



競爭事務委員會
COMPETITION
COMMISSION



通訊事務管理局
COMMUNICATIONS
AUTHORITY

Revised Draft Guideline on **Investigations**

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Guideline on Investigations

*This Guideline is jointly issued by the Competition Commission (the “**Commission**”) and the Communications Authority (the “**CA**”) under section 40 of the Competition Ordinance (Cap 619) (the “**Ordinance**”) to indicate the procedures they will follow in deciding whether to conduct an investigation and in conducting an investigation under Part 3 of the Ordinance, including the use of their powers of investigation. Separately, the Commission and the CA have issued the Guideline on Complaints which sets out the manner and form in which complaints in relation to contraventions of the Ordinance are to be made.*

In addition to these Guidelines, the Commission and CA will be releasing other policy documents, including on Leniency Agreements. These documents will also be of relevance to the various stakeholders of an investigation under Part 3 of the Ordinance.

While the Commission is the principal competition authority responsible for enforcing the Ordinance, it has concurrent jurisdiction with the CA in respect of the anti-competitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors.¹ Unless stated otherwise, where a matter relates to conduct falling within this concurrent jurisdiction, references in this Guideline to the Commission also apply to the CA.

*The Guideline is not, however, a substitute for the Ordinance and does not have binding legal effect. The Competition Tribunal (the “**Tribunal**”) and other courts are responsible ultimately for interpreting the Ordinance. The Commission’s interpretation of the Ordinance does not bind them. The application of this Guideline may, therefore, need to be modified in light of the case law of the courts.*

This Guideline describes the general approach which the Commission intends to apply to the topics covered in the Guideline. The approach described will be adapted, as appropriate, to the facts and circumstances of the matter.

¹ The relevant undertakings are specified in section 159(1) of the Ordinance. These are licensees under the Telecommunications Ordinance (Cap 106) (the “**TO**”) or the Broadcasting Ordinance (Cap 562) (the “**BO**”), other persons whose activities require them to be licensed under the TO or the BO, or persons who have been exempted from the TO or from specified provisions of the TO pursuant to section 39 of the TO.

I Introduction

- 1.1 The Ordinance applies to all sectors of the economy. It prohibits certain conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong. This conduct includes anti-competitive arrangements and abuses of a substantial degree of market power. The Ordinance also prohibits mergers which may substantially lessen competition. These prohibitions are collectively referred to as the “**Competition Rules**”. Detailed guidance on the Competition Rules can be found in the Commission’s *Guideline on the First Conduct Rule*, *Guideline on the Second Conduct Rule* and *Guideline on the Merger Rule*.
- 1.2 The Ordinance is applied and enforced by the Commission. The Commission may become aware of potential contraventions of the Ordinance in various ways, including via complaints received from the public (see the Commission’s *Guideline on Complaints*). Under sections 37 and 39 of the Ordinance, the Commission has discretion whether to investigate a matter. Under section 39(2) of the Ordinance, the Commission may only conduct an investigation using compulsory powers under Part 3 of the Ordinance where it has reasonable cause to suspect that a contravention of a Competition Rule has occurred.²
- 1.3 Where the Commission exercises its discretion to investigate an alleged contravention of a Competition Rule, whether initiated by a complaint or otherwise, it will do so in two phases:

Initial Assessment Phase

During this phase, the Commission has not formed a view on whether it has reasonable cause to suspect that a contravention of the Competition Rules has occurred. Any information it requires will be sought on a voluntary basis.

Investigation Phase

During this phase, the Commission has formed a view that it has reasonable cause to suspect a contravention of the Competition Rules under section 39. The Investigation Phase may involve the use of the Commission’s compulsory document and information gathering powers under sections 41, 42 and 48 of the Ordinance (“**Investigation Powers**”).

- 1.4 An overview of the Commission’s investigative process is set out in this Guideline.

² In this Guideline, a reference to a contravention of a Competition Rule having occurred or having taken place includes a contravention which has taken place, is taking place or is about to take place.

2 Sources of Commission Investigations

- 2.1 The Commission may launch an investigation into conduct that constitutes or may constitute a contravention of a Competition Rule on its own initiative or where information about a possible contravention is provided to the Commission by another party.
- 2.2 The Commission may become aware of possible contraventions of the Ordinance from sources such as:
 - (a) a complaint or query made by the public;
 - (b) the Commission's own research and market intelligence gathering;
 - (c) other Commission processes and investigations; or
 - (d) referrals by the Government, the courts³ or other statutory bodies or authorities of potentially anti-competitive conduct for investigation.

