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By email: guidelines@compcomm.hk

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

Dear Sirs

Comments on the Revised Draft Guidelines

The Hong Kong Association of Banks ("**HKAB**") writes further to the following revised draft guidelines published by the Competition Commission (the "**Commission**") on 30 March 2015:

- Revised Draft Guideline on Complaints (the "**Revised Complaints Guideline**");
- Revised Draft Guideline on Investigations (the "**Revised Investigations Guideline**");
- Revised Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 (Block Exemption Orders) (the "**Revised Applications Guideline**");
- Revised Draft Guideline on the First Conduct Rule (the "**Revised FCR Guideline**");
- Revised Draft Guideline on the Second Conduct Rule (the "**Revised SCR Guideline**"); and
- Revised Draft Guideline on the Merger Rule (the "**Revised Mergers Guideline**").

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

HKAB welcomes the Commission's Revised Draft Guidelines and is pleased to have the opportunity to provide further comments. We have adopted the definitions used in the Revised Draft Guidelines throughout this letter.

Chairman The Hongkong and Shanghai Banking Corporation Ltd
Vice Chairmen Bank of China (Hong Kong) Ltd
Standard Chartered Bank (Hong Kong) Ltd
Secretary Henry Chan

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HKAB appreciates the transparent approach adopted by the Commission to date in relation to finalisation of the guidelines. In particular, we commend the Commission for its publication of the Guide to the Revised Draft Guidelines Issued under the Competition Ordinance (the “**Guide**”), which provided helpful insight into the Commission’s thinking.

At the same time, HKAB notes that many of its proposals (as set out in its submissions to the Commission dated 10 November 2014 and 19 December 2014) have not been adopted or addressed (in some cases without explanation in the Guide). Whilst we hope that the Commission will give further thought to all such proposals in finalising the guidelines, we have sought, in this letter, to focus on certain key areas which we think most strongly necessitates further clarification or reconsideration by the Commission. These are areas which have an important bearing on how businesses interact with competition law in practice, and are as follows:

- the interaction between competition law and other regulatory regimes;
- the lack of market share thresholds;
- the Commission’s assessment of non-binding decisions of trade associations;
- guidance on when exclusive dealing may constitute an “object” infringement; and
- the provision of procedural safeguards.

HKAB also believes that certain specific issues should be reconsidered or could benefit from further clarification, namely:

- the concept of decisive influence under the First Conduct Rule;
- further guidance on the use of standard terms;
- the Commission’s position in relation to third line forcing;
- publication of Applications for a Decision and Block Exemption Applications; and
- further guidance on informal settlement (the “no further action” investigations outcome) and use of consent orders.

We set out our specific comments on each of these points below. We have also included our proposed drafting changes in the Appendix to this letter for the Commission’s consideration.

1. The interaction between competition law and other regulatory regimes

1.1 As mentioned in both of HKAB’s previous submissions, many businesses in Hong Kong are subject to regulation by other regulatory or supervisory authorities, particularly those in the financial, banking and/or insurance sectors. Members of the banking industry, for example, are subject to codes of practice, circulars and regulatory guidance or directives. HKAB had requested the

Commission to take into account these other regulatory regimes and/or the views of concurrent regulators in:

