競爭事務委員會
COMPETITION COMMISSION

通訊事務管理局
COMMUNICATIONS AUTHORITY

Revised Draft Guideline on
The Merger Rule

30 March 2015

Contents

Guideline on the Merger Rule

While the Commission is the principal competition
orcing the Ordinance, it has
isdiction with the CA in respect of the anti-
e conduct of certain undertakings oper
unications and broadcasting sectors.[1]
where a matter relates to conduct falling within this concurrent jurisdiction, references in this Guideline to the Commissi n also apply to the CA.

*This Guideline sets out how the Commission intends to inter and give effect to the Merger Rule in the Ordinance. This Guideline is not however a substitute for the Ordinance and does not have binding legal effect. The Competition Tribunal (the "**Tribunal**") and other courts are responsible ultimatel for interpreting the Ordinance. The Commission's interpretation of the Ordinance does not bind them. The application of this Guideline may, therefore, need to be modified in light of the case law of the courts.*

ibes the general approach which the

[CCCAD2015003E]

1 Introduction

Section 3 of Schedule 7 to the Ordinance pro
or indirectly

elecommunications Ordinance (Cap. 106) (**TO** *) is in*
the restricted application of the Merger Rule to merger
licensee, examples given in this Guideline are generally related to telecomm

In accordance with section 17 of Schedule 7 to the Ordinance
the manner in which the Commission expects to interpret and giv
visions under the Ordinance relating to the Merger Rule

the manner in which the Commission will determine whether or not a mer
or would be likely to have, the effect of substantially lessening competition in Hong Kong;
the manner in which the Commission will determine whether or not a mer
would fall within the exclusion referred to in section 8(1) of Schedule 7 to the Ordinance; and
the manner and form in which the Commission should be notified of an

There is no requirement to notify the Commission of a merger or a proposed mer
under the Ordinance. However, the Commission may use its powers to in
ger and take the necessary action to ensure compliance with the Mer
y be in the interest of the parties to a proposed merger that w

2 Scope of the Merger Rule

t of the Guideline explains the types of transactions that would constitute a
In general, transactions that involve the mer
the acquisition of one (or part of an) under
enture and the acquisition of assets by one under
y potentially be a merger which needs to be examined under the Mer
Section 4 of Schedule 1 to the Ordinance indicates that where an agreement or conduct amounts to a merger under the Ordinance, the First and Second Conduct Rules do not apply.

2.2 Section 3(1) of Schedule 7 to the Ordinance sets out the Merger Rule: "*must not, directly or indirectly, carry out a merger that has, or is likely to ha of substantially lessening competition in Hong Kong.*"

A merger takes place if:

takings previously independent of each other cease to be

usiness or in par of the b siness concer
was engaged immediatel
Schedule 7 to the Ordinance).

Mergers between previously independent undertakings

2.4

entities. A merger may also occur where, in the absence of a legal mer
de facto amalgamation of the undertakings concerned into a single economic unit,
establishing a permanent, single economic management.
determination of a *de facto* merger may include internal prof
or a revenue distribution between the various entities within the group
liability or external risk sharing. The *de facto* amalgamation ma
contractual arrangements, but it can also be reinforced b
the undertakings forming the economic unit.

Acquisition of control

A merger may also take place when one or more persons or other under
direct or indirect control of the whole or part of one or more other under
section 5(1) of Schedule 7 to the Ordinance, control, whether solely or jointl
to an undertaking, is to be regarded as existing if, by reason of rights, contr
other means, or any combination of rights, contracts or other means, decisiv
is capable of being exercised with regard to the activities of the undertaking and,
ticular, by:

ownership of, or the right to use all or part of, the assets of an under
acts which enable decisive influence to be exercised with regard to

Joint ventures

enture to perform, on a lasting basis, all the functions of an autonomous economic entity constitutes a merger for the purposes of the Ordinance entures which satisfy these requirements bring about a lasting change in the takings concerned and the relevant market.

ming all the functions of an autonomous economic entity means that a joint ate on a market and perform the functions normally car an undertaking operating on that market. In order to do so, the joint venture m a management dedicated to its day-to-day operations and access to sufficient resources, including finance, staff and assets (tangible and intangible), in order to conduct on a lasting basis its business activities within the area provided for in the joint venture agreement.

