

**RESPONSE TO THE COMPETITION COMMISSION'S
CONSULTATION ON DRAFT GUIDELINES:**

(1) COMPLAINTS

(2) INVESTIGATIONS

**(3) APPLICATIONS FOR A DECISION UNDER SECTION 9 AND 24
(EXCLUSIONS AND EXEMPTIONS) AND
SECTION 15 BLOCK EXEMPTION ORDERS**

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Freshfields Bruckhaus Deringer

RESPONSE TO THE COMPETITION COMMISSION'S (*COMMISSION*) CONSULTATION ON DRAFT GUIDELINES:

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Introduction

1. Freshfields Bruckhaus Deringer welcomes the opportunity to respond to the Competition Commission's and the Communications Authority's public consultation on drafts of three procedural Guidelines that are required by the Competition Ordinance (Cap. 619) (the *Ordinance*). We set out below our general comments, and then address each of the three procedural draft Guidelines under consultation.

2. Our comments are based on our significant experience and expertise in advising on competition law proceedings in numerous jurisdictions around the world.

3. The comments contained in this paper reflect the views of many in Freshfields Bruckhaus Deringer. They do not necessarily represent the views of every partner in the firm, nor do they represent the views of our individual clients.

General Comment

4. By the standards of guidance published by new competition authorities, the draft Guidelines are fulsome. They provide significant guidance as to the operation of the new regime particularly to small and medium size enterprises and companies that have not previously been exposed to competition law.

5. The Commission does not have, by definition, decades of decisions and case-law upon which to draw when elaborating the draft Guidelines, and it is understandable that it has reserved its position or adopted a high level approach in many areas. This will enable the Commission to develop the Hong Kong regime in a manner that is most fitting for Hong Kong. This approach leads us to the following observations:

- (a) we would encourage the Commission to treat its statutory obligation to issue guidance as a continuing one, so that the Guidelines are refreshed and re-issued as practice, decisions and case-law develops; and
- (b) we would encourage the Commission to elaborate further in the Guidelines its policy on certain key issues, drawing – in the Commission's own term – on "*international best practices*". Multi-national companies have a sophisticated understanding of competition law requirements, and necessarily seek far more detailed and precise guidance on substantive and procedural issues. Their concern is to understand how the Hong Kong regime will operate by comparison to, and in

tandem with, other competition regimes in the region and globally. The incorporation of more detail, drawing inspiration from the reams of guidance published by other authorities, would provide greater legal certainty to businesses.

6. The procedural draft Guidelines under consultation form part of the jigsaw. The Commission acknowledges that further draft Guidelines will be published for consultation, including on enforcement policy and leniency agreements. The full procedural picture will only emerge once at least these additional draft Guidelines and the Competition Tribunal's rules have been published, and the passage of the Competition (Amendment) Bill has been completed. Whilst the phased implementation of the Ordinance may necessitate the jigsaw approach, our experience is that, in practice, corporate strategy in the context of competition proceedings must be made in the light of the full procedural picture. We will seek to make additional comments, as necessary, on the three draft procedural Guidelines under consultation once the picture is more complete.

7. Even at this stage, we suggest below that two policy areas of the draft Guidelines, in particular, are revisited. We suggest policy clarifications in order to encourage open, effective and meaningful dialogue between the Commission and businesses. As Hong Kong moves from a world where there has been no competition law to a tough new regime, many businesses (and their legal advisors) will have many questions on what is, or is not, permissible. There is a balance to be struck between strict enforcement and education/guidance in individual matters; but as an area of law which is less clear cut than many, and where businesses will need to transition business practices, we see an important role for open and good faith conversations. Two areas, in particular, in the draft Guidelines risk "chilling" such communications:

- (a) the clarification in the draft Guidelines on Applications (paras 4.1 and 5.15) that the Commission can use any information received in the course of applications for exemption or exclusion decisions to commence enforcement proceedings is likely to discourage the use of an application procedure that is, in any event, optional. This may undermine the "greater legal certainty" that the Commission identifies as a benefit of such decisions (para 5.6); and
- (b) the commitments process will be weakened, and more cases will proceed to lengthy and costly Competition Tribunal proceedings, if the parties are unable to engage in a meaningful examination and discussion of the case with the Commission. The draft Guideline on Investigations (paras 7.12-7.15) does not elaborate on the processes and procedures, including regarding evidence and disclosure, by which the content and language of commitments will be decided. Parties will be reluctant to agree commitments unless the process enables them to engage with the Commission and to evaluate meaningfully whether commitments are in the best interests of their business. The success of the commitments process necessitates, in our view, greater clarity in the draft Guidelines.

Draft Guideline on Complaints

8. Complaints will be a key source of business for the Commission. Along with leniency applications (for which draft Guidelines are yet to be produced), complaints are a way for the Commission to identify possible infringements of the Ordinance.

9. The draft Guideline encourage the making of complaints by “any person”, including anonymously, and in “any form”. This is broader than the approach in the EU, for example, where the complainant must demonstrate a “legitimate interest” in relation to the subject matter of the complaint. The guidance regarding the information that is necessary to submit a “well-informed complaint” is welcomed.

The Commission as “gatekeeper” to remedies for breach of the Ordinance

10. The Commission’s role in the Hong Kong regime is unique when compared to other competition regimes internationally. Sections 108 and 109 of the Ordinance provide that no “stand alone” proceedings for a breach of a conduct rule may be brought in any court in Hong Kong. Redress for alleged breaches of the conduct rules can *only* be sought before the Commission and, subsequent to a Commission determination, in “follow on” proceedings before the Competition Tribunal (in accordance with section 110 *et seq.* of the Ordinance).

11. The Commission has the exclusive right to address potential infringements of the Ordinance and is therefore the “gatekeeper” for access to redress for alleged competition infringements. Businesses that believe that they have been the victim of anti-competitive practices cannot initiate court proceedings to seek a remedy, as they would be able to in the EU or the US, and the Commission cannot refer to that right as a reason not to investigate a complaint.

12. The draft Guideline nevertheless stresses that the “*Commission is required to investigate matters to protect the public interest and not the interest of the complainant*” and it “*might not pursue a complaint even if it is possible that further investigation may uncover a contravention of the Ordinance*” (para 4.4). The Commission stresses the discretion conferred upon it by section 37(2) *not* to investigate complaints.

13. The ability of the Commission to set priorities in its enforcement activity is sensible from a policy and operational perspective, and the draft Guideline on the issue of priorities will be an important part of the jigsaw. The guidance in the draft Guideline on Complaints as to how the Commission proposes to exercise its discretion is also to be welcomed.

14. Its choices are likely, however, to come under close scrutiny, by reference to section 37(2), in the light of its exclusive “gatekeeper” role.

15. In that regard, the draft Guidelines indicate that a complainant will be provided with an “explanation” if the Commission proposes to take no further action after a preliminary review of a complaint (para 5.2). It is not clear whether the “explanation” will be reviewable before the Tribunal under Part 5 of the Ordinance or may instead be susceptible to an application for judicial review. We would recommend that guidance is provided on this point, in keeping with other authorities’ guidance on complaints.

Procedural rights of complainants

16. The draft Guideline on Complaints provides little guidance on the rights and obligations of complainants. In this regard, the draft Guideline merely sets out:

- (a) a “request” to complainants to keep complaints confidential (paras 3.2);

- (b) the circumstances in which the complainant’s identity will be kept confidential or disclosed (paras 3.3-3.5);
- (c) the provision of an “explanation” if the Commission proposes to take no further action after a preliminary review of a complaint (para 5.2); and
- (d) the “likely” informing of the complainant of the outcome of an Initial Assessment (para 5.4).