- (A) assessing the effects on competition;
 - (B) defining the relevant market; and
 - (C) exercising its discretion in deciding which complaints or matters warrant further investigation.
- 1.2 More generally, HKAB also suggested the Commission address how conflicting obligations between members' regulatory duties and their obligation to comply with the Ordinance will be resolved.
- 1.3 HKAB appreciates that the Commission touches upon this issue briefly in the Guide, where it states that it "*cannot, in the abstract, bind itself to the views of public or regulatory authorities*" and notes that the Revised Investigations Guideline already allows for the Commission to gather information from public or regulatory authorities.¹ HKAB recognises that the Commission does not wish to bind itself automatically to the views of other authorities (and nor is this what we are proposing). However, HKAB believes that there is no reason why the Commission should not provide the necessary comfort for regulated industries and commit to speaking to other regulators and taking their views and the existing regulatory regimes into account, in considering whether to pursue a matter. The Revised Investigations Guideline only states that, in the Initial Assessment Phase, the Commission "*may*" seek information by (amongst other means) "*meeting and interviewing persons who may have knowledge of the conduct*"², which, without express reference to other regulators, does not adequately address HKAB's concern.
- 1.4 HKAB therefore recommends a number of drafting changes (set out in the Appendix to this letter) to be made to the Revised Draft Guidelines. Such proposals represent a realistic means of reconciling different regulatory regimes. Hong Kong's financial sector, for example, is heavily regulated and the operation of other regulatory frameworks should reasonably be taken into account by the Commission in order to: (i) achieve a full understanding of the Hong Kong market; (ii) avoid conflicting outcomes at the expense of businesses in regulated sectors; and (iii) ultimately, develop a legally certain and comprehensive framework encompassing the various regimes which together ensure the protection of consumers.

¹ Paragraph 60 of the Guide

² Paragraph 3.3(b) of the Revised Investigations Guideline

1.5 If the Commission believes that the guidelines are not the appropriate venue for discussing how the Ordinance will interact with other regulatory regimes, HKAB strongly urges the Commission to address these issues in its forthcoming enforcement policy. In any case, the Commission should not allow the situation to remain ambiguous.

2. Market share thresholds

2.1 HKAB's submission dated 19 December 2014 had suggested that:

- (A) the Commission clarify the degree of market power at which concerns are likely to arise under the First Conduct Rule in relation to both horizontal and vertical agreements (for example through the inclusion of indicative market share thresholds); and
- (B) the Commission provide an indicative market share threshold below which an undertaking would be unlikely to have a substantial degree of market power.

2.2 These suggestions were not adopted by the Commission in the Revised Draft Guidelines. Whilst HKAB fully understands the Commission's reluctance to bind itself to market share thresholds for the reasons set out in the Guide, we believe that the Commission should not be precluded from including *indicative* thresholds in the guidelines. On the contrary, we would argue that, from the businesses' perspective, such indicative thresholds are *essential* for a jurisdiction that is new to competition law. Businesses will recognise that such thresholds do not legally bind the Commission, such that the Commission retains sufficient flexibility to make adjustments where necessary on the specific facts of a case. Despite being non-binding, such indicative market share thresholds would be invaluable to businesses in light of how critical the concepts of "market power" and "substantial degree of market power" are to any competition analysis. Willingness to introduce such indicative thresholds would send a strong message that the Commission is willing to address the concerns of the business community and work with businesses in a pragmatic way that drives forward the objectives of competition law.

2.3 We note that even if the Commission is not minded to provide a market share threshold indicating when "market power" or a "substantial degree of market power" will likely exist, an indicative threshold below which such market power would be unlikely will nonetheless be very helpful.

2.4 As an alternative to setting out the thresholds at this stage, given that one of the Commission's main justifications for not including market share thresholds is its lack of enforcement experience, we believe the Commission should commit to including, or re-assessing the inclusion of, each of the above thresholds within, for example, one or two years after the Ordinance has been implemented. At

that point, the Commission should have a better grasp of the markets in Hong Kong.

- 2.5 We believe the proposals set out above are reasonable means by which to strike a balance between the Commission's need for flexibility and the business community's need for a more complete understanding of how the Ordinance will operate.

3. Non-binding decisions of trade associations

- 3.1 As noted in HKAB's submission dated 19 December 2014, it is common for trade associations to issue non-binding recommendations or statements (often at the request of a regulator or other third party) to assist the industry it represents.

- 3.2 The Revised FCR Guideline contains minimal guidance on when a non-binding decision of an association of undertakings will contravene the First Conduct Rule (other than in the context of recommended fee scales of trade and professional associations).³ In particular, the Commission has deleted the previous wording that a non-binding recommendation amounts to a "*decision*" where it reflects an "*objective intention to coordinate the conduct of association members*".⁴ The Commission's reasons for doing so are unclear (nor is this addressed in the Guide). HKAB therefore respectfully requests the Commission to:

- (A) clarify whether a non-binding recommendation may amount to a decision even in the absence of such objective intention to coordinate conduct;
- (B) provide further guidance on when non-binding recommendations (which are common in many industries) will be permissible; and
- (C) in particular, confirm that genuinely non-binding recommendations (i.e. those which are not monitored or subject to sanctions) will generally not be caught under the First Conduct Rule.

