.**

Publication of reasoned decision when the Commission declines to issue a Block Exemption Order (paragraph 12.5)

3.20 Paragraph 12.5 of the Draft Applications Guideline states that where a process is initiated by a Block Exemption Application, the Commission will inform the applicant of the outcome.

- 3.21 If the Commission proposes to issue a Block Exemption Order (either with or without conditions), the Commission will publish a notice of proposed Block Exemption Order in accordance with section 16 of the Ordinance. However, it appears from paragraph 12.5 of the Draft Applications Guideline that no public decision will be issued if the Commission declines to issue a Block Exemption Order.
- 3.22 As noted above, it is not a requirement of the Ordinance that a Notice of Block Exemption Application is published upon receipt of a Block Exemption Application or where the Commission declines to issue a Block Exemption Order. **If no Notice of Block Exemption Application were to be published in these circumstances, then HKAB would support the existing procedure under which no public decision is issued if the Commission declines to issue a Block Exemption Order.**
- 3.23 However, if, as currently suggested by Figure 3 of the Draft Applications Guideline, the Commission publishes a Notice of Block Exemption Application for all cases that it considers, HKAB considers that it is important, in the interests of transparency, that the Commission publishes any decision not to issue a Block Exemption Order together with the rationale for its decision to provide useful precedent for future potential applicants. **In these circumstances, HKAB recommends that paragraph 12.5 of the Draft Applications Guideline be amended to state that the Commission will publish an explanation of its decision and its reasons for the decision in cases where, having considered a Block Exemption Application, the Commission declines to issue a Block Exemption Order.**

HKAB trusts that the Commission will give due consideration to the issues and recommendations set out in this submission. Should it be of assistance to the Commission, HKAB would be pleased to set up a meeting with the Commission to discuss the submission or any specific matter in relation to the draft guidelines.

Yours faithfully,



Eva Wong
Secretary

Encl. – Summary of HKAB's recommendations



Annex

Summary of HKAB's recommendations

HKAB respectfully suggests that the following changes to be made to the draft procedural guidelines published by the Competition Commission (the “**Commission**”) on 9 October 2014. HKAB has adopted the definitions used in the draft guidelines herein.

Draft Guideline on Complaints – 2014 (the “Draft Complaints Guideline”)

1. **Paragraph 2.1(b)** be removed and **paragraph 2.1(c)** be amended as follows: “*indirectly through an intermediary (such as a legal adviser) including on an anonymous basis where appropriate*”.
2. **Paragraph 3.2** be amended to clarify that the Commission recognises that Complainants may need to share information regarding a complaint with its legal advisers and group companies.
3. **Paragraph 4.3** be amended:
 - (i) to clarify what is meant by “*likelihood of a successful outcome*” in **paragraph 4.3(d)**; and
 - (ii) to include “*the existence of other regulatory regimes and the views of any concurrent regulators*” as an additional factor to be taken into consideration by the Commission in exercising its discretion to decide which complaints warrant further investigation.
4. **Paragraph 5.1** be amended to confirm that, in the event the Commission decides to take no further action following a complaint, the Complainant will be allowed an opportunity to make further representations to the Commission and the Commission shall take such representations into account.
5. **Paragraph 5.2** (and corresponding **paragraph 4.2** of the Draft Investigations Guideline) be amended to clarify that:
 - A. the explanation to be provided by the Commission will include the Commission’s reasons for deciding to either take no further action or to recommend the Complainant refer the complaint to another agency; and

- B. the Complainant will be under a duty of confidentiality in respect of the explanation provided by the Commission.
6. **Paragraph 5.4** be revised to provide that the Complainant will also be informed of a decision by the Commission to open an Initial Assessment.

Draft Guideline on Investigations – 2014 (the “Draft Investigations Guideline”)

- 7. Further guidance be issued specifically addressing the Commission’s approach to transparency and disclosure.
- 8. **Paragraph 3.3** be amended to confirm that certain protections, such as legal privilege under section 58 of the Competition Ordinance (the “**Ordinance**”) and immunity under section 44 of the Ordinance, which apply in respect of the Commission’s use of its Investigation Powers, will also apply during the Initial Assessment Phase.
- 9. **Paragraph 3.4** be amended to include “*the existence of other regulatory regimes and the views of any concurrent regulators*” as an additional factor to be taken into consideration by the Commission when deciding whether a matter warrants further investigation during the Initial Assessment Phase.
- 10. **Paragraph 5.1(a)** be amended to state that the test “*requires a suspicion based on reasonable cause, including reasonable facts and any other information*”.
- 11. **Paragraph 5.9** be amended to provide that a section 41 notice should also specify, as a minimum:
 - A. the actual section the alleged conduct has contravened;
 - B. details of the scope and purpose of the investigation, including a detailed description of the conduct, activities or agreement which the Commission believes contravenes the Ordinance and the time frame over which the contravention is alleged to have occurred; and
 - C. a date range in the description of the documents and information required. HKAB further suggests that the Commission provides a certified copy of the section 48 warrant for the person’s records.