2.10 A joint venture does not perform all the functions of an autonomous economic entity if it only takes over one specific function within the parent companies' business activities without access to or presence on the market. This is the case, for example entures limited to research and development or production. Such joint v auxiliary to their parent companies' business activities. This is also the case where a joint enture is essentially limited to the distribution or sales of its parent companies y as a sales agency Ho the fact that a joint v

lasting change. For example a joint venture estab
not include ongoing oper
Ordinance.
decision which at the time of estab

The Commission will also take into account the presence of the joint v
companies in upstream or downstream markets. Where a substantial propor
or purchases between the parents and the joint venture are lik
are not on an arm's length basis, the joint venture is likely to be view
economic autonomy in its operational activities.

Acquisition of assets

A merger may also take place by way of acquisition of the whole or part of the assets (as opposed to control) of an undertaking, provided that such acquisition results in the acquiring undertaking being in a position to replace, or substantially replace undertaking in the business or in part of the business concerned, i.e. the b
the acquired undertaking was engaged in immediately before the acquisition.
which are being acquired in a merger may include both tangible assets (such as netw
equipment, customer base, etc) and intangible assets (such as licences, rights,

er Rule applies only to a merger involving a carrier licensee

The Merger Rule does not apply to every merger that meets the requirements of section 3 of Schedule 7 to the Ordinance. Section 4 of Schedule 7 specif

y or indirectly holds a car

y to raise competition concerns under the

ic facts of the case, the Commission will normally tak
ely to give rise to competition concer

the acquisition of securities in a carrier licensee or in an undertaking which directl
or indirectly controls a carrier licensee on a temporary basis by:

(i) an authorized institution within the meaning of the Banking Ordinance (Cap. 155);

(ii) an insurer who is authorized within the meaning of the Insurance Companies Ordinance (Cap. 41); or

(iii) an exchange participant within the meaning of the Securities and Futures Ordinance (Cap. 571), or a person licensed or exempt to car in dealing in securities or securities margin financing under Pa Ordinance,

if:

ities are acquired with a view to reselling them; and

(II) where the Commission is satisf
reasonab

licensee or the undertaking which directly or indirectl
(as the case may be) by virtue of their offices;
the acquisition of holdings in a carrier licensee or in an under
or indirectly controls a carrier licensee by a financial holding compan
context, the notion of a "financial holding compan
object is to acquire and manage holdings in other under
into profit without involving itself directly or indirectl
undertakings;
a charge[4] over securities[5] in a carrier licensee or an undertaking which directl
indirectly controls a carrier licensee to:

(i) an authorized institution within the meaning of the Banking Ordinance (Cap. 155);

if:

(ii) the securities are charged pursuant to a deed or instrument with a view to securing a loan to the chargor, the carrier licensee or the under directly or indirectly controls a carrier licensee or otherwise, and

(iii) the authorized institution,

(A) does not exercise voting rights in the securities or has not giv in writing to the chargor under the charge of an intention to ex ote attaching to such voting shares; or

Such restrictions could include non-compete co
ty or purchase and suppl

y related and necessary to the implementation of the
they will be treated as ancillary restrictions and will be assessed as
ansaction under the Merger Rule. On the other hand,
y related and necessary in this sense
st and/or Second Conduct Rules.

3 Competition Assessment

General overview

3.1 Merger and acquisition activities do not necessarily raise competition concer
the Merger Rule. Indeed, mergers can be normal business activities without competition consequences that perform an important function in the efficient operation of the economy. They may allow firms to achieve efficiencies such as economies of scale or scope, synergies and risk spreading. Although some mergers may lessen competition to an extent, concerns under the Merger Rule are unlikely to arise where there are
icient competitive constraints on the merged entity that will discipline its post-mer

ws that an assessment of the competitiv

(a) an identif
(b) an assessment of whether the tr

ysis since many of the factors affecting the identification of the relevant mar
will also be relevant to the assessment of the state of competition within the identif
et(s).

et definition

Proper examination of the competitive effects of a mer
understanding of the competitive constraints under which the mer
The scope of those constraints, if any, is identified through a market definition anal
since it offers an insight into the sources of competition to the merging par
natives available to customers. It is important to emphasise that mar
not an end in itself. It is a framework for analysing the direct competitive pressures faced
the merged entity.

The Commission will focus its assessment on whether a merger has, or will lik
the effect of substantially lessening competition in the relevant market(s).
of a relevant market for the practical enforcement of the Merger Rule inv
basic approach employed in defining relevant markets in other contexts.