3 Initial Assessment Phase

- 3.1 The Initial Assessment Phase is used by the Commission to identify whether:
 - (a) there is sufficient evidence to establish a reasonable cause to suspect that a contravention of a Competition Rule has occurred; and
 - (b) the matter warrants further investigation.
- 3.2 The timeframe for the Initial Assessment Phase will vary depending on the nature and complexity of each matter, as well as the resources available to the Commission at the time. Where the Commission already has sufficient evidence to form a view on the matters referred to in paragraph 3.1 of this Guideline, the timeframe for the Initial Assessment Phase may be very short.

³ A reference to the 'courts' means the Competition Tribunal, the Court of First Instance, the Court of Appeal and the Court of Final Appeal.

- 3.3 In the Initial Assessment Phase, the Commission may seek information using voluntary means, such as:
- (a) contacting parties by telephone or in writing;
 - (b) meeting and interviewing persons who may have knowledge of the conduct;
 - (c) reviewing publicly available information including market surveys and industry reports; and
 - (d) conducting surveys.
- 3.4 Depending on the circumstances, the Commission may contact undertakings who are the subject of an Initial Assessment to request information relevant to the Commission's consideration of the matter.
- 3.5 Once undertakings are aware that they are the subject of a Commission investigation, the Commission will endeavour to keep those undertakings informed of the progress of the Commission's investigation subject to overriding operational or confidentiality considerations.
- 3.6 At any stage of the Commission's consideration of a matter, the Commission may reassess its priorities to make the best use of its limited public resources. In this context, when exercising its discretion whether or not to pursue or continue pursuing a particular matter, the Commission will take a range of factors into account including:
- (a) whether the available evidence indicates that the Ordinance may have been contravened;
 - (b) the potential impact of the alleged conduct on competition and consumers;
 - (c) the Commission's current enforcement strategy, priorities and objectives;
 - (d) other matters currently under consideration by the Commission and the courts;
 - (e) the likelihood of a successful outcome resulting from further investigation; and
 - (f) whether the resource requirements of further investigation are proportionate to the expected public benefit.
- 3.7 When deciding whether or not to investigate a matter beyond the Initial Assessment Phase, a consideration of the factors in paragraph 3.6 of this Guideline may mean that the Commission exercises its discretion not pursue a matter further even if it is possible that further investigation would uncover some evidence that there may be a contravention of the Ordinance.

4 Possible Outcomes of Initial Assessment Phase

- 4.1 There are four possible outcomes of the Initial Assessment Phase:
- (a) the Commission takes no further action;
 - (b) the Commission commences the Investigation Phase;
 - (c) the Commission uses alternative means of addressing the issue, such as:
 - (i) referring the matter to another agency; or
 - (ii) conducting a market study; or
 - (d) the Commission accepts a voluntary resolution of the matter; such as a commitment under section 60 of the Ordinance where the Commission has concerns about a possible contravention of a Competition Rule ("**Commitment**").
- 4.2 If the Commission proposes to take no further action in relation to a complaint from a member of the public ("**Complainant**"), it will provide an explanation of this outcome to the Complainant in writing.
- 4.3 Further guidance on the outcomes at paragraphs 4.1(a), (c) and (d) above is set out in Part 7 of this Guideline.
- 4.4 If the Commission proceeds to the Investigation Phase in respect of conduct referred to it by a Complainant, it will endeavour to keep the Complainant generally informed as the matter progresses. This will always be subject to any overriding considerations, including the Commission's ability to conduct effective investigations and the need to preserve confidentiality. The Commission is therefore unlikely to advise a Complainant of internal procedural steps taken, such as whether a matter is in the Initial Assessment Phase or Investigation Phase.

