INTERNATIONAL BAR ASSOCIATION

HONG KONG WORKING GROUP OF THE ANTITRUST COMMITTEE

SUBMISSION TO THE COMPETITION COMMISSION AND THE COMMUNICATIONS AUTHORITY IN RESPONSE TO THEIR CONSULTATION ON THE DRAFT GUIDELINE ON COMPLAINTS, GUIDELINE ON INVESTIGATIONS AND APPLICATIONS GUIDELINE

10 DECEMBER 2014

INTRODUCTION AND SUMMARY

1. INTRODUCTION

1.1 This submission is made to the Competition Commission ("Commission") and the Communications Authority on behalf of the Hong Kong Working Group ("Working Group") of the Antitrust Committee of the International Bar Association ("IBA").[1] Consistent with the approach adopted in the Competition Ordinance, references in this submission to the Competition Commission are to be read as including the Communications Authority when they relate to the exercise of the Commission's functions in respect of broadcasting and telecommunications licensees.

1.2 The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at http://www.ibanet.org.

[1] The submission does not necessarily reflect the views of the organisations at which individual members of the Working Group are employed.

1.3 The Working Group hopes to contribute constructively to the Commission's consultation on the following draft guidelines, which are issued under the Competition Ordinance (Chapter 619) ("Ordinance"):

Draft Guideline on Complaints ("Guideline on Complaints");

Draft Guideline on Investigations ("Guideline on Investigations");

Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders ("Applications Guideline");

Draft Guideline on the First Conduct Rule ("Guideline on the First Conduct Rule");

Draft Guideline on the Second Conduct Rule ("Guideline on the Second Conduct Rule"); and

Draft Guideline on the Merger Rule ("Guideline on the Merger Rule" or "Merger Guideline").

1.4 This submission includes the Working Group's comments on the Guideline on Complaints, Guideline on Investigations and Applications Guideline.

1.5 The Working Group's comments draw on the vast experience of the IBA's members in competition law and practice in the Asia-Pacific region and other major competition law jurisdictions across the globe. The contributors to the Working Group's submission are listed in Annex 1.

1.6 The Working Group applauds the Commission's initiative to consult with stakeholders on its draft Guidelines and on the Commission's publication of well-drafted and practical draft Guidelines in a relatively short timeframe. Given the wide-ranging consequences of the new competition law regime and its impact on the Hong Kong markets, the Working Group considers that it would be valuable for stakeholders to be able to comment on the draft Guidelines after the current round of consultation has been completed and revised draft Guidelines published. The Working Group would be grateful if the Commission could indicate whether a second round of consultation may take place and the likely timing of that consultation.

2. SUMMARY

Guideline on Complaints

2.1 The Working Group proposes amendments to the Guideline on Complaints in relation to the nature of filing of appropriate Complaints, particularly anonymous complaints, and to further the public interest.

2.2 To encourage appropriate complaints and queries, we recommend that the Commission: (1) refrain from seeking the Complainant's name where the complaint or query is made anonymously (paragraphs 2.2, 2.4(e)), (2) allow the submission of complaints and queries via fax and also specify the webpage containing the online form for the same (paragraph 2.2), (3) provide relevant advice to the Complainant in the event of no further action or a recommendation for referral (paragraph 5.2) and (4) inform the Complainant of the outcome of the Commission's consideration of the matter (paragraph 5.4).

2.3 We believe that the public interest is served by supplementing the factors that the Commission will utilise to decide which complaints warrant further assessment; we propose two additional factors and an amendment to factor (d) in our comments on paragraph 4.3. We also believe that the public interest is served when, in the event of concurrent jurisdiction, the exchange of confidential information is proportionate to the necessity for the Commission and the Communications Authority to fulfil their functions as competition authorities (paragraph 3.6).

Guideline on Investigations

2.4 The Working Group proposes, *inter alia*, amendments to the Guideline on Investigations that seek to increase protections for persons providing information to the Commission, maintain the confidentiality of information and minimise business disruptions.

2.5 We make a number of recommendations aimed at increasing the protections for persons providing information to the Commission, which recommendations may be further divided into procedural protections and protections that ensure proper legal representation.

We seek additional procedural protections for persons who voluntarily provide information during the Initial Assessment Phase (paragraph 3.3) and who are required to appear pursuant to a section 42 notice (paragraphs 5.17, 5.22). In connection with a section 48 warrant, we also seek procedural protections for persons who: (1) are the owners of domestic premises (paragraph 5.26), (2) may have information about potentially relevant documents (paragraph 5.32), (3) are in possession of personal equipment and devices that might be or contain relevant evidence (paragraph 5.34) and (4) are not present during the search, leaving the premises unoccupied (paragraph 5.28).

The Working Group also recommends revisions to facilitate proper legal representation. Specifically, we propose that: (1) more than one qualified legal advisor be allowed to represent a person subject to a section 42 notice (paragraph 5.20), (2) Commission officers allow sufficient time for the arrival of external legal counsel prior to commencing a search under a section 48 warrant (paragraph 5.31), (3) the legal professional privilege specifically apply to all legal advisors (paragraph 5.38) and (4) any production of documents or

information be subject to the legal professional privilege (paragraph 5.39).

2.6 The Working Group proposes several revisions for the purpose of maintaining the confidentiality of information. First, any disclosure of information to Complainants (paragraphs 4.2, 7.1, 7.6, 7.22) or on the Commission's website (paragraph 7.18) should be subject to the Commission's general obligation of confidentiality and such disclosures should be drafted and/or redacted accordingly. Second, any evidence gathered by the Commission, especially confidential information, should not be used or disclosed in any market study (paragraph 7.23). Third, the creation of any new documents pursuant to paragraph 5.11 and the production of documents pursuant to paragraph 5.39 should be subject to any legal requirements that protect trade secrets and undisclosed commercial information.

2.7 The Working Group submits proposals to minimise business disruptions. To ensure that the correct individuals in the organisation are informed in a timely manner of the existence and scope of a section 41 or 42 notice: (1) the notice, if served by email, should not be sent to a general corporate email address and should be supplemented by at least one other method of service (paragraph 5.7) and (2) the notice should specify the (potentially) applicable provision(s) of the Ordinance (paragraphs 5.9, 5.17).

Businesses have a legitimate interest in monitoring the retention and ensuring the return of their property. As such, we propose that the Commission provide a detailed description of evidence acquired pursuant to a section 48 warrant and retained by the Commission (paragraph 5.35). In addition, we recommend that all property be returned to the business in accordance with Section 56 of the Ordinance and not be retained for use in another matter (paragraph 6.13) or where the Commission elects to take no further action but may later reconsider the issues (paragraph 7.7).

Applications Guideline

2.8 The Working Group appreciates that significant resources will be expended by both the Commission and applicants in the context of applications for Decisions or Block Exemption Orders. Nonetheless, undertakings should not be deterred from seeking Decisions or Block Exemption Orders, in appropriate situations. To encourage and equip undertakings to file effective applications for Decisions and Block Exemption Orders, the Working Group submits, *inter alia*, the following requests and recommendations.

2.9 The Working Group makes two recommendations that may encourage entities to seek Decisions or Block Exemption Orders. When information submitted in the context of an application for a Decision or a Block Exemption Order is used for other purposes under the Ordinance, the Commission may wish to take into account the fact that the undertakings

came forward with information voluntarily and to be more amenable to discussions relating to commitments (paragraphs 4.1, 5.15). In addition, where similar agreements enhancing overall economic efficiency are commonly used by undertakings and a Block Exemption Order may be appropriate, the Commission may wish to inform applicants of such similar agreements and facilitate discussions between such applicants (paragraph 5.8).

2.10 The Working Group seeks clarification in regard to certain of the Applications Guidelines, which guidance will assist undertakings in applying for Decisions or Block Exemption Orders. Specifically, the Working Group seeks: (1) guidance on or examples of what could be deemed "unnecessarily broad" claims for confidentiality (paragraph 3.6), (2) factors and evidence that would demonstrate that an applicant represents a "wider industry interest" (paragraph 5.3), (3) indicative timeframes for review of a Decision (paragraph 6.2) and preliminary assessment of an Application (paragraph 7.5), (4) clarification on certain circumstances where the Commission is required to consider an Application (paragraph 6.4(b)), (5) clarification on the extent to which a "future agreement or conduct" needs to be definitive (paragraphs 6.11, 6.12) and (6) the procedures for initiating an Initial Consultation and the timeframe in which the Commission endeavours to respond to such initiations (paragraph 6.13).

2.11 Finally, so that undertakings may learn from successful and unsuccessful Applications, we encourage the Commission to provide reasons for declining to consider Applications (paragraph 7.3) and to give applicants opportunities, prior to the publication of Decisions, to review draft Decisions and provide comments (paragraph 8.9). For the same reason, the Working Group encourages the Commission to provide reasons for declining to issue Block Exemption Orders (paragraphs 12.4, 13.7).

PART 1: GUIDELINE ON COMPLAINTS

1. MAKING A COMPLAINT TO THE COMMISSION

1.1 **Paragraph 2.2** sets forth alternative forms for a complaint or query to be made to the Commission. However, fax is not listed as one of the forms, and we recommend it be added. Accordingly, a fax number for the Commission and the Communications Authority should be listed in Section "6. Further Materials and Contact Details" of this Guideline on Complaints. The Working Group notes that a complaint or query may also be made by completing an online form, but do not find a webpage containing the online form in this Guideline. We recommend that such a webpage be listed as well. The online form should also accommodate complaints and queries made anonymously (such as not setting all Complainant details as compulsory fields to be completed before an online form could be submitted). However, as regards to queries, it is understood that the Commission would at least require sufficient contact information to respond to the query.

1.2 **Paragraph 2.4(e)** states that the Commission will typically request information about the Complainant, including his or her name, job title, and contact information. However, we would like to call the Commission's attention to paragraph 2.1(b), which acknowledges that a complaint or query may be made anonymously. This is to ensure that whistle-blowers or other people will not be discouraged from making complaints or queries out of concern for the potential disclosure of their identity. Therefore, we recommend that, in paragraph 2.4(e), words "(not compulsory, if the complaint or query is made anonymously)" be added following the reference to "including their name, job title, address, telephone and email address."

2. CONFIDENTIALITY

2.1 We recommend that the following statement be added to the end of the current draft of **paragraph 3.6**:

> The Commission and the CA will consider the extent of the exchange of confidential information, which should be proportionate to the necessity for the Commission and the CA to fulfil their functions as competition authorities.

2.2 **ASSESSMENT OF COMPLAINTS AND QUERIES**

2.3 For **paragraph 4.3**, we recommend that the following factors be added: (1) the possibility of duplication of law enforcement resources and efforts of other authorities; (2) the degree of culpability of the wrongdoers (e.g. the duration of the unlawful conduct). Moreover, we recommend that paragraph 4.3(d) be amended as follows: "(d) the likelihood of a successful outcome and the deterrent effect resulting from an investigation."

3. NEXT STEPS

3.1 With respect to **paragraph 5.2**, we recommend that it be amended as follows:

> If the Commission proposes to take no further action or recommends the Complainant refer their concerns to another agency, it will provide an explanation of this outcome and any relevant advice to the Complainant in writing. Where appropriate, the relevant advice may include a list of additional evidence that may be provided later by the Complainant to the Commission.

3.2 With respect to **paragraph 5.4**, we understand that for operational reasons the Complainant is unlikely to be advised of the status of the Commission's consideration of the matter if the case proceeds to the Initial Assessment stage. However, we recommend that the last sentence of paragraph 5.4 be amended as follows: "If consideration of the matter is completed, the Complainant will be informed of the outcome and will be advised of his or her obligation of confidentiality, if applicable." Our reason for this amendment is that, by filing a complaint, the Complainant has a justifiable interest in knowing the outcome of the Commission's consideration of the matter. At the same time, where an effective investigation or the public interest requires the Complainant to keep the matter confidential, the Commission should advise the Complainant accordingly.

PART 2: GUIDELINE ON INVESTIGATIONS

1. INITIAL ASSESSMENT PHASE

1.1 **Paragraph 3.1** states that the Initial Assessment Phase is used by the Commission to identify whether there is "sufficient evidence" for the Commission to conduct an investigation under Part 3 of the Ordinance. Paragraph 3.1 should clarify the threshold for a finding of "sufficient evidence" and how such finding is related to the factors listed in paragraph 3.4 and the "reasonable cause" standard under paragraphs 5.1 and 5.2.