17. The draft Guideline on Investigations provides a little more clarity:

- (a) para 4.4 provides, in respect of the Investigation Phase, that complainants “*will not be advised of the ongoing status of the investigation*”;
- (b) para 7.1 states that the Commission will notify a complainant in situations where it proposes to take no further action following an investigation (although it is not clear whether the Commission will explain “why” it has taken that decision); and
- (c) para 7.7 provides that the Commission may revisit this decision and reopen an investigation at a later date – though the Guidelines are silent on whether the business in question will be informed and the rights they will have in such a scenario.

18. We note that the issue of complainants’ procedural rights and obligations has been the subject of extensive procedural development in other jurisdictions, notably the EU, albeit that the architecture of decision-making in Hong Kong is different. We would welcome further clarification from the Commission regarding its policy in this area. In particular, given the role of “follow on” actions and the fundamental importance of the Commission’s determination as the foundation of any such action, it will be necessary for the Commission to evaluate and balance the procedural rights (if any) of complainants in the investigation and commitment procedures, notably regarding access to information, against the procedures applicable in “follow on” actions.

Coordination between authorities

19. Paragraph 3.6 of the draft Guideline on Complaints (entitled “Cooperation between competition authorities”) refers to the Commission’s concurrent jurisdiction with the Communications Authority. Paragraph 6.10 of the draft Guideline on Investigations makes a similar reference to the exchange of information between the Commission and the Communications Authority. Section 126 of the Ordinance provides a gateway through which confidential information can be passed between these “competition authorities”.

20. There is no indication of whether, when or how the Commission will liaise with (i) other (non-competition) authorities in Hong Kong or (ii) overseas competition authorities (e.g. the National Development and Reform Commission or the State Administration for Industry and Commerce in China) on case specific matters, including the sharing of confidential information. The Ordinance is not clear on whether the Commission is indeed empowered to share confidential information with other Hong Kong authorities or overseas regulators, or to enter into arrangements with such authorities for that purpose. The functions of the Commission (section

130) refer “to advising the Government on competition matters outside Hong Kong” and the powers of the Commission (section 131) refer to “becoming a member or affiliate of any international body”. These powers do not include the sharing of confidential information.

21. We suggest that the draft Guidelines be clarified to identify:

- (a) whether the Commission considers it has power to share case specific, confidential information with non-competition Hong Kong authorities or overseas authorities and/or power to enter into arrangements with such authorities for that purpose; and
- (b) if it considers it has such powers:
 - (i) how and when those powers might be exercised to share confidential information, and what measures would be put in place to protect the confidential nature of that information and its use by overseas authorities;
 - (ii) when it might exercise its discretion not to disclose such information; and
 - (iii) how the Commission will treat and use confidential information it may receive from those overseas agencies, in particular where that information would be treated as covered by legal professional privilege in Hong Kong or had been gathered pursuant to third country evidence gathering powers that are less prescriptive than in Hong Kong.

Guideline on Investigations

22. The draft Guideline on Investigations is likely to be of most significance to businesses that may be subject to an investigation. The draft Guideline repeats extensively provisions of the Ordinance, and does so in an ordered and organised manner in keeping with the likely conduct and progress of an investigation. Whilst this has utility, there is, however, little policy or practical guidance in the draft Guideline beyond the bones of the Ordinance. We would suggest that consideration is given to elaborating further the guidelines, in a manner consistent with various other international competition authorities. This is both procedurally efficient and will reduce the risk of the early operation of the Ordinance being beset by procedural challenges and disputes.

23. We set out below a few specific, but non-exhaustive, areas where further guidance would be welcomed.

Commitments pre-investigation

24. According to paragraph 4.1, the Commission may ask for a commitment in order to resolve a matter at the conclusion of the Initial Assessment phase. Paragraph 5.1 states that the Commission may launch an investigation based only on a suspicion of anti-competitive behaviour which goes beyond mere speculation. Accordingly, businesses may be faced with a situation where they are being asked by the Commission to give commitments based on evidence of misconduct which is weak. There is clearly the potential here for businesses to face adverse consequences for refusing to agree to commitments the basis of which may not be objectively justified. This is very different from a position of offering parties the opportunity to settle in

circumstances in which the Commission has reached a view that there has been an infringement and, in offering settlement, avoids the need for a full and potentially time-consuming procedure.