5 Investigation Phase

- 5.1 The Ordinance requires the Commission to have reasonable cause to suspect a contravention of a Competition Rule before it may use its information gathering powers under Part 3 of the Ordinance. The Commission considers that this test:
- (a) requires a suspicion based on relevant facts and any other information; and
 - (b) only requires that the Commission is satisfied, at least beyond mere speculation, that there may have been a contravention of a Competition Rule.
- 5.2 This test does not require evidence to a standard that, on balance, tends to suggest that a contravention has occurred.
- 5.3 The Commission will proceed to the Investigation Phase only when it is satisfied that:
- (a) it has reasonable cause to suspect a contravention of a Competition Rule; and
 - (b) the matter warrants further investigation in view of the factors listed at paragraph 3.6 of this Guideline.
- 5.4 The Commission may seek evidence without relying on its Investigation Powers during the Investigation Phase. This may include inviting parties to make voluntary submissions relevant to the investigation, such as providing relevant facts and legal and economic arguments, with evidence in support of those arguments.
- 5.5 In addition or in place of gathering evidence through voluntary means, the Commission may use its Investigation Powers during the Investigation Phase to compel the production of evidence or to enter and search premises.

The Commission's Investigation Powers

- 5.6 The Commission has powers under sections 41, 42 and 43 of the Ordinance to issue notices requiring a person to provide documents, information and/or to give evidence before the Commission. It also has the capacity to seek a search warrant from a judge of the Court of First Instance to enter and search specific premises for evidence under section 48 of the Ordinance.

5.7 Under section 167 of the Ordinance, the Commission may serve section 41 or 42 notices by email, post, fax or personal service.

Written requests for documents and information (section 41 notices)

5.8 Under section 41 of the Ordinance, where the Commission has reasonable cause to suspect that a person has or may have possession or control of relevant documents or information or may otherwise be able to assist the Commission in its investigation, the Commission may issue written notices (“**section 41 notices**”) to that person. The Commission may use section 41 notices to obtain documents or specified information which relate to any matter it reasonably believes to be relevant to an investigation from any person, such as the person under investigation, their competitors, suppliers and customers or any other parties.

5.9 Pursuant to sections 41(3) and (4) of the Ordinance, a section 41 notice will, amongst other matters:

- (a) indicate the subject matter and purpose of the investigation;
- (b) specify or describe the documents and/or information that the Commission requires;
- (c) provide details of where, when and how documents and/or information must be produced; and
- (d) set out the offences and/or sanctions that may apply if the recipient of the notice does not comply.

5.10 Pursuant to section 2 of the Ordinance, the documents that might be sought under section 41 notices include information recorded in any form. For example, the Commission may request material such as:

- (a) draft documents;
- (b) original documents;
- (c) records in electronic format (and their metadata);
- (d) correspondence; and
- (e) databases and the means of accessing the information contained in those databases.

- 5.11 Section 41 notices will often include questions or other requests to provide the Commission with information in a particular format. This may involve the creation of new documents, such as:
- (a) written responses to Commission questions set out in the section 41 notice;
 - (b) lists of customers and suppliers;
 - (c) contact details of relevant persons;
 - (d) organisational diagrams and charts; and
 - (e) data extracted in various formats.
- 5.12 Section 41 notices may be used at any stage of the Investigation Phase and may be issued to the same person more than once. For example, the Commission may decide to seek further information from the same person to clarify information or documents submitted under an earlier section 41 notice.
- 5.13 Under section 41(5) of the Ordinance, the Commission can make copies of or take extracts from documents, require an explanation of the document, or question where a particular document can be found if it is not produced to the Commission.
- 5.14 The deadline specified in the notice for the production of documents and/or provision of information will depend on the nature and volume of information requested. Other factors the Commission may consider in setting the deadline include the resources available to the recipient and the urgency of the matter.
- 5.15 The Commission will endeavour to provide reasonable timeframes for persons to comply with a section 41 notice having regard to the nature and volume of information and documents requested. In limited circumstances, the Commission will consider requests to extend the deadline for responding to a section 41 notice. In considering such requests, the Commission will have particular regard to evidence of efforts already made by the recipient to comply with the section 41 notice and whether providing an extension will impede the Commission's investigation.
- 5.16 The Commission will also consider any representations made by the recipient in a timely manner regarding the scope of section 41 notices.