1.2 **Paragraph 3.3** provides that the Commission may seek information using voluntary means during the Initial Assessment Phase. Persons providing information voluntarily during the Initial Assessment Phase should be entitled to immunity as provided in section 44 of the Ordinance and paragraph 5.42. Information provided during the Initial Assessment Phase should be subject to the same confidentiality provisions (paragraphs 6.1 to 6.14) as applicable to information provided during the Investigation Phase.

1.3 **Paragraph 3.4** provides that the Commission will consider various factors in determining whether a matter warrants "further investigation". Paragraph 3.4 should clarify whether "further investigation" refers to the Investigation Phase or additional investigation during the Initial Assessment Phase. Further, we recommend that the following factors be added: (1) the possibility of duplication of law enforcement resources and efforts of other authorities; (2) the degree of culpability of the wrongdoers (e.g. the duration of the unlawful conduct). Moreover, we recommend that paragraph 3.4(d) be amended as follows: "(d) the likelihood of a successful outcome and the deterrent effect resulting from an investigation under Part 3 of the Ordinance."

2. INVESTIGATION PHASE

The Commission's Investigation Powers

2.1 **Paragraph 5.7** provides that the Commission may serve section 41 or 42 notices by email. Paragraph 5.7 should provide that email notification to a general corporate email address shall not be deemed good service. In addition, paragraph 5.7 should provide that notice given by email should be supplemented by at least one other method of service. These proposed revisions seek to ensure that the correct persons in the organisation receive the notice in a timely manner.

Written requests for documents and information (section 41 notices)

2.2 **Paragraph 5.9** provides that the section 41 notice will, *inter alia*, "indicate what the investigation is about". Paragraph 5.9 should provide that the section 41 notice should specify the applicable or potentially applicable provision(s) of the Ordinance (e.g. the applicable conduct rule). This recommendation is based on the *Council Regulation (EC) No 1/2003 of 16 December 2002* (EU), Article 18(2), (3).

2.3 **Paragraph 5.11** provides for the creation of new documents, such as lists of customers and suppliers, organisational diagrams and charts, and data extracted in various formats. Paragraph 5.11 should provide that the production of such new documents is subject to any legal requirements to the contrary, such as the common law of confidence, which protects trade secrets and undisclosed commercial information.

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

2.4 **Paragraph 5.17** provides that the Commission may require the appearance, at a specified time and place, of any person with relevant information. Paragraph 5.17 should be amended to specify that section 42 notices should: (1) identify such person or persons with as much specificity as possible; (2) avoid vague and/or overbroad designations of such persons or persons; and (3) indicate the nature of the inquiry and the applicable or potentially applicable provision(s) of the Ordinance (e.g. the applicable conduct rule). Persons subject to section 42 notices should be given reasonable timeframes with which to comply, similar to paragraph 5.15 with respect to section 41 notices. The Commission should also put in place procedures whereby a person subject to a section 42 notice may, for valid reasons, request to modify the time and place of the attendance.

2.5 **Paragraph 5.20** allows for "a qualified legal adviser" to accompany and represent a person subject to a section 42 notice. Paragraph 5.20 should allow a person to be accompanied by one or more than one "qualified legal advisor", for example, to allow for both in-house and external legal advisors to represent the person. Paragraph 5.20 should also allow the person to be accompanied by a translator, as necessary.

2.6 **Paragraph 5.22** provides that "[r]ecordings, transcripts and documents put to the person at their appearance will be provided to them upon request when practicable." Paragraph 5.22 should be amended to provide, in the event that the appearance is recorded and/or transcribed, that the person is entitled to: (1) to review such recording and/or transcript; (2) to make any changes (in form or substance) to the content of the recording and/or transcript, which changes as well as the reasons for such changes shall be set forth in the recording and/or transcript; and (3) upon request, receive a copy of such recording and/or transcript (upon the payment of a reasonable fee) when practicable. Where the person is

required under section 43 of the Ordinance "to verify the truth of the explanation, particulars, answer or statement, by statutory declaration", the person should also be entitled to review, make any changes to, and receive a copy of such explanation, particulars, answer or statement. This recommendation is based on *15 U.S. Code § 1312(i)* (US).

Enter and search premises under warrant (section 48 warrant)

2.7 **Paragraph 5.26** summarises the types of situations where the Commission may seek a section 48 warrant. While there are references in various paragraphs indicating that the Commission anticipates searching business premises (e.g., "office hours" in paragraph 5.28, "in-house lawyer already on the premises" and "employees" in paragraph 5.31, "point of contact" in paragraph 5.33), section 48 of the Ordinance and paragraph 5.23 allow the Commission to apply to enter and search "any premises". In addition, under paragraph 5.25, the premises "need not relate to the party under investigation" and "may belong to the investigated party's supplier or customer". Given the broad scope of searchable premises, paragraph 5.26 should specify that the Commission will seek a section 48 warrant for domestic premises only in regard to the matters enumerated in paragraph 5.26 and only when there are reasonable grounds to suspect that certain relevant documents or materials are stored within the domestic premises. This recommendation is based on the *CCS Guidelines on the Powers of Investigation* (Singapore), Guideline 4.2 and the *Council Regulation (EC) No 1/2003 of 16 December 2002* (EU), Article 21(1).

2.8 **Paragraph 5.28** provides that, in executing a section 48 warrant, Commission officers have broad powers to enter specified premises, without providing any prior notice to the occupier. Paragraph 5.28 does not specify what will occur if there is no one at the premises. To address this situation, paragraph 5.28 should incorporate language similar to Singapore's *CCS Guidelines on the Powers of Investigation*, Guideline 6.11, which provides as follows.

> If there is no one at the premises, the named officer must take reasonable steps to inform the occupier of the intended entry. If the occupier is informed, the occupier or his legal or other representative must be given a reasonable opportunity to be present when the warrant is executed. If the named officer has been unable to inform the occupier of the intended entry, he is under a duty to leave a copy of the warrant in a prominent place on the premises. On leaving premises that are unoccupied, the named officer must leave them as effectively secured as he found them.

2.9 **Paragraph 5.31** provides as follows, "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." Paragraph 5.31 should be amended to provide that, where parties have requested that their external legal advisers be present during its search, Commission officers should wait a reasonable time for external legal advisers to arrive, even if an in-house lawyer is already on the premises. The Commission should take into account a request for the assistance of external counsel if made by an in-house lawyer or other company representative for a valid reason (e.g. the in-house lawyer on the premises lacks experience in competition matters). Commission officers should allow sufficient time for counsel to travel from any location within Hong Kong to the premises to provide proper legal representation.

2.10 **Paragraph 5.32** provides that Commission officers will "seek explanations from individuals present at the premises about any documents which may appear to be relevant." Paragraph 5.32 should be amended to provide such individuals with the same protections and rights accorded a person subject to a section 42 notice. At a minimum, Commission officers should not seek explanations from such individuals unless external legal counsel and/or in-house counsel are present during such discussions.

2.11 **Paragraph 5.34** provides that Commission officers may "take away anything which might be or contain relevant evidence (including electronic equipment and devices such as hard drives, servers and mobile phones)." The acquisition of equipment and devices should be limited to equipment and devices issued by the entity that is the subject of the search.

2.12 **Paragraph 5.35** provides that the Commission will retain evidence found during the search. Paragraph 5.35 should require the Commission to provide a detailed description of all retained evidence not later than three (3) working days from the end of the inspection. This recommendation is based on the *CCS Guidelines on the Powers of Investigation* (Singapore), Guideline 5.10.

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

Legal professional privileged communications

2.13 **Paragraph 5.38** provides for the preservation of "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". Paragraph 5.38 should specify that the legal professional privilege applies to all legal advisors, including in-house counsel, lawyers in private practice and foreign lawyers. This recommendation is based on the *CCS Guidelines on the Powers of Investigation* (Singapore), Guideline 7.2. The Commission should also provide guidance

regarding the resolution of disputes related to the assertion of the legal professional privilege, whether through a Guideline or by reference to another law, rule, or procedure.

Obligations of confidence

2.14 **Paragraph 5.39** provides that "[a] person is not excused from providing any information or document . . . where an obligation of confidence is owed to any other person." This requirement should be subject to any legal requirements to the contrary, such as the common law of confidence and of the legal professional privilege. Paragraph 5.39 quotes section 46 of the Ordinance, which provides that the person providing documents or information "is not personally liable for that act." Paragraph 5.39 should provide guidance as to the meaning and scope of "personally liable" (i.e. whether the person is released from civil liability, criminal liability and/or professional disciplinary and other sanctions).

3. CONFIDENTIALITY

Use of information by the Commission

3.1 **Paragraph 6.13** provides that, in general, information obtained in one matter may be used by the Commission in another matter. Paragraph 6.13 should distinguish "information" from "property" so as to ensure that property is returned in accordance with Section 56 of the Ordinance, which does not contemplate the retention of property for other investigations, proceedings, or matters.

4. POSSIBLE OUTCOMES OF INVESTIGATION PHASE

No further action

4.1 **Paragraph 7.6** requires the Commission to provide certain information to the Complainant where the Commission proposes to take no further action in relation to a matter. Any information provided pursuant to paragraph 7.6 should be subject to the Commission's general obligation of confidentiality and any writing should be drafted and/or redacted accordingly. Paragraphs 4.2 and 7.1 also require the Commission to notify the Complainant where the Commission proposes to take no further action. Paragraphs 4.2 and 7.1 should also be revised as set forth herein.

4.2 **Paragraph 7.7** provides that the Commission may reconsider the issues raised after electing to take no further action in relation to a matter. Paragraph 7.7 should specify that, if the Commission elects to take no further action, any property should be returned to the person, in accordance with Section 56 of the Ordinance, and not retained in the event that the Commission may later reconsider the issues.

Issue Warning Notice

4.3 **Paragraph 7.18** provides that "Warning Notices will be published on the Commission's website". Pursuant to Section 82(2) of the Ordinance, the Warning Notices must set out, *inter alia*, the alleged contravening conduct, the undertaking(s) involved and the evidence relied upon by the Commission. Paragraph 7.18 should provide that the publication of Warning Notices on the Commission's website is subject to the Commission's general obligation of confidentiality and that Warning Notices should be drafted and/or redacted accordingly. The Working Group believes that appropriate due process should occur before a Warning Notice is published. See Guide by the Australian Competition & Consumer Commission on "ACCC powers to issue infringement, substantiations and public warning notices, News for business."

Referral to a Government agency

4.4 **Paragraph 7.22** provides that, if the complaint is referred to a Government agency, the Commission will provide an explanation of this outcome to the Complainant in writing. Any information provided pursuant to paragraph 7.22 should be subject to the Commission's general obligation of confidentiality and any writing should be drafted and/or redacted accordingly.

Conduct a market study

4.5 **Paragraph 7.23** provides that "evidence gathered by the Commission during an Initial Assessment or Investigation Phase into particular conduct may lead to a market study." Paragraph 7.23 should be amended to specifically provide that evidence gathered during an Initial Assessment or Investigation Phase, especially confidential information, should not be used in the market study and should not be disclosed in the course of or in the market study.

PART 3: APPLICATIONS GUIDELINE

Confidentiality

1.1 **Paragraph 3.6** refers to "unnecessarily broad" claims for confidentiality but does not provide examples of what could be deemed as unnecessarily broad claims. It would be helpful to provide some guidance or examples of what could be deemed as unnecessarily broad claims in particular with reference to Section 126(1)(b) of the Ordinance.

Other Commission Procedures

1.2 **Paragraph 4.1** states that information received by the Commission from applicants or other parties cannot be confined for use only in the Commission's processes for making a Decision or issuing a Block Exemption Order. While this is understandable from an enforcement standpoint, this might deter applicants from coming forward to make use of the Decision or Block Exemption Order process. If a potential breach of the Ordinance is being uncovered in the context of the process of application for a Decision or Block Exemption Order, the Commission may wish to take into account the fact that the undertakings came forward with information voluntarily to seek clarification on their conduct or agreement(s) and be more amenable to discussions relating to commitments as opposed to proceeding with enforcement action to the Tribunal.

Considering whether to make an Application or Block Exemption Application

1.3 **Paragraph 5.3** states that Block Exemption Applications have to be representative of a "wider industry interest". Applicants must demonstrate that this is the case. It would be helpful if the Commission could clarify the factors and evidence required that would demonstrate that an applicant represents a wider industry interest.

