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9 December 2014

The Competition Commission
Room 3601, 3607-10, 36/F,
Wu Chung House, 197-213
Queen's Road East,
Wanchai
Hong Kong

Dear Sir/Madam

Draft Guidelines under the Competition Ordinance of Hong Kong - 2014

In response to the Competition Commission's (CC) recent invitation for feedback on the sixth draft guidelines (Guidelines) for Hong Kong's new Competition Ordinance (HKCO), as issued by the CC on 9 October 2014, Alvarez & Marsal (A&M) is pleased to offer our comments. This follows A&M's letter to the CC of 2 September 2014, which included initial comments on the CC's discussion notes and preparatory guidelines.

A&M is an international professional services firm with offices in Hong Kong, the People's Republic of China, elsewhere in Asia and around the globe. A&M is thus a key stakeholder in the competition arena of the region, and is keen to be involved in the consultation process as the CC works towards implementation of the HKCO.

A&M's Economics practice includes experienced experts in antitrust and competition economics, who have practiced actively and extensively in the United States (US), the European Union (EU) and around the world. The biographies of Steven Schwartz (Head of the Global Economics Practice), Tasneem Azad and Andrew Hildreth—the Managing Directors with relevant experience—are attached to this submission for information.

A&M has reviewed the draft Guidelines with a particular focus on their consistency with current economic thinking and analyses and enforcement best practice (as we understand it) from around the world, and on their clarity and internal consistency. As a general matter, we think the Guidelines are a thoughtful and comprehensive statement of the CC's proposed approach to enforcement of the HKCO. We believe that the Guidelines present a statement of enforcement processes and analytical considerations that is generally clear and is likely to assist stakeholders in understanding the standards by which behaviours will be judged by the CC and the kinds of analyses that will be relevant.

That said, we have identified several issues where we wish to encourage the CC to broaden its thinking and to consider modifications to its approach in order to provide even clearer guidance about the kinds of evidence that is relevant to its analysis. We also have considered the CC's thinking with respect to vertical pricing issues and wish to offer commentary specifically with respect to the discussion of vertical price restraints and resale price maintenance (RPM).

Though related, for expositional convenience and to assist the CC and its staff in reviewing our comments, we present our comments separately for the Guidelines on the First Conduct Rule and the Second Conduct Rule. We try, throughout our commentary, to identify common themes:

1. While the Guidelines appropriately reference economic evidence as central to its consideration of challenged behaviours, we believe that, especially with a nascent competition policy regime, more—rather than less—guidance about the sorts of analyses that the CC's staff will consider is essential to stakeholders coming to grips with a new form of enforcement.

2. In connection with discussions of the constraints on the exercise of market power, we believe that the relevance of vigorous downstream competition needs to be clearer in the Guidelines.

3. We believe that the CC ought to consider providing a clear statement that certain kinds of behaviours create a presumption of anti-competitive intent or outcome and, more pointedly, that such presumptions are rebuttable. We discuss below where we believe such rebuttable presumptions ought to exist and the nature of the evidence that the CC might want to consider in assessing whether the presumptions are in fact rebutted.

4. We recognise that the HKCO is intended to preserve competition and makes no explicit differentiation between inter-brand and intra-brand competition. We also do not mean to suggest that concerns about reductions in intra-brand competition are to be given no weight in assessments of the impact of restrictive vertical practices. Rather, we urge the CC to recognise that while the incentive for undertakings operating upstream is to focus on improving and enhancing their competitive positions versus their inter-brand rivals, it is rational and pro-competitive for them to seek to align the interests of their downstream distributors with those goals. That will often lead to a seeming sacrifice in the vigor of intra-brand competition. That appearance is illusory; in fact, so long as there is vigorous inter-brand competition downstream (as well as upstream), consumers are still well served and protected from anti-competitive behaviour.

5. Thus, we believe that behaviours such as exclusive territories and recommended resale prices are more likely than not to be competition enhancing. While that presumption certainly ought to be rebuttable, we believe that undertakings ought to be given the benefit of that doubt. The economic literature now generally accepts that it is exceedingly difficult to exercise monopoly power through restrictive vertical practices. While we do not go so far as some who urge the *per se* legality of restrictive vertical practices, we believe that anti-competitive effects are sufficiently unlikely that undertakings are entitled to the presumption we describe.