Notifying the target of the investigation

25. The draft Guidelines provide an indicative timeframe for an investigation (whilst retaining significant discretion to the Commission). In this timeframe, the draft Guideline is light on whether, how or when the target of an investigation will be notified of an investigation. The draft Guidelines provide little clarity on what information might be provided to the target, and at what stage. These points are critical for the target to defend itself effectively, and we would recommend that additional clarity is provided on this point.

Interviews

26. Paragraphs 5.17-5.22 deal with interviews carried out by the Commission during the course of an investigation. There is no indication of whether interviewees will be given advance notice of the documents on which they are to be questioned, as is common in similar proceedings in other jurisdictions (the UK's Serious Fraud Office, for example, will often provide a bundle of documents up to two weeks in advance of an interview).

Dawn raids: presence of legal advisers

27. Paragraph 5.31 states that "*The Commission is not required by the Ordinance to wait for a person's legal advisers to attend the premises before commencing its search. However, where parties have requested that their legal advisers be present during its search, and there is no in-house lawyer already on the premises, Commission officers may at their sole discretion wait a reasonable time for external legal advisers to arrive.*"

28. The clarification of waiting a reasonable time is to be welcomed. However, it is unclear why this waiting period may not apply to a business which wishes to have external lawyers present, but which has in-house lawyers (even if those in-house lawyers may not be competition specialists). We suggest that this is clarified so that a reasonable delay is provided to businesses which seek external representation irrespective of whether that business has in-house lawyers.

Dawn raids: electronic document procedures

29. Paragraphs 5.32-5.35 address the process of documentary searches. In our experience, dawn raids predominantly focus on electronic documents. International competition authorities have evolved their policies and procedures significantly regarding electronic document searches in recent years. We suggest that the draft Guideline is expanded to detail the approach of the Commission in respect of this fundamental area of dawn raid process. In particular, if the Commission intends to use external IT resources during dawn raids, an explanation of the basis on which such IT resources may be acting and the proposed processes would usefully be included in the draft Guideline.

Dawn raids: disputes regarding Legal Professional Privilege

30. Paragraphs 5.23-5.35 describe the procedure for the execution of so-called section 48 warrants. Although both the Ordinance and the Guideline (at paragraph 5.38) specifically acknowledges that the protection of legal professional privilege will be respected, there is no

practical guidance concerning how privilege will be preserved in the context of a dawn raid. This issue has been the subject of protracted debate in jurisdictions such as the EU. In the UK, for example, one would normally expect any potentially privileged material, the status of which was unclear, to be segregated from privileged and non-privileged materials for later review by an independent party. Guidance on the Commission's proposed procedures would be welcomed.

31. A related issue arises in paragraph 6.14, which states that the Commission "*will not normally accept information or documents on any condition that seeks to limit the Commission's use of the information.*" It is unclear whether the Commission will be willing to accept a limited waiver of legal professional privilege in certain documents on disclosure to the Commission. This has become the practice of the Securities and Futures Commission, and provides greater flexibility in the process and is an important consideration regarding "follow on" actions or actions in overseas jurisdictions.

Commitment process

32. Paragraph 7.12(b) provides that the commitment process may be initiated by the Commission or parties. However, there is lack of clarity on the procedures applicable to a commitment process initiated other than as part of an infringement notice. In particular, it is unclear what evidence, if any, will be made available to parties under investigation at the commitment stage. The ability of parties to enter into a commitment, in accordance with their duties to shareholders, will depend on being able to understand the Commission's case and the full state of the evidence held by the Commission (both incriminatory and exculpatory). Further, it is unclear to what extent Commission and the parties under investigation may enter into without prejudice discussions in the commitment process. The commitment process will be weakened, and more cases will proceed to lengthy and costly Competition Tribunal proceedings, if the parties are unable to engage in a meaningful examination and discussion of the case with the Commission.