Whether to apply for a Decision or Block Exemption Order

1.4 **Paragraph 5.8** states that the burden is on applicants undertaking similar agreements enhancing overall economic efficiency to consider seeking a Block Exemption Order, rather than separately applying for a Decision regarding their specific agreement. It would be helpful if the Commission could identify cases where applicants are undertaking similar agreements and inform applicants that this is the case. The Commission may also wish to facilitate discussions between such applicants – mitigating risks that any such unassisted discussions might run contrary to the First Conduct Rule.

Applications and Block Exemption Applications do not provide immunity

1.5 **Paragraph 5.15** – Comments on paragraph 4.1 apply.

Application process for a Decision

1.6 **Paragraph 6.2** does not provide for an indicative timeframe for review of a Decision. It would be useful for the Commission to provide an indicative timeframe for simple and complex cases (especially in relation to when applicants can expect to hear back from the Commission in terms of initial questions – from the time the forms are submitted). This is so that there is more certainty for businesses. While the Singapore guidance/decision regime also does not stipulate indicative timeframes for review of agreements, the relevant guidelines state that the Competition Commission of Singapore would endeavour to get back to applicants within 2 months after receipt of the relevant form if the substantive information is incomplete or incorrect. Similarly, as regards **paragraph 7.5**, it would be helpful for the Commission to provide an indicative timeframe for preliminary assessment.

Factors the Commission will consider in determining whether to consider an application

1.7 **Paragraph 6.4(b)** requires that the application raises a question of an exclusion or exemption under the Ordinance for which there is no clarification in existing case law or decisions of the Commission. This requirement does not appear to add substantially to the requirement under paragraph 6.4(a) that the application poses **novel or unresolved questions.** It is important to clarify that the reference to existing case law should be that of the Tribunal (i.e. replace the reference to "existing case law" by "existing case law of the Tribunal"). This is consistent with the wording adopted in **paragraph 6.7**. Further, the requirement that there be "no clarification" in existing case law of the Tribunal or decisions of the Commission appears stringent and consideration should be given to replace the reference to "no clarification" by "no or limited clarification".

1.8 Moreover, there may be greater utility if **paragraph 6.4(b)** instead denotes a positive requirement, e.g. that the application raises a question the determination of which will have a real or substantial impact on developing the regulatory environment in relation to an exclusion or exemption under the Ordinance.

Not a hypothetical question

1.9 **Paragraphs 6.11-6.12** should clarify the extent to which a "future agreement or conduct" needs to be definitive. For instance, for "future agreements" to be assessed, would it be sufficient for parties to sign a non-binding Letter of Intent – or would this be considered "hypothetical". Similarly, how certain should "future conduct" be and how would an applicant go about proving that future conduct was certain enough not to be hypothetical.

Initial consultation prior to applying for a Decision

1.10 **Paragraph 6.13** states that the Commission strongly encourages all applicants to approach the Commission for an Initial Consultation prior to submitting an Application. It would be helpful if the Commission could stipulate the procedures for initiating an Initial Consultation and the timeframe in which the Commission endeavours to respond to initiations for an Initial Consultation. Further, it should be made clear that any Initial Consultation is to be kept as a confidential process.

Potential outcomes of preliminary assessment

1.11 **Paragraph 7.3** states that if the Commission declines an Application, it will inform the applicant. It would be helpful if the Commission provided reasons if possible for declining applications.

Engagement with parties likely to be affected by a Decision

1.12 **Paragraph 8.9** states that after completion of the review of the Application and before making a Decision, the Commission may meet with the applicant to convey its views on the merits of the Application and any conditions and limitations being considered. It would be helpful if the applicant(s) are given an opportunity to review the Commission's draft Decision and provide comments on it before it is published.

Exercise of the Commission's discretion whether to issue a Block Exemption Order

1.13 **Paragraph 11.3** states that the issue of a sector specific Block Exemption Order should be seen as an exceptional measure. The Commission may wish to consider the applicability of sector specific Block Exemption Orders which have been tried, tested and implemented in the European Union – i.e. relating to the insurance, motor vehicles and maritime liner shipping industries – as similar issues may arise in the Hong Kong context.

1.14 Separately, the Commission should also consider whether cross-sector block exemption orders – particularly one clarifying the treatment of vertical arrangement – would be useful in the Hong Kong context.

Considering whether to Issue a Block Exemption Order

1.15 As regards **paragraph 12.4**, where the Commission declines to issue a Block Exemption Order, it would be helpful if the Commission provided reasons if possible for declining applications.

Issuing a Block Exemption Order

1.16 Similarly, as regards **paragraph 13.7**, where the Commission decides not to issue a Block Exemption Order, it would be helpful if the Commission provided reasons if possible for its decision.

ANNEX 1 – CONTRIBUTORS

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INTERNATIONAL BAR ASSOCIATION

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SUBMISSION TO THE COMPETITION COMMISSION AND THE COMMUNICATIONS AUTHORITY IN RESPONSE TO THEIR CONSULTATION ON THE DRAFT GUIDELINE ON THE FIRST CONDUCT RULE GUIDELINE ON THE SECOND CONDUCT RULE GUIDELINE ON THE MERGER RULE

10 DECEMBER 2014

INTRODUCTION AND SUMMARY

1. INTRODUCTION

1.1 This submission is made to the Competition Commission ("Commission") and the Communications Authority on behalf of the Hong Kong Working Group ("Working Group") of the Antitrust Committee of the International Bar Association ("IBA").[1] Consistent with the approach adopted in the Competition Ordinance, references in this submission to the Competition Commission are to be read as including the Communications Authority when they relate to the exercise of the Commission's functions in respect of broadcasting and telecommunications licensees.

1.2 The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at http://www.ibanet.org.

[1] The submission does not necessarily reflect the views of the organisations at which individual members of the Working Group are employed.

1.3 The Working Group hopes to contribute constructively to the Commission's consultation on the following draft guidelines, which are issued under the Competition Ordinance (Chapter 619) ("Ordinance"):

Draft Guideline on Complaints ("Guideline on Complaints");

Draft Guideline on Investigations ("Guideline on Investigations");

Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders ("Applications Guideline");

Draft Guideline on the First Conduct Rule ("Guideline on the First Conduct Rule");

Draft Guideline on the Second Conduct Rule ("Guideline on the Second Conduct Rule"); and

Draft Guideline on the Merger Rule ("Guideline on the Merger Rule" or "Merger Guideline").

1.4 This submission includes the Working Group's comments on the Guideline on the First Conduct Rule, Guideline on the Second Conduct Rule and Guideline on the Merger Rule.

1.5 The Working Group's comments draw on the vast experience of the IBA's members in competition law and practice in the Asia-Pacific region and other major competition law jurisdictions across the globe. The contributors to the Working Group's submission are listed in Annex 1.

1.6 The Working Group applauds the Commission's initiative to consult with stakeholders on its draft Guidelines and on the Commission's publication of well-drafted and practical draft Guidelines in a relatively short timeframe. Given the wide-ranging consequences of the new competition law regime and its impact on the Hong Kong markets, the Working Group considers that it would be valuable for stakeholders to be able to comment on the draft Guidelines after the current round of consultation has been completed and revised draft Guidelines published. The Working Group would be grateful if the Commission could indicate whether a second round of consultation may take place and the likely timing of that consultation.

2. SUMMARY

Guideline on the First Conduct Rule

2.1 The first five Parts of the draft guideline on the first conduct rule usefully provide guidance on concepts which are fundamental to the interpretation of the Ordinance. We provide comments on:

- Notion of Undertaking

- Concerted Practices
- Infringements by Object
- Effects-Based Analysis
- Ancillary Restraints
- Serious Anti-Competitive Conduct

2.2 Part 6 of the draft guideline contains very useful guidance on the main types of agreements that may infringe the first conduct rule. We provide comments on:

- Information Exchanges
- Joint Ventures, including Cooperative Arrangements
- Vertical Restraints
- Other Horizontal Restraints

2.3 The draft guideline in its Annex contains very useful clarifications on the self-assessment regime and on the scope of the statutory body exclusion. We provide comments on agreements enhancing overall economic efficiency and other causes for exclusion.

Guideline on the Second Conduct Rule

2.4 Set out below are the comments of the Working Group in respect of the draft Guideline on the Second Conduct Rule. The areas addressed are:

- Introduction
- Market definition
- Substantial market power
- Abuse of substantial market power

Guideline on the Merger Rule

2.5 Generally, the Working Group considers that the Merger Guideline provides a useful level of detail in all the circumstances. The Working Group offers below various suggestions as to areas that could usefully be clarified or expanded on. The areas addressed are:

- Shared Jurisdiction of the Commission and the CA
- Acquisition of Control/Object of Control
- Definition of Full Function JV
- Ancillary Restraints

- Competitive Concerns
- CR4 Ratio Test
- Failing Firm
- Essential Facilities
- Commencement of an Investigation
- Informal Advice
- Form M
- Commitments

SUBMISSION TO THE COMPETITION COMMISSION AND THE COMMUNICATIONS AUTHORITY IN RESPONSE TO THEIR CONSULTATION ON THE DRAFT GUIDELINE ON THE FIRST CONDUCT RULE

1. SUMMARY

Main concepts and overall approach

1.1 The first five Parts of the draft guideline on the first conduct rule usefully provide guidance on concepts which are fundamental to the interpretation of the Ordinance.

1.2 In its discussion of the notion of undertaking, the draft guideline helpfully supplements the definition contained in s 2 of the Ordinance by providing additional guidance on when separate legal entities (such as subsidiaries or agents) constitute a single economic unit. It is however submitted that the draft guideline should provide more guidance concerning the notion of single economic unit as this would greatly enhance legal certainty in relation to this fundamental concept.

1.3 The guidance offered on the notion of concerted practice is also particularly useful, as it is not defined in the Ordinance. However the draft guideline could be significantly improved by offering in its Part 2 a clearer analytical framework, which would inform the reading of the examples provided in Part 6 – particularly in respect of information exchanges. The Commission may also consider whether, as a matter of policy, it should not signal a less stringent enforcement approach in relation to concerted practices, given the broad liability regime (including for attempts to contravene) under s 91 of the Ordinance.

1.4 We also respectfully submit that the guideline should acknowledge more clearly that the notion of infringement by object should be restrictively interpreted. The draft guideline should also explicitly acknowledge that any restriction that does not appreciably affect competition will not be captured by the first conduct rule – if possible practical thresholds (for example in terms of market shares) should be included to define agreements that will not be able to appreciably affect competition. While market share thresholds always suffer from the uncertainties inherent in the process of establishing relevant markets or determining market volumes, this would greatly enhance the practical usefulness of the guidance offered by the Commission.

1.5 The guidance on serious anti-competitive conduct and on ancillary restraints is to be welcomed. We propose some minor suggestions to further clarify these concepts and offer practical guidance.

Examples of agreements that may infringe the first conduct rule

1.6 Part 6 of the draft guideline contains very useful guidance on the main types of agreements that may infringe the first conduct rule. Our comments mainly concentrate on the two types of practices which merit a more detailed discussion. These are information exchanges and joint ventures.

1.7 The law on information exchanges heavily relies on the notion of concerted practice, which we submit should be better explained in Part 2 of the guideline. Having set a more comprehensive analytical framework in Part 2, the discussion of information exchanges in Part 6 should be revised to better follow this framework, particularly by indicating the relevance of the nature of the information exchanged and of the market structure for purposes of the assessment under the first conduct rule.

1.8 The other area which merits more discussion is joint ventures and cooperative arrangements. In our submission, the guideline should clearly acknowledge that many joint ventures will qualify as "mergers" and will thus benefit from the exclusion under s 4 of Schedule 1 to the Ordinance, falling outside the scope of the conduct rules. As regards cooperative arrangements that should not be regarded as "mergers", more comprehensive guidance is required, including in the form of market share or other thresholds below which a joint venture is unlikely to cause concern under the first conduct rule.

1.9 The approach to vertical restraints in the draft guideline generally strikes the right balance but could be improved as regards the use of price monitoring mechanisms and concerning other typical restrictive covenants. Guidance on selective distribution systems and of point-of-sale restrictions would be particularly welcome in light of the many retailers of luxury goods active in Hong Kong.