The delimitation of relevant market(s) has two basic dimensions: product (or ser

Please refer to the *Guideline on the Second Conduct Rule*

ocus attention on the competitive assessment.

inition set out in the *Guideline on the Second Conduct*
k and is not intended to be applied mechanically. The
Commission will look at the evidence which is relevant to the case in question (and, to
the evidence available and the time reasonab
ger process to review the evidence). In particular it may be clear in cer
although there is potentially more than one mar
ise to a substantial lessening of competition based on any sensib
In such cases, it will not normally be necessary to establish a final position on which of the potential market definitions is correct. It may for example be possib conclude that even on the narrowest plausible market definition no substantial lessening of competition would result from the merger.

3.12 In relation to telecommunications markets specifically, they may be character dynamic and rapid technological changes. In such circumstances, market boundar not likely to remain constant.

Indicative safe harbours

The objective of specifying "safe harbours" is to give guidance as to which mer unlikely to substantially lessen competition. They provide a screening device and are
or a case-by-case analysis. If a merger falls outside the

The Commission has identified two saf
y, thereby expanding the eff
mechanism bey
measures will fall within the saf

The first safe harbour measure is based on concentration r
aggregate market shares of the leading firms in the relevant mar
intends to apply a test based on a four-firm concentration r
combined market share of the four (or fewer) largest fi
et is less than 75%, and the merged firm has a mar
Commission takes the view that it is unlikely that there will be a need to car
detailed investigation or to intervene. Where the CR4 is 75% or more
is unlikely to investigate the transaction if the combined market share of the mer
entity is less than 15% of the relevant market.

The second safe harbour measure is based on the Herfindahl-Hirschman Index (
The HHI measures market concentration. It is calculated by adding together the squares of the market shares of all the firms operating in the market. The increase in the HHI resulting from the merger is calculated by subtracting the pre-merger index from the expected value of the HHI following the merger, the difference being kno
delta." Both the absolute level of the HHI and the expected change resulting from the merger can provide an indication of whether a merger is likely to raise competition concerns.

In respect of the application of HHI, any market with a post-merger HHI of less than

ger HHI of more than 1,800 will be regarded as highl
s producing an increase in the HHI of less than 50 are unlik
even in a highly concentr ket. Mergers
producing an increase of more than 50 in the HHI will potentiall aise competitive
y require further investigation.

s are indicative in nature. While the Commission is unlik
s which fall below these thresholds, it does not categor
Occasionally, such mergers may still raise competition concer
or example where it involves a vertically integrated firm with market po
upstream or downstream market.

Assessment of the level of competition after a merger

3.21 Where the safe harbour thresholds are not satisfied, or the Commission otherwise considers that a detailed investigation into the merger is necessary, the next issue is to assess the level of competition following the merger.

ket structure comprises those factors that influence the level of competition in a
ket. Competition in a market is influenced by the structural features of the mar
et concentration, barriers to entry, vertical integr

, the Commission will take into account str
s such as strategic beha
and the likel
Merger Rule ensures that mar

Relevant analytical issues

ore entering into a discussion of the particular factor
generally take into account in analysing the competitive eff
ytical issues that are considered relevant to any mer

Protection of the process, not the competitor

Competition in a market is essentially a dynamic process r
where particular conduct may competitively disadvantage a par
ticular time. Competition by its very nature is a deliberate and at times r
process as competitors jockey for position. This is as true for mergers as it is f
ms of market conduct.

That a particular competitor may be injured or competitively disadvantaged at a
ticular time does not necessarily lessen competition in a market, let alone substantiall
(the test of substantiality is discussed below). Indeed, it may be the epitome of the
competitive process. As part of the process, disadvantaged competitors w
expected to respond to any competitive initiatives in the market. It is only when they are
le to respond as a direct consequence of the merger in question that concer
about the effects on the competitive process in a market.

Substantiality test – creation or enhancement of market power

elihood that pr

et will be maintained at a significantly greater level than w

or where competitive outcomes would be otherwise distorted such as reduction in consumer choice, product quality or innovation in a relevant mark the Commission will consider that the merger substantially lessens competition in

unilateral and coordinated effects

ger m y lessen competition in two ways, in terms of creating unilater ects and coordinated effects. A single merger may raise both types of eff

Unilateral effects may arise in a merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm prof prices or to reduce output or otherwise exercise market power it has gained, the expected responses of other market participants to the resulting change in mar conditions.