33. In this regard, paragraph 7.13 states that the Commission may commence proceedings before the Tribunal where a party gives a commitment which was based on information which was incomplete, false or misleading. There appears to be no acknowledgement that such a disclosure obligation ought (as a matter of procedural fairness) to cut both ways, and that parties ought not to be required to accept commitments without first having had the opportunity to make at least some evaluation of the Commission's case.

34. The draft Guideline provides little clarity on the process by which the content and language of the commitments will be decided. The draft Guideline has not sought to provide policy or practical guidance to the procedures set out in Schedule 2 of the Ordinance and in particular to the content of the required notices (there is simply a cross-reference to Schedule 2 in para 7.12). In particular, there is no indication of whether the parties involved will be granted a measure of disclosure or have the right to make representations on the content of the notice (and, if so, whether protected by without prejudice privilege). The content and language will be critical for businesses in reaching a decision whether or not a commitment can be accepted, notably, in the light of the potential for "follow on" actions. We would presume that, for the commitment process to be effective, the Commission and the target of the investigation would engage in a meaningful dialogue regarding the content and language of the commitment.

35. We suggest that the commitment procedures are explained more fully in the draft Guideline.

Consultations prior to Tribunal proceedings

36. Paragraph 7.9 provides that, in cases where it is not required to issue a Warning Notice prior to commencing proceedings before the Tribunal, the Commission will usually contact parties in order to set out its concerns and provide an opportunity for such concerns to be addressed. However, the draft Guideline does not address the extent of the disclosure which the Commission will provide in such circumstances, and whether it is obliged to do anything other than present its best possible case to the parties under investigation. Indeed, the purpose of the consultations is unclear.

Warning Notices and Infringement Notices

37. Paragraph 7.16 provides that the Commission must issue a Warning Notice before commencing proceedings in respect of a non-serious breach of the First Conduct Rule. Paragraph 7.19 provides that the Commission may issue an Infringement Notice before commencing proceedings in respect of either a serious breach of the First Conduct Rule or a breach of the Second Conduct Rule.

38. However, as with the commitment process, in neither case does the draft Guideline stipulate how the content or language of such notices will be decided. Given the potentially serious impact a notice may have on a party's business, one would expect the notice itself to be the product of negotiation with the Commission (this is the process followed, for example, by the UK's Financial Conduct Authority, whose Warning Notices and Decision Notices are the subject of often detailed negotiations) rather than the result of a unilateral determination by the Commission.

39. According to paragraph 7.21, the Commission is not obliged to issue an Infringement Notice before commencing proceedings in respect of the two categories of misconduct identified above. Thus, if the Commission is able to issue such notices on the basis of more limited disclosure than would be ordered in proceedings before the Tribunal (or indeed on the basis of no disclosure at all), then Infringement Notices will arguably serve no purpose other than to draw parties into a potentially less favourable settlement than they might subsequently obtain, in the interests of avoiding litigation risk.

Draft Guideline on Applications

40. The draft Guideline on Applications refers to applications to the Commission for individual decisions or block exemption orders that an agreement, or conduct, or a category of agreements is excluded or exempted from the Conduct Rules. The draft Guideline sets out all areas of exemptions and exclusions under the Ordinance. The processes and procedures set out in the draft Guideline are instructive, detailed and useful. For example, para 6.12 clarifies that an application may be lodged in respect of future conduct (para 6.12), so long as it is not hypothetical.

41. Our comments on this draft Guideline are, however, more fundamental regarding its scope and structure.

Scope of exclusions and exemptions and the Commission's role

42. The Ordinance provides, broadly, two categories of exclusions and exemptions:

- (a) exclusions and exemptions that apply by *operation of law*. This category includes:
 - (i) the statutory body exclusion (section 3 of the Ordinance);¹ and
 - (ii) the “general exclusions from conduct rules” (Schedule 1 to the Ordinance). Block exemptions, which are stated to be an “*exceptional measure*” (para 11.3) *confirm* that “*a particular category of agreement is an excluded agreement*” under Schedule 1, para 1 (section 15(1), emphasis added); and
- (b) exclusions and exemption that apply only upon the *making of a specific governmental act*. This category includes:
 - (i) the specified persons or activities exclusion (sections 4 and 5, applicable pursuant to regulations by the Chief Executive in Council);
 - (ii) the public policy exemption (section 31, applicable pursuant to an order of the Chief Executive in Council); and
 - (iii) the international obligations exemption (section 32, applicable pursuant to an order of the Chief Executive in Council).