1.10 We also offer some comments on the assessment of other types of horizontal practices under the first conduct rule. The main areas which we submit could be improved involve standardisation, membership in trade associations and certification practices. The guideline could usefully be improved by making it clearer that these practices only raise concern under the first conduct rule if such arrangements are practiced in a way that effectively prevents new entry into the relevant market. It is only where the use of a standard, membership in an association or the benefit of certification is indispensable to entry into and to competing in markets, and where a refusal would lead to the elimination of competition in the market, that these practices raise concerns.

Exclusions and exemptions

1.11 The draft guideline in its Annex contains very useful clarifications on the self-assessment regime and on the scope of the statutory body exclusion.

1.12 The text could however be improved in several respects, in particular as regards agreements enhancing overall economic efficiency. An express reference to the relevance of overseas precedent when assessing the availability of the overall economic efficiency exclusion would be particularly welcome in a context where many questions will be "novel"

and may lead parties to make numerous applications for individual decisions under s 9 of the Ordinance. As regards the substantive analysis, it is submitted that there should be room for out-of-market efficiencies and that both qualitative (dynamic) efficiencies and cost (static) efficiencies should bear equal weight in any efficiency assessment.

1.13 Finally, we invite the Commission to consider whether or not, as a matter of policy, it should relax the required legal standard to meet the defence for compliance with legal requirement available under s 2 of Schedule 1.

PART 1: MAIN CONCEPTS AND OVERALL APPROACH

2. NOTION OF UNDERTAKING

2.1 The notion of "undertaking" used in the Ordinance is defined at s 2(1) of the Ordinance. At paragraphs 2.1 to 2.11, the draft guideline usefully expands on aspects of the notion not covered by the statutory text. The discussion of "economic activity" at paragraph 2.3 could however be expanded by clarifying that the notion of undertaking is functional in nature. This would make it clear that the same body can be acting as an undertaking in respect of some activities and not in respect of other activities, the key differentiator being whether the activity is economic in nature.

2.2 The discussion of the concept of single economic unit in the draft guideline is also particularly welcome in the context of Hong Kong's economy. The legal test described at paragraph 2.6 of the draft guideline broadly confirms that where parties have a separate legal personality but enjoy no economic independence they will form a single economic unit, i.e. a single undertaking for purposes of the substantive assessment. In such cases, no competition exists between the two entities which competition law should aim to protect. This lack of economic autonomy is usually found where a parent has the ability to issue instructions to the subsidiary; this will be the case even where the parent refrains to exercise this power in practice as it could choose to do so at any time and without taking the views of the subsidiary into consideration. As the Commission recognizes at paragraph 2.6 of the draft guideline, this requires a case-by-case analysis. However, where the draft guideline refers to the "exercise" of a "decisive influence", which may suggest a narrow concept, we would recommend to refer to the "degree of operational and financial control" a parent has on its affiliates. Legal certainty would be greatly enhanced if the Commission were to more closely follow the discussion of the notion of single economic unit contained in the illustrative guidelines on the first conduct rule which the Administration provided during the legislative process.[2] However, the Working Group would like to point out that while the concept of a single economic entity is a useful one in the context of the substantive assessment and in particular in relation to the allocation of resources available to the market participants, it is not suitable for purposes of establishing direct antitrust liability. In this regard, the Working Group firmly believes that recourse must be had to the principles of liability established in both civil and criminal bodies of law around the world that liability can only arise if the entity in question itself positively breaches an obligation to act in a specific way or fails to act where it would have been required to do so (e.g. where

[2] See the Commerce and Economic Development Bureau's paper on Guidelines on the First Conduct Rule, LC Paper No CB(1)2336/10-11(01), at paragraph 2.3

specific duties of oversight exist that a parent company fails to fulfi).

2.3 Finally, the discussion of agents and distributors would be clearer if it started by the explanation (currently at paragraph 2.11) that agreements between principals and genuine agents do not fall within the scope of the first conduct rule. This could be achieved by moving the contents of paragraph 2.11 to the beginning of the section, before paragraph 2.8.

3. CONCERTED PRACTICES

3.1 The draft guideline contains an extensive discussion of the notion of concerted practice in its Part 2 (at paragraphs 2.15 to 2.18) and provides several examples of possible concerted practices in its Part 6 (mainly concerning information exchanges at paragraphs 6.32 to 6.43).

3.2 While the notion of "concerted practice" is not defined in the Ordinance, its use at s 6 is inspired by EU law. In its explanations of the notion in the draft guideline, the Commission chose to closely follow EU precedent in paragraphs 2.15 to 2.17. While, this is to be welcomed as reliance on established overseas precedent enhances legal certainty, it should also be clarified that an exchange of information as such does not give rise to competition concerns – in fact, knowledge of market developments enhances competitive activity - but only where the exchange of information is accompanied by a – potentially implicit – commitment to act upon this information in a certain way.

3.3 It should however be borne in mind that enforcement mechanisms available to the Commission are more extensive than those available to competition authorities under EU law. While the EU notion of concerted practice was developed in the context of enforcement powers limited to actual infringements, the Commission in Hong Kong has the power to take action against attempted infringements. Under s 91 of the Ordinance, which is inspired from s 76(1) of the Australian Competition and Consumer Act 2010 (Cth), the Commission has the power to seek orders (including pecuniary sanctions) from the Competition Tribunal against persons who have "attempted" to contravene the provisions of the Ordinance, as well as against persons involved in an infringement. In Australia, where courts can only sanction "understandings" and "agreements" (but not "concerted practices"), courts have sometimes taken enforcement action against practices that would qualify as a concerted practice under EU law on account of the fact that these constituted "attempts" to infringe competition law.[3] The combination in the Ordinance of the very broad

[3] See *ACCC v J McPhee & Son (Australia) Pty Ltd (No 3)* (1998) ATPR (Digest) 46-183.

EU law notion of “concerted practice” (at s 6) with the vast enforcement powers borrowed from Australian law (at ss 91 to 94) leads to a scope of application of the first conduct rule that is potentially extremely far-reaching, and in any case broader than that in each of the EU and Australia. It is unclear from the legislative history whether this was the objective of the Hong Kong legislator. In this context, it is respectfully submitted that the Commission should use its discretion to set policy objectives and interpret the law in a way that preserves the competitive process and market dynamism in Hong Kong without stifling competition. It may be too early at this stage for the Commission to develop an enforcement policy that takes account of the peculiarities of the Hong Kong statutory framework, but the Commission could already usefully signal at paragraph 2.15 of the guideline that it is aware of the potentially far-reaching scope of the first conduct rule and that it will focus its enforcement on concerted practices whose restrictive effects on Hong Kong markets are clearly established.

One of the filtering mechanisms that was introduced into the Ordinance to try to address the potential breadth of the prohibition was the concept of Serious Anticompetitive Conduct. It is not just a ‘procedural’ distinction, as has been suggested in the draft guideline, but, rather, was introduced to identify the four types of conduct that were regarded by the Hong Kong Legislature as the serious forms of anticompetitive conduct under the First Conduct Rule which should be the focus on enforcement action. It may be useful to make that point here and to suggest that the guideline could usefully start by acknowledging this and then devote more time to explaining how serious anticompetitive conduct is defined, what conduct would be regarded as SAC and where the boundaries are. Cartel conduct, which is the least demanding analytically, still presents definitional and coverage problems. For example, the guideline could usefully explain the common characteristics of a cartel: no integration of operation, no sharing of risk and reward from respective transactions, typically covert, at least where prohibited. There is a need here to avoid exposure for desirable arrangements among competitors.

On the suggestion that the EU concept of ‘by object’ infringement should be imported into HK, it is not clear to me what statutory or policy basis there could be for assuming that conducts outside of the four specified SAC conducts might be regarded as serious or subjected to a presumption that they are inherently anticompetitive. If the legislature had considered other conducts to be inherently or manifestly anticompetitive, I would have expected them to be included within the list of serious anticompetitive conduct. This interpretation leads to particular difficulties under the Second Conduct Rule. It contains the same ‘by object’ wording but a presumption that certain conducts are, inherently and by

their very nature, an abuse of market power does not make much sense. The HK law is restricted to exclusionary conduct, requiring assessment of whether there has been or is likely to be an exclusionary effect. Article 102 and the Second Conduct Rule are very different in both scope and underlying legal drafting in this regard.

3.4 Even if it chooses to follow EU precedent closely, it is submitted that the Commission should bring a number of changes to the draft guideline in Part 2.

3.5 Paragraph 2.17 reflects in part the guidance provided by the European Commission in its Guidelines on horizontal cooperation agreements.[4] It would however be useful if the guideline could explain when "to influence [a competitor's] conduct on the market" amounts to a concerted practice within the meaning of the first conduct rule. Under its current wording, paragraph 2.17 may be read as suggesting that any form of influence may amount to a concerted practice. However, and as illustrated at paragraphs 6.32 to 6.43, a concerted practice exists only where such influence leads to a reduction in "the independence of competitors' conduct on the market and diminishes their incentives to compete" (these are the words used in the corresponding European Commission guidelines). This effect on competitors' conduct itself depends on market structure, as explained at paragraph 6.41 of the draft guideline. The current draft of the guideline does provide guidance on both aspects (the nature of the information exchanged and the market structure), but it does so in a rather haphazard way (in hypothetical examples 2, 3, 10 and 11, and at paragraphs 6.35 to 6.43). It is submitted that the guideline would benefit from a more organised approach, starting by a clear statement at paragraph 2.17 of the relevant principles, i.e. (i) a concerted practice exists only where the object or effect of contacts among competitors is to lead to a reduction in the independence of competitors' conduct on the market and diminishes their incentives to compete; and (ii) this reduction will only arise where certain type of information is exchanged and where the relevant markets have a particular structure. These principles would then be explained more in detail in part 6.

3.6 Hypothetical examples 2 and 3 may be more relevant to illustrate the law on information exchanges in Part 6. If the Commission is minded to keep hypothetical examples 2 and 3 in Part 2, then there should at least be an introductory text below paragraph 2.17 explaining that the exchange among competitors of specific future pricing intentions that have not yet been made public would likely constitute a concerted practice. This would allow the reader to understand the reference to "proposed future fees" and "sensitive price information" in hypothetical example 2 and to the fact that the information is "confidential in nature" in

[4] European Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, (2011) OJ C11/1, at paragraph 61.

hypothetical example 3. Finally, it should be clarified that an exchange of such information can only give rise to competition concerns where the information is not available from other sources and where counterweighing buyer power does not negate any negative effects on competition which the exchange of information might otherwise give rise to.

3.7 The above proposed changes to paragraph 2.17, together with those we propose below concerning paragraphs 6.32 and 6.35, would provide a more comprehensive and systematic guidance to business operators in Hong Kong, at a time where the legitimacy of information exchanges under neighbouring competition law regimes is debated.

3.8 In addition to the above structural and policy changes, Part 2 of the guideline could be usefully amended by moving the contents of paragraph 2.14 to the section on information exchanges. This paragraph provides an example of information exchanges among competitors that falls short of a "meeting of the minds" required for there to be an agreement within the meaning of ss 2(1) and 6 of the Ordinance. The text of this paragraph should be revised to make a clearer distinction between agreements and concerted practices, and the example should serve to illustrate the notion of concerted practice rather than that of agreement.

4. INFRINGEMENTS BY OBJECT

4.1 While paragraph 3.2 of the draft guideline reflects the alternative ways an agreement can infringe the first conduct rule – i.e. infringements "by effect" or "by object", paragraphs 3.4 to 3.7 rightfully suggest that the category of infringements by object is narrow in scope and should be reserved to practices which by their nature are extremely harmful to competition.

4.2 The guideline would however gain in clarity if it could expressly confirm that the notion of "infringement by object" should be interpreted restrictively.[5] This would also be consistent with the overall effects-based approach to enforcement reflected in the rest of the guideline.

5. EFFECTS-BASED ANALYSIS

5.1 The Commission in the draft guideline usefully confirms that it will adopt an effects-based approach to its enforcement of the first conduct rule. The relevant paragraphs are principally paragraphs 3.3 and 3.11 to 3.18. It is submitted that the guideline could be made more practical and effective if it were to be amended as follows.

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[5] See *Groupement des cartes bancaires v European Commission* (Case C−67/13 P) [2014], not yet reported, at paragraph 58.