Coordinated effects take place where the merger increases, enables or encour ger coordinated interaction among the firms in the market. Coordinated inter olves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of others. These reactions can blunt a firm

Coordinated effects can be disrupted b
has the economic incentiv
a "maverick
and low incremental costs (thus making it prof

erick firm.

With-and-without test

In assessing whether competition is likely to be substantiall
Commission will usually employ an analytical tool called the
That is, the level of competition that is likely to exist in a mar
assessed and compared with the level of competition that is lik
without the merger. The competitive situation without the merger is refer
counterfactual". This analysis will be applied prospectively, that is, future competition will be assessed with and without the merger.

In most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition, as this may provide a reliable indicator of future competition without the merger. However, the Commission may need to take into account lik and imminent changes in the structure of competition in order to reflect as accur as possible the nature of rivalry without the merger. For example, in cases where one of the parties is failing, pre-merger conditions of competition might not prevail ev the merger were prohibited. The Commission will not, however, apply the without" test relying on agreements or conduct that would contravene the Ordinance:

e options are relevant.

Capacity or reserves may also be useful as a measure
ets where there is volatility in mar ms

s to the degree to which a market is composed of a small
ms or made up of many small firms. In general, an unconcentr
e than a concentrated mar
ged entity holding large market share and increases the level of mar
y less n the level of competition.

High market shares and concentration levels as a result of a merger are gener
necessary but not sufficient conditions for the creation or enhancement of mar
that may lead to a contravention of the Merger Rule. On the other hand,
with only small market share in a relatively unconcentrated market would not nor
be able to exercise market power and thus is less likely to contravene the Mer

As information on market shares and concentration levels is more readil
or a pre-merger situation, thresholds on market shares and concentration lev
simple means of screening-out mergers that are not likely to lessen competition (see
ost-merger information by its nature is prospectiv

The actual volume or rev ue measure used f
acteristics of the product in question.
constrained b
revenues, call min

The Commission will consider the likelihood of a merger resulting in the mer
being able to significantly and sustainably increase prices or prof

Sustained price increases above competitive levels are the most visib
ged firm has increased its market power and there is a substantial lessening of
competition in the market. The price increase may be used to protect ineff
ations rather than to accumulate excess profits. Another possibility is that a mer
instead of increasing prices, may prevent prices from falling to the competitiv
orestalling entry such that profit margins are preserved or even increased.

Cost reductions which are claimed to result from the merger may not result in lo
ices to consumers because the savings may accrue as increased profits.

Relevant matters that may be considered in determining whether competition is substantially lessened

Section 6 of Schedule 7 to the Ordinance provides a non-exhaustive list of the relevant matters that may be taken into account in determining whether a merger has, to have, the effect of substantially lessening competition in Hong Kong:

the extent of competition from competitors outside Hong Kong;

Extent of competition from competitors outside Hong Kong

y such as Hong Kong, competition from competitors outside Hong
t competition", can play an important role in restraining the
An example of import competition in the telecomm
national telephone services to Hong Kong user
ating outside Hong Kong. In consider
aint to the exercise of market power, the capacity of
seas suppliers and speed of entry into the domestic market ha
considered.

In most segments of the telecommunications industry where physical presence in Hong Kong is necessary for the supply of services, the threat of import competition ma
relevant.

Failing firms

rst glance, one would expect that the acquisition of a failing or failed f
not substantially lessen competition. In some instances this may be the case
there may be circumstances where the acquisition of a failing firm may substantiall

If all three conditions are satisfied, then subject to the consider
the competitiv
to be no wo
"with-and-without

One issue that may arise in this scenario, however, is the distr
customer base if this base is significant in terms of mark
et, the distribution of the failing firm's customer base among the remaining mar
ticipants would be determined by market forces, whereas an acquisition w
to deliver those customers to the acquiring firm thus increasing its mar

Extent to which substitutes are available

In considering the extent to which substitutes are available in the market,
and potential substitutes from the supply side and the demand side will be included.
In considering the extent to which substitutes are available, the Commission ma
consider the price elasticity of supply of the firms in the market post-mer
the producers of the substitutes are able to increase supply to meet the demand of
customers of the merged firm who intend to switch suppliers in response to a mater
ice increase of the merged firm, the existence of substitutes in the mark
be an effective restraint to the exercise of market power by the merged f
therefore be necessary to consider the relative supply capacity of the firm
after the merger, as well as the costs of capacity expansion. If the merged f
controlling a majority of the capacity in the market, other firms in the mark
e restraint.

the consequence that incumbents are less constrained b
ving competitively.

or the purposes of the Merger Rule include sunk costs,
network effects, strategic behaviour, product diff
essential facilities and regulatory or legal barriers. Sunk costs and economies of scale and scope are particular features of telecomm
k-based markets. These structural barriers to entry can be contr
viou as a barrier to entry, which will be discussed separ
agraphs 3.57 to 3.70 set out the Commission's approach to barriers to entr context of the Merger Rule with particular relevance to the telecommunications sector Additional guidance on barriers to entry is provided in the *Guideline on the Second Conduct Rule* in the context of assessing substantial market power.