Discussion of Hong Kong Competition Commission Enforcement Guidelines: First Conduct Rule

Terms used in the FCR

1. It is well settled in the United States and Europe that for agreements to be actionable, they cannot involve two parts of a single entity. This reflects the principle that an entity cannot conspire with itself. We also recognise that there can be situations where the lines are blurred; effective control or influence can exist without a 100% parent-subsidiary relationship. However, we are concerned that the notion of "decisive influence" that is used in the Guidelines may be too vague to be meaningful and could lead to certain potentially anti-competitive agreements going unchallenged.

2. Decisive control can be exercised contractually ("*de facto* control", in the language of the Guidelines) and the exclusion in the Guidelines (see paragraphs 2.6 and 2.7) allows for the possibility that such contractual integration may escape antitrust scrutiny. Indeed, recent judgments in Europe have shown that 50/50 joint ventures where two parties have decisive influence over a third does not always mean that the three parties would necessarily be treated as one for the purposes of competition law (see cases of Dow Chemical Company and of El du Pont de Nemours).[1]

3. We urge the CC to offer more clarity on (a) the precise meaning of "decisive influence"; (b) whether and what forms of contractual integration can be sufficient to establish *de facto* control; and (c) the standards by which influence will be judged.

Object, Effect and Serious Anti-Competitive Conduct

4. We agree with the approach adopted by the CC towards horizontal agreements whose premise (object) is to fix prices, reduce output and/or allocate markets. We also agree with the characterisation of the CC in respect of cases of "Serious Anti-Competitive Conduct". Such horizontal arrangements - or hardcore offences - are so pernicious that any pro-competitive effects that might be argued would be swamped by the market distortions resulting from such agreements, even where effects are de-minimus. Indeed, the CC could go further and adopt a stringent *per se* approach specifically to hardcore offences, limiting entirely the role of efficiency defences in such cases.

Resale price maintenance

5. The CC appears to adopt a disproportionately hostile approach to its analysis of vertical arrangements, especially those that it characterises as resale price maintenance (RPM). While it differentiates between RPM that involves recommended resale prices as opposed to those that are mandatory, we believe the Commission gives too little weight to the pro-competitive benefits of RPM-like behaviour and, indeed, to many of the vertical practices it analyses under the First Conduct Rule.[2]

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[1] Case C-179/12 P Dow Chemical Company v Commission OJ 2013/C 344/47.
Case C-172/12 P EI du Pont de Nemours & ors v Commission OJ 2013/C 344/46.

[2] We note, however, that there may be an institutional exception. While generally it is accepted that RPM is pro-competitive, there is an exception that shows under certain conditions that RPM might be inferior to allowing prices to be determined competitively. The exception might have relevance to the institutional structure of ownership in certain industrial sectors in Hong Kong. In particular, in a paper by Paul Dobson and Michael Waterson: "The competition effects of industry-wide vertical price

6. We believe that the CC ought to relax its view of the sorts of restrictive vertical practices; we believe that such practices that are explicitly vertical such be presumptively pro-competitive. Such a presumption should be subject to challenge with direct evidence of an actual or likely adverse effect on competition. Moreover, we believe the CC gives too much weight to practices that are alleged to affect intra-brand competition without sufficient consideration of potential offsetting benefits to inter-brand competition.

7. We recognise that the HKCO is intended to preserve competition and makes no explicit differentiation between inter-brand and intra-brand competition. We also do not mean to suggest that concerns about reductions in intra-brand competition are to be given no weight in assessments of the impact of restrictive vertical practices. Rather, we urge the CC to recognise that while the incentive for undertakings operating upstream is to focus on improving and enhancing their competitive positions versus their inter-brand rivals, it is rational and pro-competitive for them to seek to align the interests of their downstream distributors with those goals. That will often lead to a seeming sacrifice in the vigour of intra-brand competition. That appearance is illusory; in fact, so long as there is vigorous inter-brand competition downstream (as well as upstream), consumers would still be well-served and protected from anti-competitive behaviour.