5.2 First, paragraphs 3.3 and 3.12 should expressly confirm that the Commission will only be concerned under the first conduct rule with practices that have an appreciable effect on competition. This would be consistent with the legislative intent, as discussed during the parliamentary debate and as reflected in the illustrative guidelines on the first conduct rule which the Administration provided during the legislative process.[6] Finally, this would expressly confirm the approach adopted concerning the existing competition rules applicable in the telecommunications sector, maintaining legal certainty and continuity for the actors in this sector.[7] This statement of principle would serve as a good introduction to the discussion at paragraphs 3.13 and 3.18, and usefully complement these explanations by making it clear that only appreciable restrictive effects will be of concern.

5.3 Second, the guideline could usefully introduce materiality thresholds under which it is unlikely to be concerned, on the model of what the European Commission and the Competition Commission of Singapore have done.[8] While these thresholds, expressed in the form of market shares, could also be inserted under the discussion in Part 6, the discussion of the requisite degree of market power under the first conduct rule at paragraphs 3.15 and 3.16 could already refer to a minimum market share threshold. Paragraph 2.19 of the Competition Commission of Singapore's guidelines on the section 34 prohibition could serve as a useful model, with a reference to 20 and 25 per cent *de minimis* market share thresholds respectively for horizontal and other agreements. These thresholds would clearly be indicative, and would not detract from the discussion of other relevant circumstances at paragraph 3.17.

5.4 Materiality thresholds could also be expressed in terms of duration, or by reference to a combination of market share and duration factors. These are discussed where relevant in our comments on Part 6 of the draft guideline.

6. ANCILLARY RESTRAINTS

6.1 The discussion of ancillary restrictions at paragraphs 3.19 to 3.23 of the draft guideline could be improved as follows.

6.2 First, paragraph 3.23 should expand on the circumstances where a non-compete will be

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6 See the Commerce and Economic Development Bureau's paper on Guidelines on the First Conduct Rule, LC Paper No CB(1)2336/10-11(01), at paragraphs 3.8 to 3.12.

7 See the decision of the Telecommunications (Competition Provisions) Appeal Board's in case *PCCW-HKT Telephone Limited v the Telecommunications Authority*, Appeal No. 4 of 2002, at paragraph 19.

8 See for example the European Commission's *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)* C(2014) 4136 final; the European Commission *Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices* OJ(2010) L102; and the Competition Commission of Singapore's guidelines on the section 34 prohibition.

regarded as ancillary to a joint venture. For example, practical guidance could be included to offer legal certainty to non-competes entered into for the lifetime of a joint venture, provided that they match the product and territorial scope of the venture.

6.3 Second, the draft guideline should clarify whether the Commission is of the view that ancillary restrictions that are part of a merger transaction should fall within the scope of the merger exclusion under s 3 of Schedule 7, or whether they should be assessed independently under the first conduct rule. The draft guideline on the merger rule appears to suggest at paragraphs 2.18 and 2.19 that these types of ancillary restraints shall be assessed under the merger rule. This correctly suggests that where the merger rule does not apply, these ancillary restraints will not fall within the scope of the Ordinance. In any case, practical guidance should be added, in either guideline, on ancillary restraints in the context of merger transactions, including as regards post-closing non-compete and non-solicitation clauses.

7. SERIOUS ANTI-COMPETITIVE CONDUCT

7.1 The Working Group believes that the guidelines should acknowledge that the notion of what constitutes a "serious anti-competitive conduct" is one with substantive relevance. Based on the legislative intent, these should be considered the primary types of infringements which the Commission should be most concerned about. While they do not relieve the Commission from establishing that any specific conduct is likely to produce appreciably negative effects on competition, these examples indicate that such effects are likely to be present and may thus serve as a reason to exercise administrative discretion when deciding which matters to pursue. .

7.2 In this context, the discussion at paragraph 5.3 should be completed by the addition of a point (c), confirming that the notion is also relevant to determine whether proceedings can be brought (and sanctions sought) for the whole duration of the infringement or only for the period that follows the issuance of a warning notice under s 82(5) of the Ordinance.

7.3 Also, paragraphs 5.4 and 5.6 suggest that, as a matter of enforcement policy, the Commission will generally consider infringements by object to constitute serious anti-competitive conduct. The Working Group believes that this is a sound approach, if "infringements by object" are those four types of behaviour identified as serious anti-competitive infringements in the context of the First Conduct rule.

PART 2: EXAMPLES OF AGREEMENTS THAT MAY INFRINGE THE FIRST CONDUCT RULE

8. INFORMATION EXCHANGES

8.1 Paragraphs 6.32, 6.35 and 6.38 to 6.43 provide guidance on those information exchanges which constitute in themselves a prohibited concerted practice within the meaning of the first conduct rule. While the principles will have been set out following our proposed revisions to paragraph 2.17, they could usefully be repeated at paragraph 6.32, whose current wording appears to be overly broad. This statement may be misunderstood as signalling that any instance of such knowledge would be problematic. Accordingly, it is submitted that paragraph 6.32 be rephrased to reflect the narrower scope of the notion of concerted practice. Please refer to our comments on paragraph 2.17 in this regard.

8.2 Similarly, the guidance at paragraph 6.35 should be rephrased to incorporate the constitutive elements of a concerted practice. It is only the exchange of future specific pricing intentions that have not been made public either by the suppliers themselves or by third parties, such as their customers, that would constitute a concerted practice, as the draft guideline recognizes at paragraph 6.42. Further, the Commission in Hong Kong may wish to consider adopting a more effects-based approach, in view of the extensive enforcement powers under s 91 of the Ordinance. In any case, it is respectfully submitted that paragraph 6.35 in its current wording is overly broad as regards information exchanges on quantities. The paragraph could usefully refer to future individualised quantities, and explain that these could for instance include intended future sales, market shares, territories, and sales to particular groups of consumers. As a matter of policy, the Commission should also consider referring to market structure in its assessment of these information exchanges, signalling a preference for an effects-based enforcement consistent with the narrow scope of the notion of infringement by object.[9] In this context, the discussion of the relevance of market structure to the analysis (currently at paragraph 6.40) could be moved to paragraph 6.35.

8.3 Together with our proposed changes to paragraphs 2.17, the above proposed changes to paragraphs 6.32 and 6.35 would provide a more comprehensive and systematic guidance to business operators in Hong Kong on the law of information exchanges. In addition to the above changes, the guideline could also be usefully amended as follows:

8.3.1 The reference to information exchanges in figure 1 at page 21 should be made consistent with the discussion of information exchanges in the revised

[9] See *Groupement des cartes bancaires v European Commission* (Case C−67/13 P) [2014], not yet reported, at paragraph 58.

paragraphs 2.17, 6.32 and 6.35, including as regards the requirement for individualised and non-public price or quantity information.

8.3.2 The reference at paragraph 6.12 to the exchange of information on future price intentions should reflect the requirement that the information be individualised and not public as well as accompanied by a certain – potentially informal – commitment to implement the information provided. The Working Group believes that the Commission should acknowledge the fact that competitors will as often not adhere to such statements as they do, so that the sharing of "information" without a corresponding commitment does not remove any uncertainty with regard to the future behaviour of the relevant player.

8.3.3 For the sake of clarity, the second sentence of paragraph 6.34 could be usefully amended to state that "The information exchange will be considered as having the object of harming competition *where it is a component of another clear infringement by object such as price fixing among the same parties*" (proposed addition in italics).

8.3.4 The guideline should expressly recognise the exceptional nature of concerted practices arising from information exchanged via common customers or suppliers. Before identifying the possible concern at paragraph 6.37, the guideline should clearly spell out that obtaining competitor pricing information (or information about a competitor's future quantities) from a common supplier or customer is as a general rule not a competition law concern. This practice is the very essence of the competitive process, with customers playing one supplier against another, not necessarily being bound to the truth in relation to the "information" they are sharing. It is only where exceptional circumstances are present, including the clear intent and knowledge that the information would be passed on by the common supplier or customer to a competitor, that the practice may constitute a prohibited concerted practice where all of the other constitutive elements of the practice are present (in terms of nature of the information exchanged and market structure).

8.3.5 Hypothetical example 11 should be improved on the model of hypothetical example 9. Before referring to the possibility of the application of the overall economic efficiency exclusion, the text should state "Moreover, *on the assumption that it may give rise to harmful effects on competition,* the information exchange appears to give rise to efficiencies sufficient to satisfy the terms of section 1 of Schedule 1 to the Ordinance" (proposed addition in italics).

9. JOINT VENTURES, INCLUDING COOPERATIVE ARRANGEMENTS

9.1 Many joint ventures will qualify as “mergers” and will thus benefit from the exclusion under s 4 of Schedule 1 to the Ordinance, falling outside the scope of the conduct rules. Still, given the prevalence of joint ventures in economic life, it would be useful if the Commission could significantly expand the guidance on various common types of cooperative arrangements under the first conduct rule. Currently, some guidance is provided on joint purchasing arrangements at paragraphs 6.24 to 6.31 and on production joint ventures at paragraphs 6.87 to 6.92. However, guidance on other types of joint ventures is only briefly discussed at paragraphs 6.81 to 6.86.

9.2 It is submitted that the following types of cooperative joint ventures would merit a specific discussion in the guideline:

- Joint marketing and commercialisation;
- Joint research and development activities, including joint licensing arrangements;
- Consortia and joint bidding in the context of public tenders where the parties are not able – either factually or commercially – to compete for the relevant project alone (including how such conduct is to be distinguished from anti-competitive bid-rigging); and
- Specialisation arrangements in the context of joint production and joint research and development activities.

9.3 The above arrangements each raise particular issues and are sufficiently common in Hong Kong to warrant consideration under the Commission’s guideline. For each such arrangement, it would be useful if the guideline could provide the following practical guidance:

- Confirmation that the prohibition will only apply where it can be clearly shown that the agreement in question is likely to produce appreciable negative effects on competition pursuant to an effects-based analysis, even where they involve output and price-setting activities;
- The main circumstances guiding the Commission’s analysis, including the competitive relationship (i.e. horizontal or vertical) among the parties to the venture, and a discussion of when possible efficiencies will be recognised;
- The Commission’s views on the scope for legitimate ancillary restraints; and

- Bright-line guidance in the form of market share or other thresholds below which a joint venture is unlikely to cause concern under the first conduct rule.

9.4 The above four aspects could first be discussed in general terms with the introduction of new paragraphs below paragraph 6.85 as follows:

9.4.1 ***An effects-based approach to joint ventures***. This first part could significantly borrow from existing paragraphs 6.88 and 6.89. These paragraphs discuss production joint ventures but contain guidance that should be stated as a matter of principle at the beginning of the guideline's general discussion of joint ventures. The Commission should clearly indicate that the joint pooling of risks and resources between competitors or non-competitors shall not constitute an infringement by object of the first conduct rule, even where the arrangements involve output limitation and the setting of prices of goods or services that are jointly developed or produced. This statement of principle would then be qualified depending on the outcome of an effects-based analysis, which the guideline would describe in respect of various common types of joint ventures. This approach would dispel doubts for prospective parties to joint venture arrangements that may be created by the broad language used elsewhere in the guideline, for example at paragraph 4.4. At the same time, the new text would also explain that the effects-based analysis is limited to those activities within the scope of the venture, and that the venture should not be used as a vehicle for coordination of market behaviour outside of its scope. Practical guidance could also be included as regards information barriers and other safeguards which parties could put in place to avoid illegitimate "spill-over" effects from their coordination within the joint venture.

9.4.2 ***Main circumstances guiding the analysis, including the competitive relationship (i.e. horizontal or vertical) among the parties to the venture***. This section would explain in general terms the Commission's approach to the establishment of joint ventures among non-competitors and competitors, including a recognition of efficiencies flowing the pooling of resources, already discussed at paragraph 6.92 concerning production joint ventures.

9.4.3 ***Ancillary restraints***. Building on the existing guidance reflected at paragraph 6.86, this section would expand on the circumstances where a non-compete will be regarded as ancillary to a joint venture. For example, practical guidance could be included to offer legal certainty to non-competes entered into for the lifetime of a joint venture, provided that they match the product and territorial scope of the

venture.

9.4.4 ***Bright-line thresholds-based guidance.*** While different thresholds may apply to different types of ventures, the Commission could explain that the starting point of its analysis would be the market share thresholds that will have been introduced at paragraphs 3.15 and 3.16 concerning horizontal and vertical restraints.

9.5 The existing guidance on production joint ventures could usefully benefit from the approach proposed above, including as regards the following.