Barriers to entry – structural

ket entry in certain markets such as telecommunications typically inv
sunk costs. Sunk costs are the costs of acquiring capital and other assets that:

are uniquely incurred in entering the market and supplying the services in question;
y recouped within a short period of time; and

An example of significant sunk costs typicall
k roll-out (e.g. installing r
etc), a cost which cannot be reco
to exit the mar

olve costs which cannot be recovered or easily recouped.

With economies of scale and scope, average costs fall as the suppl
of services supplied increases respectively. Falling costs are lik
y where there are minimum efficient scales for entr

When combined with sunk costs and excess capacity, the eff
in particular can create significant barriers to entry. Having sunk the infrastr
there are incentives for incumbents in situations of excess capacity to reap the economies
of scale to drop prices and gain necessary revenue flows. Even without an
pose, such action can significantly deter new entrants (as discussed belo
y indeed be accompanied with that strategy in mind).

Closely related to economies of scale are network effects. By its nature,
telecommunications is essentially a network industry and a feature of netw
they generate network effects (or externalities). Network effects arise when the value
a consumer places on connecting to a network (as measured by the price one is willing
to pay) depends on the number of others already connected to it. They are a f
economies of scale, but on the demand side.

et might require the use of an essential facility, an asset or
(1) access to it is indispensable in order to compete in the mark
and (2) duplication of the facility is impossible or extremely difficult owing to ph
or is highly undesirable for reasons of pub

Denial of access to essential facilities is thus capable of constituting a signif
in the telecommunications industry where access to customer
tain situations has to go through a "bottleneck" or "essential facility".
potential for essential facilities to act as a barrier to entry can be alleviated b
regulatory regimes for the interconnection and sharing of bottleneck facilities.

Barriers to entry – strategic behaviour

3.67 The most important non-structural factor, when assessing barriers to entr
generally referred to as strategic behaviour. This is broadly defined as any actions b
to alter the market structure, and so alter the conditions and levels of competition (f
example, by raising barriers to entry). As such, it goes beyond the normal competitiv
ivalry between firms.

An example of strategic behaviour which w
irm decides to b
entrants that it could prof
prices down to lev

ective as any traditional structural barriers to entry descr
These are sometimes described as strategically erected bar

Removal of a close competitor

By its nature, a horizontal merger will usually remove a competitor from the mar
ever, the resulting higher market shares of the mer
concentration levels are generally necessary, but not suff
or enhancement of market power that may lead to a contravention of the Mer
A factor which may provide guidance on whether market power is created or enhanced is whether the merger results in the removal of a close competitor. The higher the degree of substitutability between the merging firms' products, the higher the degree of closeness of competition between them, and the more likely it is that the merging fi
ices significantly. For example, a merger between two undertakings offer
which a substantial number of customers regard as their first and second choices could generate a significant price increase.

ond removing a close competitor, the merger may create a market str
is conducive to coordinated action or tacit collusion. Effective and vigorous competitor
otherwise known in this context as "maverick" firms, serve to undermine attempts to
The role of mavericks has been discussed abo

er (sometimes referred to as b ust
le threat to bypass the supplier if no acceptab
ys be the case in telecommunications when the existence
y be constrained by the presence of bottleneck or essential
k to which the originating or terminating customer
y not be common in telecommunications,
ects of any demand-side mar
y-side market power.

Nature and extent of change and innovation in the market

The Ordinance indicates that the nature and extent of change and innovation in the ket may be a relevant factor when determining whether a merger is or lik have the effect of substantially lessening competition. While price competition is a central concern of merger control, non-price competition, and in particular reductions in innovation levels, may also be a source of legitimate concern. In gener of innovation issues involves the application of the "with-and-without test agraph 3.36, that is to compare pre and post-merger innovation levels and, is any material change, to assess the effect on competition of the posited reduction in innovation.