***Request for attendance before the Commission to answer questions
(section 42 notices)***

- 5.17 Under section 42(1) of the Ordinance, the Commission may require any person to appear before it, at a specified time and place, to answer questions relating to any matter the Commission reasonably believes to be relevant to an investigation (“**section 42 notices**”). By way of example, persons with relevant evidence may include, without limitation:
- (a) current or former employees, competitors, customers, distributors or suppliers of the parties under investigation;
 - (b) representatives of relevant trade associations; or
 - (c) Complainants.
- 5.18 Section 42 notices may be used at any stage of the Investigation Phase and may be issued to the same person more than once. For example, the Commission may require a person to appear before it after considering responses provided in a previous appearance before the Commission or to ask about information obtained from other sources.
- 5.19 When setting the time and place for appearance before it, the Commission may consider a range of factors including the resources available to the person and the urgency of the matter.
- 5.20 Any person required by the Commission to appear may be accompanied and represented by a legal adviser admitted to practice law in Hong Kong and, to the extent required by relevant professional regulations or rules of conduct, holding a current Hong Kong practising certificate.
- 5.21 If necessary, an appearance before the Commission may be adjourned after commencement to be continued at a later date.
- 5.22 Recordings and any transcripts made of the interview will be provided to the person interviewed upon request when practicable. These recordings and transcripts will be subject to the person’s confidentiality obligations under the Ordinance (discussed further at Part 6 of this Guideline).

Enter and search premises under warrant (section 48 warrant)

- 5.23 Under section 48 of the Ordinance, the Commission may apply to a judge of the Court of First Instance for permission to enter and search any premises to obtain documents, information and other items relevant to its investigation (“**section 48 warrant**”).
- 5.24 A section 48 warrant may be issued where a judge of the Court of First Instance is satisfied, on the basis of an application made on oath by an authorised officer of the Commission, that there are reasonable grounds to suspect that there are or are likely to be, on the premises in question, documents that may be relevant to an investigation by the Commission.
- 5.25 The premises specified in the section 48 warrant need not relate to the party under investigation. For example, the premises may belong to the investigated party’s supplier or customer.
- 5.26 The Commission expects the types of situations where it may seek a section 48 warrant to include, without limitation, matters which involve:
- (a) secretive conduct;
 - (b) instances where it considers that documents or information relevant to its investigation may be destroyed or interfered with should the Commission seek them through other means; and/or
 - (c) circumstances where the Commission has been unsuccessful in obtaining specific or categories of documents or information (the existence of which the Commission may already be aware of through other sources) or suspects non-compliance with an earlier request for such documents and information, whether the request was voluntary or pursuant to a section 41 notice.
- 5.27 The Ordinance does not require the Commission to have first used one of its other Investigation Powers before applying for a section 48 warrant.
- 5.28 A section 48 warrant provides authorised Commission officers with broad powers to enter specified premises, without providing any prior notice to the occupier. However Commission officers will normally, subject to operational considerations, arrive at the specified premises during usual office hours.

5.29 On arrival, the Commission officer executing the section 48 warrant will produce, upon request, evidence of their identity, the section 47 authorisation and the warrant.

5.30 If there is no one at the premises when authorised Commission officers arrive, the authorised officers will take reasonable steps to inform the occupier of the intended entry and afford the occupier, or the occupier's representative, a reasonable opportunity to be present when the warrant is executed.

5.31 Section 50 of the Ordinance authorises the Commission to, among other matters:

- (a) use reasonable force to gain entry and/or access evidence on the premises;
- (b) remove any obstructions to the execution of the warrant (including individuals who are obstructing the execution of the warrant); and
- (c) take such action and steps as necessary for the preservation of any relevant documents or the prevention of any interference with them (including the alteration or removal of such documents from the premises), such as by taking possession of any computer or other device found on the premises that Commission officers believe will, on examination, afford evidence of a contravention.

5.32 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 a 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. During such time, Commission officers may take necessary measures to prevent tampering with evidence, such as instructing employees and other persons at the premises to move away from their workspaces, requesting that computer/IT system access or email accounts be blocked, stopping external communications and sealing offices and/or filing cabinets. Where compliance with such directions cannot be assured or legal advisers are unable to commit to a timely arrival at the premises, the Commission will immediately commence its search of the premises.

5.33 During the search of the premises, Commission officers will:

- (a) search, copy and/or confiscate relevant documents and equipment (such as a computer or other device) that might reasonably provide evidence of a contravention of a Competition Rule; and

(b) seek explanations from individuals present at the premises about any documents which may appear to be relevant.

5.34 To facilitate an efficient execution of the section 48 warrant, Commission officers will request that the person in charge at the premises designate an appropriate person to be a point of contact for Commission officers during the search.