4. Exclusive dealing

- 4.1 The Revised SCR Guideline newly stipulates that "*certain exclusive dealing arrangements by an undertaking with a substantial degree of market power*

³ Paragraph 2.36 of the Revised FCR Guideline

⁴ Paragraph 2.23 of the draft guideline on the First Conduct Rule

might also be considered to have the object of harming competition when viewed in their context".⁵

4.2 On the other hand, the Revised SCR Guideline expressly recognises that exclusive dealing is "*commonly used in commercial arrangements and in most cases will not harm competition*".⁶ The Revised SCR Guideline then discusses the circumstances when exclusive dealing may be a concern, focusing on the potential foreclosure effects of such arrangements (see paragraphs 5.24 to 5.28).

4.3 HKAB notes that:

(A) the Commission has not provided any guidance on what the "*certain exclusive dealing arrangements*" which could be problematic are, or the relevant "*context*" which they will be viewed against; and

(B) the Commission's classification of exclusive dealing as a potential "object" infringement is inconsistent with the practices of most overseas jurisdictions (which tend to involve an assessment of the effect of the exclusive dealing).

4.4 It is therefore unclear when exclusive dealing will be considered an "object" infringement and not assessed within the effects-focused framework provided in the relevant paragraphs of the Revised SCR Guideline. As such, HKAB recommends that the Commission provide further explanation of when exclusive dealing arrangements will be considered to have the object of harming competition, including examples.

5. Procedural safeguards

5.1 Given the negative impact an investigation could have on the operations and reputation of a business, the importance of transparency, and the fundamental right to a fair hearing (which is a constitutional right in Hong Kong), HKAB believes it is critical for the Commission to provide as much clarity as possible in its Guideline on Investigations.

5.2 In particular, HKAB wishes to draw to the Commission's attention the following points which were raised in HKAB's submission dated 10 November 2014 but were not addressed in the Revised Draft Guidelines or explained in the Guide:

(A) Protection during the Initial Assessment Phase: the Revised Investigations Guideline does not clarify whether the various protections

⁵ Paragraph 4.15

⁶ Paragraph 5.23

under the Ordinance which apply in respect of the Commission's Investigation Powers once the Commission has formally commenced an investigation (e.g. legal privilege and immunity) also apply during the Initial Assessment Phase.

(B) Information to be included in a section 41 information request: HKAB submitted that a section 41 information request should include:

- (i) the actual section of the Ordinance which has allegedly been contravened; and
- (ii) a date range in the description of the documents and information required,

given that both are important for ensuring that parties can understand the basis and scope of the Commission's request. HKAB reiterates that these are important for the protection of the parties' right to a fair hearing and in the interests of transparency.

(C) Information to be included in a section 48 warrant: the Revised Investigations Guideline is silent on the information which will be included in a section 48 warrant. As HKAB previously suggested, it would be in the interests of transparency and the right to a fair hearing if the warrant included, at minimum:

- (i) the actual section of the Ordinance which has allegedly been 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.

(D) Provision of a register and copies of all documents taken following a search: as proposed by HKAB, the Commission should, following a search:

- (i) 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.

Without a complete record of all documents taken by the Commission, the person who is subject to the investigation would not have a fair opportunity to challenge the case against them. In any case, the Commission should have access to such a register and copies as a matter of good record-keeping, so it is unclear why they should not be shared as a matter of course with the person being searched.

- (E) Commission's treatment of confidential information: although the Revised Draft Guidelines do provide some additional explanation on how the Ordinance operates in relation to the Commission's treatment of confidential information, it still falls short of committing to the best practices proposed by HKAB. In particular, HKAB had suggested that the Commission should:
- (i) seek disclosure without consent only in exceptional circumstances (i.e. that the Commission's starting point should always be to seek consent);
 - (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.