Additional relevant matters for vertical mergers

ies with high sunk costs such as telecomm
help reduce the risk of in
services car
network oper

ontal merger because in a vertical merger, the two mer
supply complementary products whereas in a horizontal mer
substitute products in the same market.

There are two main possible theories of harm for unilater
ger. Competitors at a downstream functional level (e
vice providers) may have to rely on the supply of an input at an upstream lev
reliance on an upstream network provider to carry their downstream ser
tical merger takes place, the merged entity may have the ability and incentiv
oreclose downstream non-integrated rivals' access to the supply of such an input.
is known as input foreclosure theory of harm. The other theory of harm,
customer foreclosure, may result from a vertical merger when a supplier integr
an important customer in the downstream market. Such downstream presence of the
ged entity may enable it to foreclose access to a sufficient customer base b
or potential rivals in the upstream market (the input market) thereby reducing their ability
or incentive to compete.

Where there is market power at one functional level, there may be incentiv
that market power into the vertically-related market for anti-competitive pur

Anti-competitive foreclosure concer y to
er to one or both of these questions is aff

tical merger for its likely anti-competitive effects, the
inquire as to whether:

er at one or more of the functional lev

there are incenti s to leverage that market power into the upstream or downstream market with the purpose of lessening or foreclosing competition in that market (i.e. where the merged firm operates in a competitive upstream or downstream market);
the market power is likely to be leveraged (for example, where raising r in downstream markets through discriminatory access pricing would be prof and would lessen competition); and
the effect is likely to substantially lessen competition in that market.

ertical merger may also bring about coordinated effects. For example
ger may increase the degree of symmetry between firms active in the mar
elihood of coordination by making it easier for the firms in the mar

4 Exclusions and Exemptions

Exclusion – outweighing economic efficiencies

Section 8(1) of Schedule 7 to the Ordinance pro
apply to a mer
outweigh the adv

ysing whether the economic efficiencies that arise or ma
outweigh the adverse effects involves a net economic benef
ysis is to isolate and ascertain the objective benefits created b
economic importance of such efficiencies. The efficiencies are not assessed from the subjective viewpoint of the parties.

There are generally three types of economic efficiencies:

- productive efficiency, which is achieved where a firm produces the goods and services that it offers to consumers at the lowest cost;
- allocative efficiency, which is achieved where resources in the econom allocated to their highest valued uses (i.e. those that provide the greatest benef relative to costs); and
- dynamic efficiency, which is achieved through an ongoing process of introducing new technologies and products in response to changes in consumer pref and production techniques.

In relation to productive and dynamic efficiencies, competition seeks to achiev iciencies organically or internally within a firm. However, mergers also ha iciencies by permitting a better utilisation of existing assets and

ed (or achieved to a similar extent) b ould
ed (or achieved to a similar extent) without the merger
ganisation) or by another means having less significant anti-
But the less restrictive alternative must be something that is likely to
et and not merely a theoretical possibility

rify and quantify, in par
iciencies is uniquely in the possession of the mer
iciencies p. ojected reasonably and in good faith by the mer
y not be realised. Therefore, undertakings must do more than assert the claimed
iciencies. They must be able to demonstrate that the efficiencies are timel
and sufficient to outweigh the adverse effects caused by any lessening of competition.
iciency claims must be substantiated by the merging parties so that the Commission
can verify by reasonable means:

the likelihood and magnitude of each claimed efficiency;
how and when each efficiency would be achieved;
how each efficiency would enhance the merged firm's ability and incentiv
compete;
ould be merger-specific; and

y substantial but are generally less v
to procurement, management,
substantial, or ma

4.11

erse effects caused by any lessening of competition.
an application are explained in paragraphs 5.16 to 5.24.

olicy Exemption

suant to section 9 of Schedule 7 to the Ordinance, the Chief Ex
order published in the Gazette, exempt a specified mer
the application of the Merger Rule if he or she is satisfied that there are exceptional and compelling reasons of public policy for doing so. Such an exemption may be subject to y conditions or limitations that the Chief Executive in Council considers appropr

Exclusion from the merger rule for statutory bodies or specified persons and persons engaged in specified activities

The Merger Rule does not apply to a statutory body as defined in section 2(1) of the Ordinance, unless it is specified in a regulation made by the Chief Executiv
under section 5 of the Ordinance that, *inter alia*, the Merger Rule applies to the statutor
, or to the statutory body to the extent that it is engaged in an activity specif
the regulation under section 3 of the Ordinance.