5.35 Commission officers may search any part of the specified premises for relevant documents and other evidence including desks, bookshelves and cabinets, and take away anything which might be or contain relevant evidence (including electronic equipment and devices such as hard drives, servers and mobile phones). Following a review of the collected evidence, the Commission will return documents and/or equipment if it considers that these are outside the scope of the investigation, or clearly duplicate other relevant documents.

5.36 Evidence found during the search will be retained by the Commission for as long as necessary for the purposes of the investigation and/or any ensuing legal proceedings. Section 56 of the Ordinance provides that parties may request from the Commission copies of documents retained by or in the possession of the Commission certified by a member of the Commission to be a true copy of the original.

Other issues relating to the use of the Commission's Investigation Powers

Statutory declarations regarding evidence

5.37 Section 43 provides that, when the Commission uses its Investigation Powers to compel a person to provide any explanation, further particulars, answer or statement to the Commission, the Commission may require that person to verify the truth of the information provided by statutory declaration.

5.38 In normal circumstances, the Commission will require persons to provide such a verification.

Legal professional privileged communications

5.39 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. However, section 58 of the Ordinance provides that this does not affect any requirement under the Ordinance to disclose the name and address of a counsel's or solicitor's client.

5.40 The Commission will establish and publish a procedure for dealing with disputes with respect to claims to legal professional privilege in the context of the Commission exercising its Investigation Powers, including powers conferred by warrant under section 48 of the Ordinance.

Obligations of confidence

5.41 Section 46 of the Ordinance provides that a person is not excused from providing any information or document to the Commission under its Investigation Powers where an obligation of confidence is owed to any other person. Section 46 also provides that such a person will not be personally liable for a disclosure required under the Ordinance.

Self-incrimination

5.42 Section 45 of the Ordinance provides that a person is not excused from giving any explanation or further particulars about a document, or from answering any question from the Commission, on the grounds that to do so might expose the individual to proceedings in which the Commission seeks a pecuniary or financial penalty⁴ or criminal proceedings.⁵

5.43 No statement made under compulsion by a person to the Commission in giving any explanation or further particulars about a document, or in answering any question pursuant to Part 3 of the Ordinance, including the Commission's Investigation Powers, is admissible against that individual in such penalty (pecuniary or financial) or criminal proceedings unless, in the proceedings, evidence relating to the statement is adduced, or a question relating to it is asked, by that person or on that person's behalf.

Immunity

5.44 Section 44 of the Ordinance provides that a person who provides evidence to the Commission, and any counsel, solicitor or other person who appears before the Commission, has the same privileges and immunities as the person would have if the investigation were a civil proceeding in the Court of First Instance.

⁴ Pursuant to sections 93 and 169 of the Ordinance respectively.

⁵ Section 45 applies to all criminal proceedings, other than an offence under section 55 of the Ordinance, an offence under Part V (Perjury) of the Crimes Ordinance (Cap 200) or an offence of perjury.

Sanctions for non-compliance with the Commission's Investigation Powers

5.45 Section 52 of the Ordinance provides that failure to comply without reasonable excuse with any requirement (or prohibition) imposed under the Commission's Investigation Powers is a criminal offence punishable by fines of up to HK\$200,000 and imprisonment for 1 year.

5.46 The Ordinance creates criminal offences punishable by fines of up to HK\$1 million and imprisonment for 2 years in respect of providing false or misleading information,⁶ destroying, falsifying or concealing documents,⁷ obstructing a search under a section 48 warrant,⁸ or disclosing confidential information received from the Commission.⁹

Duration of Investigation Phase

5.47 The duration of an Investigation Phase will largely depend on the nature and complexity of each matter and the level of cooperation, if any, by the parties under investigation.

6 Confidentiality and Disclosure

The Commission will conduct investigations in confidence

- 6.1 The Commission will generally investigate in private to protect the interests of all persons involved and will not make disclosures except where appropriate. To this end, the Commission will not normally comment on matters it is considering or investigating.
- 6.2 The Commission's ability to investigate a matter may be impeded where the investigation is publicised or otherwise widely known. In appropriate cases, such as where an investigation is made public by another party, the Commission may acknowledge that it is reviewing a matter. To support the Commission's ability to conduct effective investigations, the Commission will typically ask that Complainants keep their complaint confidential.

⁶ Section 55 of the Ordinance.

⁷ Section 53 of the Ordinance.

⁸ Section 54 of the Ordinance.

⁹ Section 128(3) of the Ordinance.