12. **Paragraph 5.22** be amended as follows: “*Recordings, transcripts and documents put to the person at their appearance will be provided to them upon request when practicable promptly and as soon as practicable*”.
13. **Paragraph 5.29** be amended to
- A. provide that the Commission, should specify, as a minimum:
- (i) the actual section the alleged conduct has contravened;
 - (ii) details of the scope and purpose of the investigation, including a detailed description of the conduct, activities or agreement which the Commission believes contravenes the Ordinance and the time frame over which the contravention is alleged to have occurred; and
 - (iii) a date range in the description of the documents and information required. HKAB further suggests that the Commission provides a certified copy of the section 48 warrant for the person’s records.
- B. include the following wording: “*A certified copy of the warrant will be provided to the person whose premises are the subject of the search. A minute of notification of service will serve only to certify delivery and its signature by the recipient will not imply submission.*”
- 13.2 **Paragraph 5.31 be amended to:**
- A. clarify that 31 be amended to clarify that:
- (i) where the in-house lawyer is located on a different part of the undertaking’s premises, the Commission may wait a reasonable time to allow the in-house lawyer to arrive at the search area; and
 - (ii) at the very minimum, the undertaking that is the subject of the search will be given the choice of whether they are happy to be represented by the in-house lawyer available on the premises or if it would be more appropriate, in light of the in-house counsel’s experience and expertise, to wait for external legal advisers; and
- B. delete the following wording: “*and there is no in-house lawyer already on the premises*”.



14. **Paragraph 5.35** be amended to confirm that the Commission shall (as a matter of best practice) in all cases provide a person whose premises have been searched with a register and copy of all documents taken away.
15. **Paragraph 5.38** be amended to:
 - A. expressly recognise that communications between in-house counsel and its clients within the same undertaking may attract legal professional privilege;
 - B. clarify that the Commission shall:
 - (i) agree a process with the person whose premises are being searched and/or its legal advisers at the outset of any search to allow the person in question or its legal advisers to assess and assert privilege over documents during the course of a search and to deal with any contested documents (including using best efforts to resolve any issues with the person or its legal advisers on site); and
 - (ii) not read, take copies of or confiscate any documents over which a claim for legal professional privilege has been asserted – to the extent that there are any documents which are only partly covered by legal professional privilege, sections over which a claim for legal professional privilege arises may be redacted by the person or its legal advisers.
16. **Section 6** be revised to provide that, at least in the early stages of implementation, documents that are provided to the Commission during the course of an investigation will benefit from a blanket protection against disclosure to third parties, for example, in the context of follow-on actions.
17. **Paragraph 6.3** be amended to provide assurance that, where the Commission proposes to disclose or reasonably expects that it may need to disclose confidential information, the Commission will:
 - A. seek disclosure without consent only in exceptional circumstances;
 - B. notify the person from whom the confidential information was originally obtained or to whom the confidential information belongs as soon as practicable in all cases of a proposed disclosure; and
 - C. allow a reasonable period for that person to make representations in respect of the proposed disclosure..

18. **Paragraph 6.11 or 6.12** be amended to clarify that, as a general rule:
- A. employees of a person are allowed to disclose or report confidential information regarding that person to other employees of the person; and
 - B. undertakings are allowed to disclose or report confidential information to their parent or other group companies,
- where reasonably necessary in connection with any matter arising under the Ordinance, provided that a recipient of such confidential information is subject to the same duty of confidentiality under section 128 of the Ordinance.
19. **Paragraph 6.12(a)** be amended to further explain how the Commission will interpret exceptions in section 128(2) of the Ordinance and, in particular, the factors that it will consider before giving consent to disclosure by a third party under paragraph 6.12(a)/section 128(2)(a) of the Ordinance.
20. **Paragraph 7.1** be amended to clarify:
- A. the Commission shall provide an explanation of the outcome including reasons behind its decisions to take no further action in a matter; and
 - B. whether the Commission will offer the Complainant any subsequent opportunities to make further representations to the Commission where the Complainant disagrees with the Commission's decision to take no further action and, if so, what the procedures for this would be.
21. **Paragraph 7.5** be revised to provide additional guidance how an informal settlement route would operate and the likely outcome as opposed to more formal settlement (e.g. through Commitments), including whether any information or decision would be publicised by the Commission in these circumstances.
22. **Paragraph 7.10** be expanded to clarify the circumstances in which a consent order may be required to remedy the Commission's concerns and that the Commission supports this with practical examples.
23. **Paragraphs 7.16 and 7.17** be expanded to include:
- A. assurance from the Commission that any warning period or extension to a warning period will be reasonable and practicable taking into account the relevant circumstances;
 - B. confirmation that the Commission will have regard to the amount of time that the contravening undertaking is likely to require to cease the contravening conduct, in accordance with section 82(3) of the Ordinance;