8. Thus, we believe that behaviours such as exclusive territories and recommended resale prices are more likely than not to be competition enhancing. While that presumption certainly ought to be rebuttable, we believe that undertakings ought to be given the benefit of that doubt. The economics literature now generally accepts that it is exceedingly difficult to exercise monopoly power through restrictive vertical practices. While we do not go so far as some who urge the *per se* legality of restrictive vertical practices, we believe that anti-competitive effects are sufficiently unlikely that undertakings are entitled to the pro-competitive presumption we describe.

9. We also urge the CC to reconsider the distinction it draws in the Guidelines between mandatory resale prices and recommended resale prices. While the difference between what is recommended and what is voluntary is an appealing and facially significant difference, we actually think it is a distinction without a difference in terms of the impact on competition. In the end, whether resale prices are set by the upstream undertaking or merely suggested does not determine the competitive impact of those prices. That impact is determined by the vigour of inter-brand competition (upstream and downstream), the extent to which resale prices promote the alignment of interest between upstream and downstream undertakings and not by the mandatory nature of such prices.

10. That said, with respect to other sorts of restrictive vertical arrangements where there is a presumption of legality, we believe it is incumbent on the CC to consider whether the justifications that are typically offered to support such restraints are meaningful or pretextual. For example, rather than a blanket acceptance of the view that restrictions are needed to overcome the effects of free-riding, we urge the CC to look for actual evidence of free-riding, absent the restrictions. Alternatively, we urge the CC to analyse the underlying economic incentives to engage in free riding or other such behaviours.

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fixing in bilateral oligopoly", *International Journal of Industrial Organization*, 25(5), October 2007, 935-962., they note that in instances where vertical restraints are imposed by buyers (for example, in instances in the retail sector), then the possibility arises that RPM pricing may be above where competitive prices are set. We understand that such a market structure might be relevant to the grocery retail sector in Hong Kong.

11. We are mindful that the CC states in the draft Guidelines that it will consider evidence of economic efficiencies as a form of pro-competitive benefits from otherwise harmful agreements. Applying this to analyses of resale pricing arrangements and other restrictive vertical practices should involve addressing these issues; we believe this is right and proper and encourage the CC in that direction.

Bid-rigging

12. The CC notes that bid-rigging can include situations of "cover bidding" (where certain bidders submit higher bids so as to be excluded from a particular round) and are similar in effect to traditional interpretations of bid rigging. The CC may find a 2011 case from the UK in the construction sector of interest, where the UK Appeal body, the Competition Appeal Tribunal, suggested that on a sliding scale of severity, cover-bidding may be seen as less serious a breach.

Agreements of Lesser Significance

13. The CC sets out turnover thresholds in respect of "Agreements of Lesser Significance". This section may benefit from further clarification, in particular in respect of how the turnover figures would be calculated. For example, would turnover also relate to parents of a subsidiary?

Block exemptions

14. The HKCO allows for the CC to issue block exemptions in respect of certain agreements, where it considers an exemption may be warranted. Whilst block exemptions are employed elsewhere in the world, they are used rarely and are extremely tightly circumscribed. They will also normally be time-limited and be kept under review to ensure that they are not left in place longer than may be strictly necessary, and to ensure that any new information that may be brought to light is taken into account. The CC may wish to stress in the Guidelines that block exemptions will only be used in truly exceptional circumstances and that applications for exemptions will be heavily scrutinised.

Statutory bodies

15. The CC notes that the HKCO does not apply to statutory bodies (i.e. there is a blanket exemption for statutory bodies). In other countries competition law does normally apply to public bodies to the extent that they may be engaging in economic/commercial activities within a market. This gives other firms operating in those relevant markets certainty that they are competing on a similar footing to statutory bodies with whom they may be competing. As an example, the CC may wish to review the December 2011 guidance issued by the UK competition authority in respect of the application of competition law to public bodies.