Handling confidential information

- 6.3 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to or obtained by the Commission. The following categories of information are defined as confidential under section 123 of the Ordinance:
- (a) information that has been provided to or obtained by the Commission in the course of, or in connection with, the performance of its functions under the Ordinance, that relates to
 - i. the private affairs of a natural person;
 - ii. the commercial activities of any person that are of a confidential nature; or
 - iii. the identity of any person who has given information to the Commission;
 - (b) information that has been given to the Commission on terms or in circumstances that require it to be held in confidence; or
 - (c) information given to the Commission that has been identified as confidential information in accordance with section 123(2) of the Ordinance.
- 6.4 Section 126(1) of the Ordinance permits the disclosure of confidential information by the Commission in certain circumstances, including disclosures made by the Commission in the performance of any of its functions, or in carrying into effect or doing anything authorised by the Ordinance. Section 126(1) disclosures are therefore not limited to where the Ordinance expressly requires the Commission to publish information and, subject to the provisions of the Ordinance, the Commission may in certain circumstances disclose confidential information without the consent of relevant parties.

Claiming confidentiality and making confidential information available to the Commission

- 6.5 Section 123(1)(c) of the Ordinance provides that a person may identify information given to the Commission as confidential information. Pursuant to section 123(2), claims to confidentiality under section 123(1)(c) should be in writing setting out the reasons why the identified information is, in the relevant person's opinion, confidential.
- 6.6 Where a document contains a mix of non-confidential and confidential information (as defined under the Ordinance), persons submitting information to the Commission should identify within the document which parts of the document are confidential.

- 6.7 As set out in paragraph 6.13 of this Guideline, the Commission considers it is in parties' interests to clearly specify the reasons for claiming confidentiality.

Disclosure of information and documents obtained during the Initial Assessment and Investigation Phases

- 6.8 Section 126(1) of the Ordinance permits the Commission to disclose confidential information in a number of circumstances.

Disclosures made in the performance of the Commission's functions

- 6.9 As discussed at paragraph 6.5 of this Guideline, section 126(1)(b) of the Ordinance permits the disclosure of information by the Commission in the performance of any of its functions, or in carrying into effect or doing anything authorised by the Ordinance.
- 6.10 During the Initial Assessment Phase or Investigation Phase, the Commission may need to disclose confidential information to other persons to the extent that is necessary to seek clarifications on existing evidence or to seek relevant evidence. For example, in the Investigation Phase the Commission may need to question a person under section 42 of the Ordinance about a confidential meeting minute obtained from another party.
- 6.11 In deciding whether or not to disclose confidential information pursuant to section 126(1)(b), the Ordinance requires the Commission to consider and have regard to the matters set out at section 126(3). These factors include the extent to which the disclosure is necessary for the purpose sought to be achieved by the disclosure and the need to exclude, as far as is practicable, from such disclosure, information the disclosure of which, in the opinion of the Commission:
- (a) would be contrary to public interest;
 - (b) would or might be likely to significantly harm the legitimate business interests of the person to whom it relates; or
 - (c) might significantly harm the interest of a natural person where the information relates to the private affairs of that person.
- 6.12 In conducting this assessment, the Commission will usually be in a better position to evaluate the interests of the person to whom the confidential information relates where the person providing the information has, in its reasons, clearly articulated the basis for identifying the relevant information as confidential.

Disclosures made in accordance with a court order or by law

- 6.13 In some circumstances, the Commission may be required to produce confidential information in accordance with a court order, law or legal requirement. Section 126(1)(c) of the Ordinance provides that a disclosure of confidential information made by the Commission in accordance with any court order, law or legal requirement is to be regarded as a disclosure made with lawful authority. The Commission will endeavour to notify and consult the person who provided the confidential information prior to making such a disclosure.

Cooperation between competition authorities¹⁰

- 6.14 For matters falling within the Commission's concurrent jurisdiction with the CA, information may be exchanged between the Commission and the CA under section 126(1)(h) of the Ordinance.

Obligation of other parties to maintain confidentiality

- 6.15 Where a disclosure of confidential information is made by the Commission to a person, that person has an obligation under section 128(1) of the Ordinance to maintain the confidentiality of that information. That person must not disclose the information to any other person or permit any other person to have access to the information. Failure to maintain such confidentiality is an offence under section 128(3) of the Ordinance.
- 6.16 Under section 128(2) of the Ordinance, there are certain exceptions to the obligation imposed by section 128(1), including where:
- (a) the Commission has consented to a disclosure;
 - (b) the information has already been lawfully disclosed to the public;
 - (c) disclosure is for the purpose of obtaining professional advice in connection with a matter arising under the Ordinance;
 - (d) disclosure is made in connection with any judicial proceedings arising under the Ordinance; or
 - (e) disclosure is required by, or in accordance with, any law or court order.