9.5.1 The discussion at paragraph 6.89 of when joint sales are necessary for joint production to be implemented could be expanded to explain when joint production activities would generally be considered as legitimate. This should include bright-line indicative market share thresholds (for example 25 per cent) below which joint production activities are unlikely to cause concern.

9.5.2 Practical guidance on information barriers and other safeguards could be offered to address the risks of illegitimate information exchanges through the joint venture mentioned at paragraph 6.91.

9.6 While the Commission's allowance afforded to undertakings engaged in joint purchasing arrangements is to be welcomed, bright-line thresholds-based guidance could be added to reinforce the effects-based analysis already acknowledged at paragraph 6.27. In this regard, inspiration may be drawn from the policy of the Department of Justice and the Federal Trade Commission in the United States[10], where joint purchasing arrangements are recognised not to raise particular competition concerns where the parties' market share in the relevant input and output markets fall below certain thresholds. More specifically:

- joint purchasing between competitors and non-competitors are generally deemed not to appreciably restrict competition where the parties have a combined share of total purchases of less than 35% in the relevant input market; and
- joint purchasing between competitors are generally deemed not to appreciably restrict competition where the parties have a combined share of total purchases of less than 35% in the relevant input market, and the cost of the products and services purchased jointly accounts for less than 20% of each party's total revenue in the relevant output market.

9.7 These indicative thresholds would find a fitting home at paragraph 6.29, where the

[10] US Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care, August 1996, Statement 7, no 17.

Commission could, in discussing the possible restrictive effects of joint purchasing arrangements, also provide comfort to business operators that “appreciable" restrictive effects are unlikely where the undertakings involved have only limited market power.

9.8 In addition to the above, the Commission may consider the following minor adjustments to the current guidance on joint purchasing arrangements:

- Paragraph 6.24 suggests that “Joint buying can be carried out in a number of ways, including through a jointly controlled legal entity”. It would be useful to mention that where the jointly controlled legal entity fulfils the criteria to constitute a “merger” under s 2(1) of the Ordinance, it will fall outside the scope of the conduct rules.

- At paragraph 6.26 the draft guideline comments on the distinction between a legitimate joint purchasing arrangement and a purchasing cartel, being that in the latter purchases are being made individually. It would be useful for the Commission to provide more practical guidance on this point, as joint purchasing arrangements would often involve a joint negotiation of an umbrella price which then applies to individual purchases made by the participants to the arrangement.

10. VERTICAL RESTRAINTS

10.1 The discussion of vertical restraints at paragraphs 6.5 to 6.8 usefully confirms that agreements among undertakings at a different level of the supply chain will generally not cause competition concerns.

10.2 In this context the wording of paragraph 6.6 (“generally less harmful”) could be strengthened significantly, with a view to enhance legal certainty. At the very least, the Commission should clearly state that any vertical restraints among non-competitors will be subject to a rigorous effects-based analysis. Given that they are not identified as “serious infringements of competition law”, they would not normally be considered to give rise to competition concerns. This would also be consistent with the discussion of vertical restraints later in Part 6 of the draft guideline, including at paragraphs 6.76 to 6.80.

10.3 Another way to enhance the practical guidance contained in the guideline would be to refer to a materiality threshold at paragraph 6.8. This paragraph could usefully repeat the market share threshold below which appreciable restrictions of competition are unlikely to arise in the context of vertical agreements, already inserted at paragraphs 3.15 and 3.16.

10.4 The draft guideline discusses vertical restraints in the context of resale price restrictions (at paragraphs 6.61 to 6.75) and of exclusivities (at paragraphs 6.76 to 6.80). We have the

following comments and suggestions in this regard:

10.4.1 Paragraphs 6.68 and 6.69 suggest that in a context where the parties agree on maximum resale prices or where the supplier recommends resale prices, reliance on a price monitoring system will make these measures work in reality as fixed or minimum prices. It is respectfully submitted that the Commission should recognise that there are many instances where the use of these monitoring mechanisms do not serve to enforce minimum sales prices, including where recommended resale prices exist or maximum resale prices have been agreed. Maximum resale prices in particular would sometimes be used as a contractual mechanism to ensure that a supplier-funded rebate or benefit effectively accrues to the retailer or to end-consumers. More generally, end-user pricing information is an important parameter for a supplier to determine its competitive position and design its commercial strategy accordingly. It is submitted that the stringent approach reflected at paragraphs 6.68 and 6.69 on the use of price monitoring mechanisms unnecessarily imposes additional business constraints on suppliers and wholesalers, which are not commensurate to the objective of retaining downstream price competition. Accordingly, the guideline should explain that the use of these price monitoring mechanisms may be an element that is taken into consideration when assessing potential RPM issues but whose relvance will depend on the circumstances of each case. The Working Group firmly believes that the Commission should not adopt a broad statement against their use as a matter of principle.

10.4.2 The discussion at paragraphs 6.72 and 6.73 of possible efficiencies arising from the use of resale price maintenance for a limited period of time in support of a new product introduction or of a promotional campaign could gain in practical relevance if the Commission could provide an indicative timeline which business operators could use as a "rule of thumb". For example, without denying the complexity of the efficiency analysis, the guideline could refer to a period of three months (or a total of three months within a twelve month period), a reference period which is also used in the context of the initial promotional periods for the purpose of introducing new products onto the market, as contained in Hypothetical Example 7 of the Commission's Draft Guideline on the Second Conduct Rule.[11]

10.4.3 The Working Group believes that the statement at paragraph 6.77 that "exclusive

[11] CCCAD2014002E

distribution and exclusive customer allocation agreements will not generally be considered by the Commission to have the object of harming competition" must be significantly strengthened. As mentioned in relation to paragraph 6.6, we firmly believe that the Commission's policy should be that such agreements would hardly ever give rise to negative effects that could cause competition concerns, and at any rate do not constitute infringements by object. The Working Group suggests that the Commission could already provide bright-line rules in the form of market share thresholds (for example 30 per cent) and duration (for example five years) under which these types of exclusivities will generally not cause concern.

10.4.4 The Commission should not be expected to provide detailed guidance on all possible vertical restrictions at this early stage, but the discussion at paragraphs 6.77 and 6.78 could be usefully supplemented by a general recognition of the benefits arising from selective distribution systems and of point-of-sale restrictions (including restrictions on online sales or requirements for resellers to offer in person pre- and after-sales services). Such guidance would be particularly welcome in a context where there are many retailers of luxury goods active in Hong Kong and where brand owners face significant pressure from counterfeit goods and other trademark infringements.

11. OTHER HORIZONTAL RESTRAINTS

11.1 The draft guideline contains a useful discussion of other horizontal practices. We have the following minor comments.

11.2 Price fixing

11.2.1 Paragraph 6.12, which discusses the approach to price-fixing practices, states that "the exchange of information on future price intentions will be assessed as price fixing." The Working Group believes that such a statement is overly broad and does not reflect the requirement for a case of price fixing. There are many instances of information exchanges regarding future prices that do not meet the rightfully stringent prerequisites of a case of price fixing. At any rate, the Working Group suggests that the Commission should clearly commit to showing a negative effect on competition before treating information exchanges as a restriction of competition.

11.2.2 Paragraph 6.14 discusses non-binding price recommendations from trade associations and states that they will generally constitute infringements by object

where they are “intended to coordinate member pricing in the market”. The Working Group respectfully submits that the Commission will have the burden of showing such an intent before considering such activities as a violation of competition rules.

11.3 **Bid-rigging**

11.3.1 In the discussion of bid-rigging practices at paragraph 6.22 the draft guideline provides examples or bid-rigging agreements. For the sake of clarity, in respect of example (b), it would be useful to confirm that a unilateral decision not to participate in a bid or to submit a price with the knowledge that it is too high would not constitute an issue under the first conduct rule. While this may be obvious, it would provide clarity to many suppliers who would sometimes participate in tender processes to confirm their general interest in working for a particular customer without however wishing to win a particular bid.

11.3.2 The discussion of bid-rigging practices could also benefit from the addition of an example below paragraph 6.23 where joint bids would be allowed, or a cross-reference to the discussion of joint bidding consortia in the joint venture section.

11.4 **Boycotts**

11.4.1 The discussion of group boycotts at paragraph 6.45 could usefully be expanded to distinguish between the (arguably rare) cases where a joint agreement not to transact with a particular counterparty will constitute a serious infringement and the (arguably more frequent) cases where agreements or trade association decisions that have a similar effect will be subject to an effects-based analysis.

11.4.2 There are many business decisions among competitors and non-competitors that have the effect of restricting choices of suppliers or customers or to exclude competitors which should be legitimate under the first conduct rule on account of the fact that they have a limited or no restrictive effect on competition. These can be association membership rules, certification programmes, the choice of partners in a joint venture, etc.

11.5 **Standardisation**

11.5.1 Paragraph 6.50 states that “[i]f a trade association prohibits new entrants from accessing its standard terms and the use of those terms is vital for successful entry into the market, the Commission will likely consider such conduct as having the object of harming competition.” This appears to reflect a particularly

expansive view of infringements by object.

11.5.2 It is submitted that the analysis of whether access is "vital for successful entry into the market" should be subject to an effects-based analysis. The materiality thresholds to require access to a standard should be set at a high level, for example there should be a requirement that the standard should be indispensable to entry into and to competing in the market (i.e. it cannot be economically replicated) and that the refusal to allow use of the standard would lead to the elimination of all competition in the market.

11.6 **Terms of membership of trade associations and certification**

11.6.1 Paragraph 6.55 rightly identifies a scenario where membership in an association may be an "essential pre-condition for competing in a market". This leads the draft guideline to discuss membership terms and association procedures at paragraphs 6.56 and 6.57.

11.6.2 It is however submitted that the discussion in these two paragraphs should be clearly limited to the (arguably exceptional) cases where membership in the association is an "essential pre-condition for competing in a market". Further the requirements set out in these two paragraphs should only apply where membership is indispensable to entry into or to competing in the market (i.e. there are no economic alternatives) and that the refusal to become a member would lead to the elimination of all competition on the market.

11.6.3 The same approach should be reflected in hypothetical example 14, where a mere "competitive disadvantage" should not lead to a finding that refusal of membership (or of certification) constitutes an infringement by object. First, the analysis should be subject to an effects-based approach and not a "by object" approach. Second, concerns would only arise where the "competitive disadvantage" is so significant that it meets the required legal thresholds under the first conduct rule, as recognised by the draft guideline at paragraph 6.55 which refers to there being an "essential pre-condition for competing in a market". In practical terms, for there to be a concern under the first conduct rule, membership (or certification) should be indispensable to entry into or to competing in the market and membership (or certification) refusal should lead to the elimination of all competition in the market.

PART 3: EXCLUSIONS AND EXEMPTIONS

12. AGREEMENTS ENHANCING OVERALL ECONOMIC EFFICIENCY

12.1 Self-assessment

12.1.1 Consistent with an effects-based approach, the draft guideline recognises at paragraph 2.3 of the Annex that the overall economic efficiency exclusion applies indiscriminately to agreements which have as their object harm to competition, and those which have restrictive effects. Further, the draft guideline offers valuable guidance on how the four cumulative conditions of s 1 of Schedule 1 to the Ordinance will be interpreted by the Commission, endorsing a self-assessment approach that contributes to greater commercial certainty amongst business operators. It is clear from the wording at paragraph 4.2 of the Annex that any prior decision from the Commission is to be dispensed with where the four conditions are fulfilled. In this connection, it is submitted that "or Tribunal" should be inserted after "any prior decision of the Commission" to the effect that any prior decision of the Commission or the Competition Tribunal will not be necessary where the parties concerned are satisfied with their efficiency assessment.

12.1.2 While the draft guideline provides guidance on the four cumulative conditions under s 1 of Schedule 1, many questions will remain as to the availability of the overall economic efficiency exclusion in the early stages of the Commission's and the Competition Tribunal's enforcement. Many if not all questions relating to an exclusion under the Ordinance could be deemed to relate to "novel" or "unresolved" questions within the meaning of s 9 of the Ordinance. To avoid significant legal uncertainty and numerous applications under s 9, the guideline could clearly indicate at the outset of Part 2 of the Annex that, while the Commission will interpret and implement the Ordinance taking account the particular features of the Hong Kong economy, parties can still expect the rules in Hong Kong to be interpreted in a manner consistent to that adopted by foreign competition authorities, particularly the EU and the UK regimes that have served as a model for the provisions of s 1 of Schedule 1 to the Ordinance.