Such practices are necessary in any fully transparent and accountable enforcement regime.

- 5.3 Many of the above proposals are based on the experience of a fair and transparent process in other jurisdictions. HKAB believes that there is no reason why, in conducting investigations, the Commission should not seek to adhere to overseas established best practices, as there are no Hong Kong-specific considerations which should allow the Commission to be less transparent than other competition authorities. We note that these suggestions do not seek to limit the Commission's statutory powers – rather, they relate mainly to the provision of information to parties, and the importance of having fair and clear procedures in place.

6. Other points which should be reconsidered or clarified

Decisive influence

- 6.1 The concept of “decisive influence” has now been defined in the Revised Mergers Guideline⁷, but the Revised FCR Guideline is silent on whether the same definition applies in the context of assessing whether separate entities form part of the same undertaking. HKAB believes that, in the interests of clarity and consistency, the same definition should be adopted or referred to in the Revised FCR Guideline for the purposes of the First Conduct Rule and Second Conduct Rule.

The use of standard terms

- 6.2 HKAB’s submission dated 10 November 2014 had recommended that the guidelines include further examples of standard terms which are unlikely to raise competition concerns. This proposal has not been adopted and Hypothetical Example 15 of the Revised FCR Guideline remains the only practical example on this issue.
- 6.3 As acknowledged by the Commission in the initial draft and Revised FCR Guideline, the use of standard terms is a widespread practice across many industries, including the insurance and banking sectors. The Commission also expressly recognises the benefits of such standard terms for consumers and competition in general.⁸ It is therefore important that the guidelines contain clear and practical guidance on when the use of standard terms will be acceptable, so as to ensure that businesses are not unduly discouraged from adopting them. HKAB therefore wishes to reiterate its previous submission as to the importance of having further examples.
- 6.4 Similarly, as mentioned in HKAB’s submission dated 10 November 2014, terms often become standardised in, for example, the insurance sector even without contact between competitors, simply by virtue of normal market negotiations and the nature of the services and products being offered. In particular, standardised terms have arisen as a result of how the industry allocates risk – this is primarily by means of back-to-back insurance arrangements with reinsurers, of which there are only a few on the market and who tend to dictate the exclusion terms in a policy. To avoid confusion, the Commission should clarify that no competition concerns would arise purely by reason of undertakings having similar terms, provided that these similarities do not result from any agreement or understanding between those undertakings.

⁷ Paragraph 2.7 of the Revised Mergers Guideline

⁸ Paragraphs 6.62 and 6.63

Third line forcing

- 6.5 HKAB raised the possibility that Hypothetical Example 7 of the draft guideline on the Second Conduct Rule (now Hypothetical Example 6 of the Revised SCR Guideline) could suggest that third line forcing is prohibited in Hong Kong. Most other jurisdictions (e.g. the European Union and most Asian countries) do not consider it to be an infringement to make the purchase of goods or services or giving of discounts conditional upon the purchaser buying goods or services from a particular third party. It is, however, seen as a type of illegal exclusive dealing in Australia.
- 6.6 The Commission has not amended this example or clarified whether third line forcing is a type of abusive conduct in Hong Kong. Given that many businesses may, for example, require customers to use suppliers of a certain quality or standard, HKAB wishes to reiterate the importance of the Commission providing clarification on how it will assess third line forcing (including whether or not this is what Hypothetical Example 6 is directed at).

Publication of Applications for a Decision and Block Exemption Applications

- 6.7 HKAB has previously noted that publication of (albeit non-confidential) Applications for a Decision and Block Exemption Applications goes beyond the requirements under the Ordinance. Such documents will likely include information which could be used against the applicant by third parties (for example, in potential future litigation). The publication of a Notice of Block Exemption Application (as opposed to the proposed Block Exemption Order) is also not contemplated by the Ordinance. HKAB therefore suggested that such requirements, which go beyond what is required by the Ordinance and could potentially prejudice the relevant undertaking(s) in question, be deleted from the draft Applications Guideline.
- 6.8 HKAB notes that the Commission has not adopted this proposal in the Revised Applications Guideline, nor has it explained why it is necessary for it to publish such documents. We therefore respectfully request the Commission to remove these requirements.