¹⁰ Section 2 of the Ordinance defines 'competition authority' to mean the Commission or the CA. The phrase 'competition authority' when used in this Guideline is used in this narrow sense.

Use of information by the Commission

6.17 Subject to legal requirements to the contrary, information obtained by the Commission in one matter may be used by the Commission in another matter. In particular, the Commission will not normally accept information or documents provided voluntarily on any condition that seeks to limit the Commission's use of the information. Accordingly, the Commission will not accept any such information or documents on a 'without prejudice' or limited waiver basis¹¹ unless it expressly agrees to do so in a specific circumstance.

7 Possible Outcomes of Investigation Phase

- 7.1 Where the Commission considers it unlikely that a contravention of a Competition Rule has occurred, it will take no further action regarding the matter. Where a Complainant is involved, the Commission will notify the Complainant of this outcome.
- 7.2 Where the Commission considers that a contravention of a Competition Rule has occurred or may occur, the Ordinance provides it with a range of options to resolve its concerns. These include express powers to accept Commitments under section 60 and, where the Commission has reasonable cause to believe that a contravention of a Competition Rule has taken place, to commence proceedings before the Tribunal. The Commission might also seek to resolve its concerns by way of a consent order.
- 7.3 At any stage the Commission may approach parties under investigation to discuss the matter and outline any concerns the Commission may have. Similarly, parties under investigation may approach the Commission at any stage to propose a way to resolve the Commission's concerns.
- 7.4 Possible outcomes of Commission investigations are outlined further below.

No further action

7.5 The Commission may, having regard to its resources and priorities, determine at any point of the Initial Assessment or Investigation Phase that no further action by the Commission is warranted. Where parties swiftly alter any conduct of concern in response to the Commission's enquiries, this will increase the likelihood of the Commission taking no further action.

¹¹ For example, in circumstances where privilege might be waived only for the purpose of one particular matter or Commission procedure.

- 7.6 If the Commission proposes to take no further action in relation to a matter commenced following a complaint, it will provide an explanation of this outcome to the Complainant in writing. When the Commission's decision to take no further action is influenced by parties changing their conduct in response to the Commission's enquiries, the Commission will inform the Complainant of this outcome.
- 7.7 A decision to take no further action at a point in time does not prevent the Commission from revisiting the issue at a later date. For example, additional evidence or a pattern of conduct may arise warranting further investigation.

Accept a section 60 Commitment

- 7.8 Under section 60 of the Ordinance, at any stage the Commission may accept a Commitment to take any action or refrain from taking any action from parties under investigation. The Commitment process¹² may be initiated by the Commission or parties subject to a Commission investigation at any time.
- 7.9 If the Commission accepts a Commitment, it may agree to terminate its investigation and not to bring proceedings in the Tribunal (or terminate them if it has already brought proceedings).
- 7.10 Section 61(1) of the Ordinance provides that the Commission may withdraw its acceptance of a Commitment in the event of a material change of circumstances or where the Commission has reasonable grounds to suspect either:
- (a) failure to comply with the Commitment; or
 - (b) the Commitment was based on information that was incomplete, false or misleading in a material particular.
- 7.11 Where a Commitment has been withdrawn pursuant to section 61 of the Ordinance, the Commission may conduct a new investigation or begin proceedings in the Tribunal.
- 7.12 Under section 60(6) of the Ordinance, as soon as practicable after accepting a Commitment, the Commission must notify the person who made the Commitment and publish the Commitment in a register under section 64 of the Ordinance.

¹² Schedule 2 to the Ordinance sets down the procedural requirements for acceptance and variation of Commitments.

- 7.13 If a person fails to comply with a section 60 Commitment accepted by the Commission, the Commission may seek to enforce the Commitment in the Tribunal under section 63 of the Ordinance.