43. The draft Guideline only applies to the first category (and in circumstances where orders and regulations have already been made).

44. The draft Guideline does not set out any process or procedure regarding the second category. Decisions on these exclusions and exemptions are to be taken by the Chief Executive in Council. It is unclear from the silence in the draft Guideline whether the Commission considers that it has any role or function in respect of the decision-making by the Chief Executive in Council. Whilst no specific role is set out in the respective sections of the Ordinance, the Commission nevertheless has the function to “*advise the Government on competition matters in Hong Kong*” (section 130(d)).

45. We would suggest that the draft Guideline clarifies the position, as businesses may have direct interests in respect of this second category of exclusions and exemptions:

- (a) if the Commission proposes to have a role in the decision-making process, businesses should be guided as to whether to engage with the Commission on these issues, and if so how; or
- (b) if the Commission has no role, the Commission should guide businesses to whom enquiries or representations should be made.

¹ Unless specified to apply by regulation of the Chief Executive in Council, pursuant to section 3(2).

The circularity of applying for individual Decisions and Block Exemptions Orders

46. In respect of the first category of exclusions and exemption, the draft Guidelines acknowledge that “*undertakings to whom an exclusion or exemption applies will not contravene the ordinance*” and “*there is no requirement for undertakings to apply to the Commission in order to secure the benefit of a particular exclusion or exemption*” (para 1.5, repeated in paras 5.4 and 5.5). Businesses “*may self-assess the legality of their conduct having regard to the Conduct Rules and the exclusions and exemptions from those rules*” (para 5.5). The Commission also encourages applicants to seek legal advice before approaching the Commission about an application (paras 4.2 and 5.16).

47. The procedure envisaged by the Commission in the draft Guideline involves Initial Consultations, is public, requires third party engagement, must be accompanied by a fee, may be investigative of the applicant and, of itself, provides no immunity to the applicant (contrary to historic notification regimes in the EU, for example). The Commission has further clarified that:

- (a) “*The Commission can use any information received, with or without notice, for other purposes under the Ordinance*” (para 4.1); and
- (b) “*The Commission may, in its discretion, initiate enforcement action in respect of any such agreement or conduct (including proceedings before the Tribunal) if it declines to consider an application, make a Decision, or issue a Block Exemption Order. In such cases, the Commission may use information provided by the applicant in the relevant enforcement action*” (para 5.15).

48. As an application, or even an initial consultation, may itself prompt the Commission to take enforcement action, the practical effect of such guidance will be significantly to restrict the number of parties making applications. Applications are likely only to be made when parties can be confident that an application will succeed – circumstances in which it would be unnecessary to seek clarification from the Commission and to subject the issue to the scrutiny and process proposed by the Commission. The Commission’s proposed approach is unlikely to engender a culture of openness and cooperation with businesses.

49. We suggest that the Commission revisit the policy in paragraphs 4.1 and 5.15. In this regard, the Commission seeks to maintain a broad discretion regarding the commencement of an investigation (see the public interest assessment, in the same terms, in para 4.3 of the draft Guideline on Complaints and para 3.4 of the draft Guideline on Investigations). The exercise of that discretion could include consideration of the making of an application.

50. If the Commission does not amend its approach, we suggest that the draft Guideline groups together the relevant issues – on risks and benefits – close to the beginning of the draft Guideline, so that there can be no ambiguity regarding the implications for businesses of proceeding with an application, rather than relying on self-assessment.

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