The Merger Rule also does not apply to a person specified in a regulation made b
e in Council under section 5 of the Ordinance, which provides that,

5 Procedures and Enforcement

Under section 7(1) of Schedule 7
the Commission may commence an in ger within
y on which the Commission first became a or ought to have
ger has taken place. As detailed in sections 99 and 100 and
if the Commission, after car ying out an investigation,
e that a merger contravenes the Merger Rule
y on which the merger was completed or the Commission
ger (whichever is the later), br
s to unwind the merger in relation to a completed merger.
the Commission under section 97 to the Ordinance ma
proceedings in the Tribunal seeking to stop the merger process.

As a merger may be subject to investigation by the Commission, and proceedings in the Tribunal (which has the power to effectively unwind a completed merger or stop the merger process in case of an anticipated merger), it may be in the interest of the par to a merger to contact the Commission at an early stage to understand whether the Commission has any concerns about a proposed transaction. Such contacts in advance y enable the parties to identify any potential competition concerns and to address the issues in good time, as well as to minimise the risk that proceedings are brought b Commission before the Tribunal.

y notification of a proposed merg

assist merging parties and their adviser
willing to pro
advice would be giv

the party requesting it and the Commission requests the par
advisers) to agree not to publish the advice or to disclose it in an
Commission's prior consent, whether or not the proposed mer
or is completed.

There is no timetable for providing informal advice, but the Commission will tr
with requests in an efficient and timely manner and within the par
ame, where that is possible.

ore deciding whether to submit a notification of a proposed merger for inf
advice from the Commission, parties to a merger may apply the safe harbour
agraphs 3.13 to 3.20 to self-assess whether the merger transaction in contemplation
y potentially raise competition concerns. It should however be emphasised that
meeting one or both of the safe harbour thresholds does not necessarily mean that the
proposed transaction does not give rise to competition concerns. The Commission
y still commence an investigation in appropriate circumstances. Parties consider
application for informal advice are encouraged to contact the Commission at an ear
opportunity to discuss the content, timing and scope of information that they ma
required to provide.

or the Commission not taking enf

or assess whether there are justif or them to

or a decision from the Commission that the merger is excluded from the Merger

aphs 5.16 to 5.24).

Section 60 of the Ordinance provides that the Commission ma

y action or refrain from taking action that the Commission

iate to address its concerns about a possible contravention of,

the Merger Rule, in return for the Commission's agreement not to commence an

estigation or bring proceedings in the Tribunal, or to terminate any inv

proceedings that has been commenced.

5.10 Section 60 thus provides for an opportunity to the parties to a merger to off

to address the competition concerns that the Commission may identify in relation to a merger or proposed merger, in return for the Commission not taking, or ceasing,

orcement actions against them. Such circumstances may arise, for example

ties to a proposed merger have notified the transaction to the Commission f

ormal advice, and the Commission is of the view that the proposed mer

ns and intends to take further action were the proposed

or the Commission not to tak
the parties to a mer
able to eliminate or a
market that is,

le to deal with the competition concerns identified at source
ucture of the market expected in the absence of the mer
ivalry, and do not generally require ongoing monitoring activity
on the other hand, are less likely to address competition concer
ger or a proposed merger as comprehensively as str
distortions compared with a competitive market outcome
the disadvantage of requiring ongoing monitoring and compliance activity

uctural remedies could include divestment of part of the merged business through the disposal of assets or shares. Typically this might involve an overlapping b Commission would require the disposal to be made within a specified time limit.

In appropriate cases, behavioural remedies may be accepted where the Commission wishes to ensure that the merged entity does not behave in an anti-competitiv after the merger. For example, the parties may be required not to undertak
se of conduct made possible by the merger.

Under Schedule 2 to the Ordinance, before accepting a Commitment, the Commission
ust give notice of the proposed Commitment in any manner it consider
to those that are considered likely to be affected by the merger and the proposed
iod of 15 days for representations to be submitted,

se effects caused by any lessening of competition (see

excluded from the application of Schedule 7 by virtue of section 3 (application
y bodies) or section 4 (application to specif sons and persons
ied activities) of the Ordinance (see paragraphs 4.13 and 4.14)

Under section 164 of the Ordinance, a fee will be payable for making an application f