Issue Warning Notice

- 7.14 Where the Commission has reasonable cause to believe that there has been a contravention of the First Conduct Rule, and this suspected contravention does not involve Serious Anti-competitive Conduct, section 82(1) of the Ordinance provides that the Commission must issue a Warning Notice before commencing proceedings in the Tribunal. The Warning Notice provides parties under investigation with an opportunity to cease the conduct within a specified period.
- 7.15 Section 82(2) of the Ordinance requires that a Warning Notice must set out the alleged contravening conduct, the undertaking(s) involved, the evidence relied upon by the Commission and indicate the manner in which the contravening undertaking may cease the contravening conduct. Section 82(4) provides that if parties continue to engage or repeat the contravening conduct after the expiry of the warning period, the Commission may without further notice commence proceedings in the Tribunal.
- 7.16 Warning Notices will be published on the Commission's website.

Issue Infringement Notice

- 7.17 Section 67 of the Ordinance provides that the Commission may issue an Infringement Notice where it has reasonable cause to believe that there has been a contravention of the First Conduct Rule involving Serious Anti-competitive Conduct and/or the Second Conduct Rule. In the Infringement Notice, the Commission will offer not to bring proceedings in the Tribunal on condition that the undertaking(s) under investigation makes a commitment to comply with the requirements of the notice within a specified compliance period ("**Infringement Notice Commitment**").

7.18 Section 75 of the Ordinance provides that where an Infringement Notice Commitment is made by the undertaking(s) within the compliance period, the Commission may not bring proceedings in the Tribunal in respect of the alleged contravention specified in the Infringement Notice. However, section 76 of the Ordinance provides that section 75 does not prevent the Commission from beginning proceedings in the Tribunal where the Commission has reasonable grounds for suspecting that a person who made an Infringement Notice Commitment has failed to comply with one or more of the requirements of the Infringement Notice.

7.19 The Commission is not required, however, to issue an Infringement Notice before commencing proceedings in the Tribunal or accepting a Commitment under section 60 of the Ordinance.

Commence proceedings in the Tribunal

7.20 Where the Commission has reasonable cause to believe that a person has contravened a Competition Rule, or been involved in such a contravention, the Commission may initiate proceedings before the Tribunal under sections 92, 94, 99 and/or 101 of the Ordinance to seek appropriate orders and sanctions¹³ including, where relevant, interim orders under sections 95 and 98 of the Ordinance. This includes initiating proceedings against persons involved in a contravention of a Competition Rule as defined in section 91 of the Ordinance. Persons in this context includes individuals who aided and abetted, counselled or procured any other person to contravene a Competition Rule, induced or attempted to induce another person to contravene a Competition Rule, was in any way knowingly concerned in or party to a contravention or conspired with another to contravene a Competition Rule.

7.21 For a suspected contravention of the First Conduct Rule that does not involve Serious Anti-competitive Conduct, the Commission must issue a Warning Notice (see paragraphs 7.14 to 7.16 of this Guideline) before the Commission can apply to the Tribunal. In all other cases prior to commencing proceedings in the Tribunal, the Commission will usually contact parties:

- (a) to advise parties of its concerns; and/or
- (b) to provide parties with an opportunity to address those concerns.

¹³ Schedules 3 and 4 to the Ordinance, and sections 93, 96 and 101 of the Ordinance, set down the orders that may be made by the Tribunal in relation to contraventions of the Competition Rules.

7.22 If proceedings are commenced in the Tribunal, the Commission will issue a press release as soon as practicable after commencing proceedings.

Apply for a consent order

7.23 Even where parties wish to resolve the Commission's concerns, these may in some cases only be satisfactorily addressed by an order made by the Tribunal upon the consent of the Commission and the parties. Subject to the Tribunal's determination, a consent order may provide for a declaration that a person has contravened a Competition Rule, the imposition of a pecuniary penalty, a disqualification order or any other order that may be made by the Tribunal under the Ordinance.

Referral to a Government agency

7.24 At any stage, the Commission may consider it appropriate to refer a complaint to a Government agency. In such cases, it will provide an explanation of this outcome to the Complainant in writing.

Conduct a market study

7.25 In addition to investigating suspected contraventions of the Competition Rules, section 130(3) of the Ordinance provides that the Commission may conduct market studies into cases that affect competition in markets in Hong Kong. Although an investigation is not a necessary precursor for the Commission to conduct a market study, evidence gathered by the Commission during the Initial Assessment or Investigation Phase into particular conduct may lead to a market study being conducted into particular practices or certain industries.