12.2 Substantive analysis

12.2.1 Reference is made to paragraph 2.17 of the Annex, where the Commission discusses the need for parties to demonstrate that efficiency benefits must have an overall impact on consumers "within the relevant market". It is submitted that

this approach is unduly narrow. Noting that s 1 of Schedule 1 to the Ordinance is modelled on Article 101(3) of the Treaty on the Functioning of the European Union, we would first refer to relevant EU guidance which provides that any assessment of benefits flowing from a restrictive agreement should be "*in principle, made within the confines of each relevant market*".[12] The words "in principle" gives flexibility to consider efficiencies generated in "other markets" and to weigh these against restrictive effects arising *in* the relevant market in determining whether the overall impact on consumers is neutral. In support of this view, reference is also made to recent precedent of the European Commission, which recognised "out-of-market" efficiencies in the context of metal-neutral airline joint ventures on the basis that the claimed efficiencies arose in "related" markets.[13] It is submitted that not all efficiencies generated by cooperation agreements arise "within the relevant market" so as to be capable of appraisal in a self-contained manner. Therefore, we would encourage the Commission to amend its wording at paragraph 2.17 to clarify that it will also consider efficiencies that do not strictly fall "within the relevant market".

12.2.2 In determining whether consumers do receive a "fair share" of benefits generated by cooperation agreements, we would further encourage the Commission to state as a matter of principle at paragraph 2.7 or 2.8 of the Annex that both qualitative (dynamic) efficiencies and cost (static) efficiencies should bear equal weight in any efficiency assessment. Notwithstanding the complexities of quantifying qualitative efficiencies, it is submitted that their value to consumers should not be underestimated. The above expression would also complement well our above suggestion to retain flexibility in considering efficiencies arising outside of the relevant market.

13. OTHER CAUSES FOR EXCLUSION

13.1 Compliance with legal requirements

13.1.1 Paragraph 3.2 of the Annex adopts the stringent approach under EU law, which requires that no margin of autonomy be left to a party to make a successful state compulsion defence.

13.1.2 From a policy perspective, we would respectfully invite the Commission to consider whether other doctrines, such as the "filed rate" and the "State action"

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12 See European Commission Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C 101/08, paragraph 43

13 See European Commission Decision of 23/05/2013, Case COMP/AT.39595 *Continental/United/Lufthansa/Air Canada.*

theories under US antitrust law, would not be more appropriate in the Hong Kong context. These provide additional comfort that where an organ of the State or an authority exercising regulatory powers encourage a particular type of conduct, parties will not be sanctioned by another authority (i.e. the Commission) or the Courts for following such guidance. The proposed adoption of the stringent EU approach at paragraph 3.2 does not appear to sit well with the Hong Kong tradition of Government and regulators providing prudential guidance and driving consensus-based change. The use of the stringent EU standard will likely have the unfortunate result of encouraging more rigid forms of regulation and Government intervention in the Hong Kong economy, as this would be the only way to rely on the cause for exclusion under s 2 of Schedule 1 to the Ordinance.

13.2 **Mergers**

13.2.1 Paragraph 5.2 of the Annex states that "[t]he application of the exclusion for mergers is discussed in detail in Part 6 of this Guideline". It would be useful to specify that the guidance is provided at paragraphs 6.82 to 6.84. More generally, it may be more logical to transfer this guidance to the Annex and cross-refer to it in the discussion of ancillary restraints in Part 5 and of joint ventures in Part 6.

SUBMISSION TO THE COMPETITION COMMISSION AND THE COMMUNICATIONS AUTHORITY IN RESPONSE TO THEIR CONSULTATION ON THE DRAFT GUIDELINE ON THE SECOND CONDUCT RULE

1. OVERVIEW

1.1 The Working Group appreciates the opportunity to make this submission to the Commission in relation to its draft Guideline on the Second Conduct Rule ("Guideline").

1.2 Set out below are the comments of the Working Group in respect of the Guideline. The areas addressed are:

- Introduction
- Market definition
- Substantial market power
- Abuse of substantial market power

2. INTRODUCTION

2.1 Paragraph 1.8 states that “the undertakings with a substantial degree of market power have a special responsibility not to engage in conduct which harms competition”. The Working Group does not believe that the undertakings with a substantial degree of market power have a "special responsibility" to behave in a certain way in the market, apart from the obligation not to breach the Second Conduct Rule ("CR2").

2.2 The concept of "special responsibility" makes reference to a string of EU cases. In the Working Group's view, this string of cases is not particularly fortunate and not worth emulating. In particular, it is the Working Group's understanding that these EU cases start from the premise that a market with a dominant undertaking is a market where competition does not work effectively. The Working Group believes that such a conception is not accurate. Companies may be dominant because of superior efficiency, and markets with dominant companies may work entirely efficiently. Hence, the Working Group believes that it is not proper to impose an extra burden of "special responsibility" upon dominant undertakings.

2.3 Indeed, paragraph 1.6 of the Guidelines makes a clear and healthy statement that neither market power nor profit increase will necessarily lead to harm to competition, and CR2 does not prevent firms from gaining market shares or increasing profits through legal means. The Working Group considers that market power resulting from innovation or high-

quality products in many cases is entirely legitimate, and proposes to focus on paragraph 1.6 instead of the "special responsibility" wording in paragraph 1.8.

2.4 **Recommendation:** The Working Group recommends deleting the sentence "[u]ndertakings with a substantial degree of market power have a special responsibility not to engage in conduct which harms competition".

3. MARKET DEFINITION

3.1 Paragraph 2.4 states that a precise market definition is not always required in all cases. The Working Group takes the view that this statement may cause significant uncertainty for firms wishing to comply with CR2.

3.2 First of all, the Ordinance is premised on the existence of a "substantial degree of market power". This concept explicitly refers to the "market". Furthermore, internationally, there is a widespread recognition that the market boundaries should be clearly defined before the authority can assess whether an undertaking possesses substantial market power or dominance. The flow of analysis – first market definition, then market power – seems to be quite natural and logical. Although the Working Group admits that in some merger cases the market analysis may be done without the precise definition of the relevant market, the cases on abuse of a substantial degree market power are premised on a finding of substantial market power, which in turn requires a precise definition of the relevant market. In the Working Group's view, a contrary viewpoint would negatively affect the rights of defence of the undertaking under investigation.

3.3 Moreover, the Ordinance is a relatively new regulation in Hong Kong, and undertakings may not be particularly familiar with it. Undertakings may find it excessively hard to comply with the Ordinance and the Guidelines if the Commission were to work around the concept of the definition of the "relevant market". At this point, it may be possible that many companies would just need to assume that they have a significant degree of market power, due to the uncertainties of defining the relevant market, which may lead to overregulation and the stifling of completely legitimate business conduct.

3.4 **Recommendation:** The Working Group recommends that the Commission delete paragraph 2.4, or amend it to make clear that the paragraph does not apply to CR2 cases.

3.5 Paragraph 2.7 mentions that market definition in previous cases has "no precedential value". The Working Group considers this to be too absolute a statement, reducing the potentially beneficial effect of prior case practice in terms of market definition for the compliance assessment in later cases.

3.6 The Working Group notes that the reasoning and conclusions made by the Commission in previous cases regarding market definition are valuable sources of orientation for other companies assessing their obligations under the Ordinance and the Guidelines. The Working Group also believes that adherence to market definition in past cases will ensure a degree of consistency in the Commission's case practice. In short, the Working Group is concerned that the statement on "no precedential value" will not sufficiently value the importance of administrative consistency.

3.7 **Recommendation:** The Working Group recommends that the Commission delete paragraph 2.7 or, at least, delete the sentence "For this reason, market definition has no precedential value and a defined relevant market in one case will not bind the Commission in another".

In the alternative, the words "to the extent that the Commission shows sufficient reasons for departing from prior cases" could be added after the above-mentioned sentence, and the following sentence should be deleted: "That said, the Commission will have regard to previous cases when defining the relevant market and undertakings may wish to use relevant markets defined in past cases as a guide to the Commission’s likely approach when assessing the impact of their conduct on competition."

3.8 Paragraph 2.26 states that dynamic and innovative markets are generally distinct from the traditional markets due to rapid changes in terms of market boundaries and market positions of undertakings. The Working Group agrees with the Commission on this point, and welcomes this approach. The Guideline's recognition of the dynamic and innovative nature of high technology markets demonstrates a profound understanding of the unique characteristics of such markets.

4. SUBSTANTIAL MARKET POWER

4.1 Paragraph 3.3 mentions the possibility of more than one undertaking having substantial market power in a relevant market, particularly if the market is highly concentrated with only a few large market participants. The Working Group considers that this statement

contains unclear guidance, and has the potential of creating an important degree of uncertainty.

4.2 Internationally, some jurisdictions look at 50% (or Singapore at 60%) market share as an indication of dominance/significant market power. In the US the case law and practice by the US antitrust authorities is to require very substantial market shares, typically at least 50%, and also requires additional factors such as substantial entry barriers. This implies that there is only one company in the market that can be dominant/have significant market power. In contrast, the statement at paragraph 3.3 suggests the opposite. Admittedly, some foreign jurisdictions also have the figure of "collective dominance" which assumes that two or more undertakings act as a single economic entity in practice. However, Hong Kong appears to pursue a different path: unlike the European Union ("EU") for example, which at Article 102 TFEU explicitly mentions an "abuse by one or more undertakings of a dominant position", Section 21(1) of the Ordinance only mentions "[a]n undertaking".

4.3 Furthermore, even EU competition law has many additional requirements, known as *Airtours* criteria, though the law has evolved somewhat since the case that gave the name.[14]

4.4 In Hong Kong, paragraph 3.3 of the Guideline reveals an unclear rationale, creating uncertainty for market players. In particular, to the Working Group, it is not clear which criteria the Commission would follow to determine whether a group of undertakings are simultaneously held to have a substantial degree of market power.

4.5 **Recommendation:** The Working Group recommends deleting paragraph 3.3.

In the alternative, the Working Group recommends that the Commission publish the criteria it intends to follow to determine whether a group of undertakings are simultaneously held to have a substantial degree of market power.

5. ABUSE OF SUBSTANTIAL MARKET POWER

5.1 Paragraph 4.3 states that "abusive conduct may particularly result in harm to competition through anti-competitive foreclosure". The Working Group generally supports this approach.

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[14] (Airtours)

However, the Working Group believes that the Commission's intentions could be even more clearly expressed if the word "particularly" were omitted.

5.2 The Working Group proposes that, like many of the leading antitrust jurisdictions, the Commission focus on exclusionary abuses, not exploitative abuses. Accordingly, the word "particularly" may be redundant.

5.3 **Recommendation:** The Working Group recommends that the Commission delete the word "particularly".

5.4 Paragraphs 4.5 to 4.8 discuss the situations where CR2 is infringed by "object". The Working Group believes that all CR2 cases should be brought by the Commission under the "effect" standard.

5.5 In particular, the Working Group believes that all types of single-firm conduct should be examined under a "rule of reason" approach, looking at the specifics of the market and the actual economic effects of the conduct at stake. The Working Group believes that the "object" analysis is not pertinent for CR2 cases, and therefore encourages the Commission not to pursue CR2 through by "object" cases. Admittedly, Section 21 of the Ordinance explicitly talks about "object and effect", but this provision does not impose a specific mandate on the Commission to actually bring CR2 cases under the "object" standard.

5.6 **Recommendation:** The Working Group recommends the deletion of paragraphs 4.5 to 4.8.

5.7 Paragraph 4.8 (and also paragraph 5.5 in the following section) states that average variable cost ("AVC") would be the main threshold for determining predatory prices, and that prices below that threshold could even constitute a by "object" infringement. The Working Group believes that this approach is not entirely appropriate.

5.8 In particular, the Working Group observes that recent economic literature shows that other cost benchmarks may be equally credible, depending on the specifics of the case at hand, and that certain business models work perfectly in line with market principles even though some prices are below AVC.

5.9 The Working Group understands that the AVC/average total cost (ATC) benchmarks may likely come from the *AKZO* case[15] in the EU. The facts in that case date back to the late 1970s, and subsequent EU cases[16] and guidelines[17] have not fully followed the *AKZO* case.

5.10 In addition, the Working Group notes that, in some cases, pricing below AVC and ATC can be economically entirely rational. For instance, it is typical and well-accepted as a reasonable business model that undertakings in multiple-sided markets may charge nothing to some groups of consumers while charge other groups.