- C. an explanation of the procedures to be adopted by the Commission and the factors or evidence that the Commission will take into consideration when assessing the amount of time that the contravening undertaking is likely to require to cease the contravening conduct, including for example:
- (i) whether the contravening undertaking will be given a reasonable opportunity to make representations and provide evidence to the Commission;
 - (ii) what information or factors will be taken into account by the Commission in its assessment; and
 - (iii) whether the Commission will accept or proactively seek views from third parties; and
- D. in relation to any extension of the warning period under section 82(6) of the Ordinance, an explanation of:
- (i) the procedures that the Commission will adopt in reviewing whether an extension should be granted, including the circumstances in which the Commission may grant an extension of its own volition;
 - (ii) the factors or evidence that the Commission will take into account when assessing whether an extension should be granted (or, the information that should be included in an application for extension); and
 - (iii) what the Commission will consider to be a “good reason” for granting an extension to a warning period.

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

24. **Paragraph 5.15** be revised to:

- A. provide that information provided to the Commission as part of a Block Exemption Application should not be used against the applicant;
- B. clarify that the Commission will not use information provided in an application for any purpose other than considering the conduct that is the subject of the application; and

- C. the reference to Part 12 of the Draft Applications Guideline in the context of using information provided by the applicant in a relevant enforcement action be amended as appropriate, as Part 12 does not appear to deal with or expand on this issue.
25. If the Commission chooses not to revise **Paragraph 5.15** as suggested in A above, that the Commission considers whether there are alternative ways to provide comfort or protection to potential applicants regarding the potentially self-incriminating nature of an Application or Block Exemption Application. These could include one or more of the following:
- A. Allowing potential applicants to engage in an Initial Consultation with the Commission on an anonymous basis.
- B. Amending the information required in an Application and a Block Exemption Application under paragraphs 6.16 and 11.13 of the Draft Applications Guideline respectively. While HKAB recognises that the Commission needs to strike a balance against ensuring that it has sufficient information to come to a decision on any Application or Block Exemption Application, the requirements to provide, amongst other things, detailed information regarding the potential competition concerns (including possible theories of harm) significantly increase the potential exposure of potential applicants to enforcement action if the Commission does not grant the Application or Block Exemption Application. Decreasing the level of information required will assist in minimising the risk to potential applicants. HKAB suggests that paragraphs 6.16 and 11.13 of the Draft Applications Guideline are amended to say that potential applicants may provide only such information as is required to make their case in the first instance without the need to submit all supporting documents, and that such supporting documents may be provided subsequently once the Commission has agreed to consider the Application or Block Exemption Application.
- C. Providing assurances, for example in the Commission's enforcement priorities, that the Commission will not prioritise enforcement actions against applicants in the early stages of full implementation of the Ordinance and/or that where an Application or Block Exemption Application has been made in good faith that the Commission will not commence an investigation into the agreements which were the subject of the Application or Block Exemption Application, should such application be unsuccessful without giving the parties an opportunity for further assessment.
- D. Including provision in the Commission's Leniency Agreements Policy for a reduction to be provided where an enforcement action is initiated

following an Application or Block Exemption Application and the applicant subsequently co-operates with the Commission's investigation.

26. **Paragraphs 6.13 to 6.15 and 11.10 to 11.12** be amended to clarify that any “*indication*” provided based on an Initial Consultation will be issued in writing to the potential applicant and, where appropriate, may also highlight any additional information required by the Commission to consider the Application or Block Exemption Application.
27. **Paragraph 6.15** be amended to confirm that the Commission may also provide an indication of whether it will consider an Application based on an Initial Consultation, consistent with a Block Exemption Application.
28. **Paragraphs 6.16 and 11.13** be amended to provide further guidance on the issue that an applicant who provides contact details for affected suppliers and customers may not be protected by the exemption under s.60B of the Personal Data (Privacy) Ordinance.
29. The requirement for an overview of submissions made to competition authorities in other jurisdiction with respect to the same agreement or conduct (if any) in **paragraph 6.16(g)** be deleted.
30. **Paragraph 8.2** be amended as follows: “*The Commission will publicise an Application in accordance with sections 10(1) or 25(1) of the Ordinance, including by posting a notice of the Application together with a non-confidential version of the Application on the Commission's website*”.
31. **Paragraph 12.1** be amended to clarify the meaning of “*publicise*” and to confirm that the Commission will not publish a non-confidential version of Block Exemption Applications.
32. If no Notice of Block Exemption Application were to be published, then HKAB would support the existing procedure under which no public decision is issued if the Commission declines to issue a Block Exemption Order. However, if, as currently stated, Block Exemption Applications will be publicised by the Commission before they are fully considered, **paragraph 12.5** should be accordingly amended to state that the Commission will publish an explanation of its decision and its reasons for the decision in cases where, having considered a Block Exemption Application, the Commission declines to issue a Block Exemption Order.