If the Commission makes a Decision, the Commission may not take any action under the Ordinance unless the Decision is rescinded (section 15 of Schedule 7 to the Ordinance), or the merger as implemented is materially different from the proposed mer
the Decision relates (section 14 of Schedule 7 to the Ordinance). The Decision b
Commission may include conditions or limitations subject to which it is to ha
including, in the case of a proposed merger, specifying a date by which the proposed
ger must be completed. Pursuant to section 13 of Schedule 7 to the Ordinance
after the Commission has made a Decision, it must inform the applicant in wr
Decision, the date of the Decision and the reasons for it. The Commission will in line with section 16 of Schedule 7 to the Ordinance, maintain a register of Decisions and notices

ore deciding on an application for a Decision,
Ordinance requires that the Commission pub
the Internet or a similar electronic netw
considers appropr

that are made to the Commission.

According to section 11(3) of Schedule 7 to the Ordinance
required to consider an application for a Decision if:

- the application poses novel or unresolved questions of wider impor
  interest;
- the application raises a question of an exclusion under the Ordinance f
- there is no clarification in existing case law or decisions of the Commission;
- it is possible to make a Decision on the basis of the information pro

ther, the Commission is not required to consider an application for a Decision if the application concerns hypothetical questions or conduct (section 11(4) of Schedule 7 of the Ordinance).

y party who would like to apply for a Decision should complete Form M.
submitted information to the Commission when notifying a proposed mer
mal advice need only to provide such further information as required b
which has not already been provided. Where the application involves a proposed
et in the public domain, the applicant must give consent to the

y rescind a Decision if it has reason to believ

ger has not been carried into effect, that there has been a material change of circumstances since the Decision was made; or

ger has been carried into effect:

mation provided by a person involved in the mer

based its Decision was incomplete, false or misleading in a mater

that an undertaking has failed to observe any condition or limitation subject to which the Decision has effect.

ore rescinding a Decision, the Commission is required under section 15(3) of Schedule 7 to the Ordinance to publish a notice of the proposed rescission through the Internet or a similar electronic network and in any other manner the Commission considers appropriate in order to bring the proposed rescission to the attention of those the Commission considers likely to be affected by the proposed rescission,

iod of 30 days for representations to be submitted, and consider any representations about the proposed rescission that are made to the Commission. If a Decision is rescinded, a notice of rescission will be issued to each undertaking specif

ming them of the rescission and the reasons for it, the date on which the

As indicated in paragraph 5.1 abo
may conduct an in
cause to suspect that a contr

that the merger has taken place. Under section 7(2) of Schedule 7 to the Ordinance Commission is to be taken to have become aware that a mer
been notified of the merger pursuant to this Guideline.

ing an investigation, the Commission may in appropr
the investigation powers conferred under the Ordinance to obtain evidence from the relevant parties. The Commission may also seek representations from the par
a merger or an anticipated merger, and/or from relevant third parties, conduct mar
inquiries which could include consulting competitors of the merging parties, customers, industry associations and consumer groups and consider their views in so far as they are relevant, and carry out independent research, for example to help assess the degree of competition in the relevant market.

after investigation, the Commission considers that there is no reasonable cause to believe that the merger or anticipated merger contravenes or is likely to contr
ger Rule (as the case may be), no proceedings will be brought and the Commission will take no further action.

The Commission will in general follow the *Guideline on Investigations*, to the extent
in conducting investigations.

proceedings

iod of six months after the da ger was

completed or the Commission became aware of the mer This

y be extended by the Tribunal under section 99(3) of the Ordinance on the application of the Commission if the Tribunal considers it reasonable to do so.

Where proceedings are brought in relation to an anticipated merger under section 97 of

ibunal has finally deter

wn motion or on application by the Commission, make inter

under section 98 of the Ordinance for the purpose of preventing pre-emptiv

might prejudice the hearing under section 97 or any final order that the T

e on the hearing of the application.[13]

Confidentiality and disclosure

5.31 Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to or obtained b the Commission. Reference is made to the *Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Ex Orders* and *Guideline on Investigations* issued by the Commission, to the extent where they are applicable, for the Commission's approach in handling confidential inf

ger Rule.

Other Commission Procedures

provided voluntar
on a proposed mer
exploring possibilities of Commitments or appl

advice (or such other purposes as specified by the parties).
y information so received, with or without notice to interested par
poses under the Ordinance. This includes for the pur
a contravention under the Ordinance has occurred and/or with a view to enf
where there has been a contravention.

As a general matter, parties to a merger are encouraged to seek legal advice bef
approaching the Commission seeking an informal advice on a proposed mer
other purposes.