5.11 **Recommendation:** The Working Group recommends that the Commission do not propose AVC/ATC as specific cost benchmarks for predatory pricing.

5.12 Paragraph 5.6 states that the Commission may "at its discretion" consider the extent to which the predator undertaking will be able to recoup its short-run loss in the future. The Working Group believes that the Commission should prove the possibility of the dominant undertaking to recoup the losses in each case, as a matter of bringing a complete and economically sound case.

5.13 The Working Group would also like to refer to the *Brooke Group* case in the United States which confirmed that recoupment is a pre-condition for a successful case against predatory pricing.[18] In particular, in *Brooke Group*, the Supreme Court indicated that proof of recoupment or at least a showing that the "predator undertaking" has a reasonable prospect or a dangerous probability of recouping its investment is required.

5.14 **Recommendation:** The Working Group recommends that the Commission change the words "at its discretion" to "shall".

5.15 Paragraph 5.12 to 5.14 describes margin squeeze as a type of abuse of substantial market power. The Working Group notes that the concept of margin squeeze may already be addressed in the predatory pricing and refusal to deal sections of the Guideline.

5.16 The Working Group notes that, although the *TeliaSonera* judgment[19] in the EU treated margin squeeze an independent type of abusive conduct, the US Supreme Court found

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15 (AKZO)
16 (Wanadoo, others)
17 (Art 102 Guidelines)
18 (Brooke Group)
19 (TeliaSonera)

otherwise.[20] In the light of inconsistent decisions at the international level, the Working Group believes that it is not warranted that the Guideline specifically address margin squeeze as a stand-alone abuse.

5.17 **Recommendation:** The Working Group recommends that paragraphs 5.12 to 5.14 be deleted.

5.18 Paragraph 5.21 states that a refusal to honour the FRAND commitment may be abusive if an IPR is essential to an industry standard and the IPR holder gave a commitment to license the IPR on FRAND terms. The Working Group believes that, for a young competition regime such as Hong Kong's, abuses of IPRs should not be a priority. Hence, the Working Group queries whether it makes sense to maintain this paragraph in the Guideline.

5.19 To the extent that the paragraph is maintained, the Woking Group notes that FRAND terms should apply to holders of standard essential IPRs irrespective of their origin, that is, even if the IPRs have become essential through unilateral declarations by the IPR holders or have otherwise developed into an industry standard in practice.

5.20 **Recommendation:** The Working Group recommends that the Commission do not include paragraph 5.21 or, at least, delete the words "and the undertaking gave a commitment at the time when the standard was adopted by the industry that it would license the IPR on fair, reasonable and non-discriminatory (“FRAND”) terms".

5.21 Paragraphs 5.28 to 5.30 seek to address rebates and provide a breakdown of rebate schemes into different types, namely conditional rebates (loyalty and fidelity rebates) and retroactive rebates vs. incremental rebates. The Working Group observes that rebate schemes are likely to be common in Hong Kong, and therefore queries whether the above-mentioned concepts without specific guidance create sufficient certainty for market players on how to direct their compliance efforts.

5.22 In practice, at both the distribution and the consumer level, discount schemes represent a form of healthy competition between businesses. In addition, in contrast to an exclusive dealing requirement, a rebate scheme creates an incentive for the buyer to increase its own sales efforts and thereby increase its own total sales and the total sales in the relevant

[20] (Linkline)

market. Rebates can motivate resellers to be more proactive in their sales efforts, and can be popular tools for businesses with small and large market shares alike.

5.23 While the Guideline states that rebates will be analysed in an economic analysis, in light of the range of circumstances where rebate schemes do not lead to exclusionary effects, the Working Group suggests that the Guideline place more emphasis on how rebate schemes are to be assessed and the likely efficiencies that can result in rebate schemes.

5.24 **Recommendation:** The Working Group recommends that the Commission places more emphasis on how rebate schemes are to be assessed and the likely efficiencies that can result in rebate schemes.

SUBMISSION TO THE COMPETITION COMMISSION AND THE COMMUNICATIONS AUTHORITY IN RESPONSE TO THEIR CONSULTATION ON THE DRAFT GUIDELINE ON THE MERGER RULE

1. OVERVIEW

1.1 The Working Group appreciates the opportunity to make this submission to the Commission in relation to its Merger Guideline.

1.2 The Working Group commends the Commission on the effort to provide detailed guidance and to solicit comments and feedback from stakeholders.

1.3 Generally, the Working Group considers that the Merger Guideline provides a useful level of detail in all the circumstances. The Working Group offers below various suggestions as to areas that could usefully be clarified or expanded on.

2. SHARED JURISDICTION OF THE COMMISSION AND THE CA

2.1 The introduction to the guideline states that; *"[w]hile the Commission is the principal competition authority responsible for enforcing the Ordinance, it has concurrent jurisdiction with the CA in respect of the anticompetitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors. Unless stated otherwise, so far as a matter relates to conduct falling within this concurrent jurisdiction, references in this Guideline to the Commission are to be read as applying also to the CA."*

2.2 This leaves room for ambiguity as to which regulator parties and their legal advisers should be dealing with. It would be helpful if the guideline could be explicit as to which of the Commission and the CA it is that parties should be dealing with and addressing communications to in relation to merger related matters.

3. ACQUISITION OF CONTROL/OBJECT OF CONTROL

3.1 With reference to paragraphs 2.5- 2.7 and 2.13 of the Merger Guideline, clear guidelines are needed on when a merger arises because 'control' has been taken over assets/shares.

3.2 Paragraphs 2.5 - 2.7 simply restate the relevant provisions from the Ordinance.

3.3 While the hallmark of control is very clearly the possibility to exercise decisive influence, the Guidelines stop short of explaining what is meant by 'decisive influence'.

3.4 To avoid an abstract discussion, we think it would be very useful if the Guidelines explained what is meant by sole and joint control and how these forms of control can arise on a legal and de facto basis.

3.5 The EU guidelines contain very useful pointers in sections 2 and 3 of its consolidated jurisdictional guidelines.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF.

3.6 We do not think that all the details of those guidelines would be necessary. However, the guidance on what amounts to 'strategic matters' (board, budget, business plan etc) is extremely useful and allows advisers to differentiate in practice with more confidence between controlling and non-controlling stakes/ contractual arrangements.

3.7 There are also some entirely open questions which could be cleared up, e.g. it is unclear whether the HKCC would treat negative sole control as 'control' within the meaning of the Ordinance.

3.8 We are concerned that the Guidelines do not adequately enable advisers to differentiate between an acquisition of assets which leads to a structural change in the market and one which does not.

3.9 Again, paragraph 2.13 reproduces section 3(2) of Part 2 of the Ordinance . As it stands this is quite confusing. It seems to us that in almost all cases a company that acquires part of a business will be able to substantially replace the acquired undertaking in whatever business it was engaged before the acquisition. The key question is whether those assets amount to an 'acquired undertaking' and whether the target actually carries out a 'business' such that acquiring it leads to a structural change in the market.

3.10 We suggest that this is done by clarifying that an acquisition of assets will only amount to a merger when the target is a business with a market presence, to which a market turnover can be clearly attributed.

3.11 It would also assist if it could be made clear whether the HKCC would consider the transfer of a client base of a business to be a 'merger' (where this is sufficient to transfer a business with a market turnover). The wording of section 3(2)(c) is a bit ambiguous in this regard. It is not clear whether goodwill must be included with the assets before a merger arises or whether goodwill might be an additional asset. The Guidelines could clear this up and give business and advisers clear guidance on when the acquisition of an asset will fall within the scope of HK merger control.

4. DEFINITION OF FULL FUNCTION JV

4.1 With reference to paragraph 2.9 of the Merger Guideline, it may assist to clarify that what is meant by the expression "operate on a market" is that the JV must perform the usual functions of an undertaking operating on the same market. In many cases, a full function JV will rely on purchases/sales to parents or employee secondments for a start-up period. Such a start-up period may be necessary in order to establish the joint venture on a market. The Guidelines could also give guidance on the permissible start-up period.

5. ANCILLARY RESTRAINTS

5.1 With reference to paragraph 2.18 of the Merger Guideline, it may assist to provide greater clarity on the assessment of non-competes. Perhaps the Commission could include a case study or guidance on temporal, product and geographical range of non-compete restrictions which would be considered unlikely to have an anti-competitive effect. The examples should cover both acquisition and JV where the allowed restrictions will be different (e.g. a non compete for the life of a JV would be expected to be acceptable). It would also be helpful to clarify that JVs can agree not to compete with parents as well as vice versa.

5.2 COMPETITIVE CONCERNS

5.3 Paragraph 3.9 of the Merger Guideline currently states that: *"…when assessing the potential competitive impact of a merger, the main competitive concern is whether the merger will result in an increase in prices above the prevailing level after the merger.*

5.4 This is to be contrast with the statement at para 3.3 of the guideline that*: "The promotion of competition in the context of the Ordinance has an economic objective to increase economic efficiencies and, ultimately, consumer welfare (typically in the form of lower prices, higher output, wider choice, better quality or more innovation)"* (note also similar factors listed at para 3.29).

5.5 It is suggested that paragraph 3.9 should make it clear that all of these factors listed at paragraph 3.3 should be a focus when assessing the competitive impact of a merger. Otherwise, the law risks being interpreted in a manner that fails to give due recognition to the most important facets of competition which deliver consumer benefits: innovation, increased product quality and wider choice.

6. CR4 RATIO TEST

6.1 With reference to paragraph 3.14 of the Merger Guideline, this is a relatively complex test and it may be difficult for parties to apply in practice. For example, parties may lack knowledge of the market shares of other parties creating uncertainty as to whether the transaction is potentially notifiable. It may be helpful to introduce a simpler threshold test or clear safe harbours so parties to a transaction can more readily identify if the transaction is potentially notifiable.

6.2 Particular uncertainty is created where the CR4 is greater than 75% and the combined market share of the merged parties is greater than 15% but less than 40% of the relevant market. It is respectfully submitted that a simple combined market share safe-harbour would be more capable of application in practice.

7. FAILING FIRM

7.1 With reference to paragraph 3.48 of the Merger Guideline, it would be of assistance if this wording could be expanded to confirm that it will also apply to a failing division of a firm, as it does in the EU.

8. ESSENTIAL FACILITIES

8.1 Paragraph. 3.65 is confusing in that merger control is prospective but the paragraph seems also to contemplate a certain type of conduct - i.e. denying access which would, if it occurred, be addressed under s36AA of the Telecommunications Ordinance (Cap. 106). The only point that the Guidelines should make is that having preferential access to inputs, etc. may be relevant for entry analysis.

8.2 In the event that the doctrine is to be mentioned, the paragraph could usefully reference the statutory basis for its application in the telecommunications sector in Hong Kong (section 36AA of the Telecommunications Ordinance).

8.3 It would also be instructive for the paragraph to note the high degree of facilities based competition in telecommunications markets in Hong Kong and the Authority's decision in 2004 to withdraw Type II access. The 6 July 2004 Statement of the Telecommunications Authority at the attached link refers:

http://www.cedb.gov.hk/ctb/eng/legco/pdf/typeII_review.pdf

9. COMMENCEMENT OF AN INVESTIGATION

9.1 With reference to paragraph 5.1 of the Merger Guideline, it may be helpful to include examples of circumstances under which it is considered the Commission "ought to have become aware that a merger has taken place". There is a concern that if parties remain at risk that the transaction may at an unspecified future time point be investigated that this will chill competition.

9.2 The Commission has six months to bring proceedings in the Tribunal. It may be helpful if the stages of investigation during this time period are more clearly set out.

10. INFORMAL ADVICE

10.1 With reference to paragraph 5.4 of the Merger Guideline, it would be helpful to provide indicative suggestions of the likely timeframes the Commission will adopt in providing informal advice. If the informal advice is non-binding and there is no guidance on timing, parties to a transaction may be reluctant to use this procedure.

11. FORM M

11.1 With reference to paragraph 5.7 of the Merger Guideline, it may be of assistance in providing guidance if Form M were to be included as an attachment to the Guideline.

12. COMMITMENTS

12.1 With reference to paragraph 5.9 of the Merger Guideline, the IBA would encourage the Commission over time to expand and elaborate on both the procedure for submitting and types of remedies that the Commission will consider favourably.

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