Clarification on certain investigation outcomes

- 6.9 In its submission dated 10 November 2014, HKAB recommended that the Commission provide further guidance on:
- (A) how the informal settlement route (i.e. where the Commission decides to take “no further action” in a matter) will operate. It is unclear, for example, whether any information or decision would be publicised by the Commission in such circumstances; and
 - (B) when the Commission will apply for a consent order.

- 6.10 The Revised Investigations Guideline remains silent on the above points. For example, paragraph 7.23 simply notes that the Commission's concerns "*may in some cases*" only be satisfactorily addressed by a consent order, without providing any explanation or examples of when such cases may arise.
- 6.11 HKAB wishes to emphasise that further guidance on these issues is necessary to ensure that businesses are fully informed of the options available to them when assessing potential competition risks under the Ordinance. As such, it recommends that the Commission provide further detail on the above investigation outcomes.

HKAB trusts that the Commission will give due consideration to the issues and recommendations set out in this letter, all of which are highly important to members of HKAB. It would be helpful if the Commission could provide feedback to HKAB on the above recommendations.

HKAB remains available to discuss the specific matters mentioned in this letter, and issues relevant to banking practices generally. We would welcome the opportunity to meet with the Commission before finalisation of the guidelines (even if this is to occur after the Legislative Council consultation process), to the extent that it would be helpful in ensuring that our points are adequately addressed.

Yours faithfully



Henry Chan
Secretary

Appendix – Suggested areas for clarification / changes

Issue	Clarification / change
Clarification on the interaction between competition law and other regulatory regimes	Inclusion of “ <i>The Commission may also, for example, take into account the existence of other regulatory regimes or the views of any concurrent regulators in Hong Kong in assessing whether the agreement has the object of harming competition.</i> ” at the end of paragraph 3.5 of the Revised FCR Guideline, and at the end of paragraph 4.8 of the Revised SCR Guideline
	Inclusion of “ <i>The Commission may also, for example, take into account the existence of other regulatory regimes or the views of any concurrent regulators in Hong Kong in assessing whether the agreement has an anti-competitive effect.</i> ” at the end of paragraph 3.25 of the Revised FCR Guideline, and at the end of paragraph 4.18 of the Revised SCR Guideline
	Inclusion of “ <i>consider the views of any concurrent regulators in Hong Kong</i> ” as an analytical step the Commission may take in defining the relevant product market, in paragraph 2.14 of the Revised SCR Guideline
	Inclusion of “ <i>the views of any concurrent regulators in Hong Kong</i> ” as a factor the Commission may consider in defining the relevant geographic market, in paragraph 2.21 of the Revised SCR Guideline
	Inclusion of “ <i>the existence of other regulatory regimes and the views of any concurrent regulators in Hong Kong</i> ” as a factor to be taken into consideration by the Commission in exercising its discretion whether to pursue a particular matter, in paragraph 3.6 of the Revised Investigations Guideline (and/or in the Commission’s forthcoming enforcement policy)
	Expression of the Commission’s policy towards resolving conflicts between the policy objectives of other regulators (i.e. an undertaking’s regulatory duties under a different regime) and the Commission’s policy objectives (i.e. the undertaking’s obligation to comply with the Ordinance), in the guidelines and/or the Commission’s forthcoming enforcement policy
Absence of market share thresholds	Clarification on the degree of market power at which concerns are likely or unlikely to arise under the First Conduct Rule in relation to both horizontal and vertical agreements (or commit to doing so at a later stage)

	Provision of an indicative market share threshold below which an undertaking would be unlikely to have a substantial degree of market power (or commit to doing so at a later stage)
Assessment of non-binding decisions of trade associations	<p>(A) Clarification on whether a non-binding recommendation may amount to a decision even in the absence of an objective intention to coordinate the conduct of association members;</p> <p>(B) Provision of further guidance on when non-binding recommendations will be permissible; and</p> <p>(C) Confirmation that genuinely non-binding recommendations (i.e. those which are not monitored or subject to sanctions) will generally not be caught,</p> <p>in the Revised FCR Guideline</p>
Exclusive dealing as an “object” infringement	Guidance on and examples of when exclusive dealing arrangements will be considered to have the object of harming competition, in paragraph 4.15 of the Revised SCR Guideline
Availability of protections during the Initial Assessment Phase	Insertion of “ <i>The protections under the Ordinance as to immunities (see paragraph 5.39 of this Guideline) and legal privilege (see paragraph 5.44 of this Guideline) will apply during the Initial Assessment Phase.</i> ” at the end of paragraph 3.4 of the Revised Investigations Guideline
Information to be included in a section 41 information request	<p>Inclusion of</p> <p>(A) “(including the actual section of the Ordinance which has allegedly been contravened)” at the end of sub-paragraph (a); and</p> <p>(B) “(including a date range)” at the end of sub-paragraph (b), in paragraph 5.9 of the Revised Investigations Guideline</p>
Information to be included in a section 48 warrant	<p>Insertion of the following paragraph:</p> <p>“A section 48 warrant will provide, amongst other information:</p> <p>(i) the actual section of the Ordinance which has allegedly been contravened;</p> <p>(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</p> <p>(iii) a date range in the description of the documents and/or</p>

	<p><i>information that the Commission requires.”</i></p> <p>as a new paragraph after paragraph 5.24 of the Revised Investigations Guideline</p>
Provision of a register and copies of all documents taken following a search	<p>Insertion of the following wording:</p> <p><i>“The Commission will, as soon as practicable following a search, provide to the undertaking under investigation a register and copies of all documents taken by the Commission.”</i></p> <p>at the end of paragraph 5.36 of the Revised Investigations Guideline</p>
Commission’s treatment of confidential information	<p>Insertion of the following paragraph:</p> <p><i>“Generally, the Commission’s starting point will be to obtain the required consent of the relevant person (as specified in section 126(2) of the Ordinance). Where the Commission intends to disclose confidential information without such consent, it will notify the relevant person of the proposed disclosure as soon as practicable, and allow a reasonable period for that person to make representations in respect of the proposed disclosure.”</i></p> <p>after paragraph 6.13 of the Revised Investigations Guideline</p>
The concept of “decisive influence”	<p>Insertion of the following wording:</p> <p><i>“The concept of “decisive influence” to be applied in the context of assessing whether the relevant entities constitute a single economic unit is consistent with that discussed at paragraph 2.7 of the Guideline on the Merger Rule.”</i></p> <p>at the end of paragraph 2.9 of the Revised FCR Guideline</p>
Standard terms	<p>Provision of further examples of when the use of standard terms will be acceptable in the Revised FCR Guideline</p> <p>Insertion of the following paragraph:</p> <p><i>“The mere fact that market participants adopt similar terms (for example, where commercial negotiations in the market have led to standardisation in the terms used in an industry) will not raise concerns under the First Conduct Rule, in the absence of any agreement or understanding between such participants.”</i></p> <p>after paragraph 6.66 of the Revised FCR Guideline</p>
Assessment of third line forcing	<p>Clarification on how the Commission will assess third line forcing and whether Hypothetical Example 6 is directed at third line forcing, in the Revised SCR Guideline</p>

<p>Publication of Applications for Decisions and Notices of Block Exemption Applications</p>	<p>Deletion of references to the publication of non-confidential versions of Applications for a Decision or Block Exemption Applications from paragraphs 3.6, 6.17, 8.2, 11.16 and 12.1 and Figure 3 of the Revised Applications Guideline</p>
<p>Clarification on informal settlement / “no further action”</p>	<p>Clarification on how the informal settlement route (i.e. where the Commission decides to take “no further action” in a matter) will operate, in section 7 of the Revised Investigations Guideline</p>
<p>Clarification on when consent orders will be used</p>	<p>Clarification on when the Commission may apply for a consent order, in section 7 of the Revised Investigations Guideline</p>