Discussion of Hong Kong Competition Commission Enforcement Guidelines: Second Conduct Rule

General Comments

1. We recognise that the Commission does not wish to draw bright lines about the precise meaning of terms such as "substantial" when used with respect to market power, given that case-specific assessments will be relevant. Instead, the Guidelines use the notion of "substantial market power" (similar to that employed across Europe). However, the CC could provide additional guidance in respect of situations that are more likely than not to be seen as substantial. We do not suggest that the CC attempt to define the term with precision. Rather, we suggest that the CC—early in the Second Conduct Rule Enforcement Guidelines—indicate that "substantial market power" may be inferred in the following situations:
   a. Shares in a properly defined market exceeding a certain threshold (e.g. 50%);
   b. Stable market shares persistently over time, that would appear inconsistent with vigorous competition on the merits;
   c. The existence of sufficiently high entry barriers such that effective entry or expansion into the market within the short-term and/or medium-term is unlikely to be profitable and/or technologically viable;
   d. Persistent price increases that exceed associated cost increases resulting in persistent and rising margins without sufficient competitive responses;
   e. Price levels that allow for supra-competitive margins to be persistently earned; and/or
   f. Reductions in production or distribution capacity in the face of growing market demand.

2. In this connection, we do not mean to suggest that finding the above conditions to exist is sufficient to *prove* that an undertaking (as that term is used in the Guidelines) has substantial market power. Rather, we believe that these may provide a basis for the inference noted above, an inference that is rebuttable with evidence that demonstrates the vigour of competition. Because the Guidelines represent a new enforcement regime in Hong Kong, we believe such guidance will provide much clearer information to all affected undertakings and their counsel and will, in particular, provide them with information about the kinds of analyses and information they will need to provide in order to undermine the above inference.

3. At 1.5-1.7, the CC properly notes that the HKCO is not intended to chill competitive activity that results in an undertaking gaining market power as a result of innovation, superior product quality and the like. We also recognise the fine line that exists between legitimate and competition-enhancing behaviour and that behaviour that excludes or limits competition. Thus, we encourage the CC to make clear throughout these Guidelines that the fact of market power is not, by itself, a violation of the HKCO. A large market share is not a violation of the HKCO; nor is marketplace success. Rather, the HKCO targets the abuse of market power or the gaining of market power acquired and maintained through exclusionary and other anti-competitive practices whose net impact is to harm, not enhance, competition.

4. The Guidelines note at 1.13 that the "Second Conduct Rule applies to conduct that harms competition in *Hong Kong* (emphasis in original)...this is the case notwithstanding that the abusive conduct takes place outside Hong Kong or the undertaking that engages in the abusive conduct is located outside Hong Kong." We are sure that the CC is aware of the legal proceedings in the United States involving Motorola and the extent to which activities that never reached the US actually affected commerce and competition in the US and, moreover, how close of a connection between extra-territorial behaviours and effects in the US must exist for those behaviours to be actionable and damage-causing in the US. We are concerned that the vague language in this section could open the door to similar uncertainty. While we understand the logic of this provision of the Guidelines, we also urge the CC to consider elaborating on the standards or methods of analysis that will be applied in assessing whether extra-territorial conduct has a sufficiently close

causal nexus with competition in Hong Kong. Failing to do that could lead to the sort of uncertainty that would ensnare the CC in investigations that will get bogged down in these questions and uncertainty on the part of undertakings who will have difficulty in assessing how the impact of their foreign behaviours on Hong Kong competition will be judged.

Relevant Markets

5. We appreciate the CC's recognition that there will be instances where a full-scale analysis of the relevant market is unnecessary; in those instances where a quick-look analysis reveals no likelihood of anti-competitive effect under any reasonable delineation of a relevant market, there is no use in either undertakings or the CC engaging in that effort. However, we do suggest that the CC consider and identify the kinds of evidence it will consider as a part of the quick-look analysis; such disclosure will enable undertakings to conduct their own analyses and recognise more quickly the likely scope of investigations and also present affirmative evidence in support of a quick-look dismissal of an investigation.

6. At 2.6, the CC describes a relevant market as including products which are considered "interchangeable or substitutable" to buyers. We suggest that the word "functionally" be added before interchangeable in order to emphasise the point that physical similarities (or lack thereof) is not the sole basis on which products are deemed to be substitutes, but rather the use that the products are put to and/or how customers may perceive and purchase them. We also suggest that this paragraph reference the subsequent paragraphs in which the crucial questions of "how close substitutes must they be" and "how is that determined" are addressed.

7. The CC would also benefit from breaking from the sequential approach to market delineation (set out in Figure 1), as the relevant market definition may need to be revisited or reviewed as a case progresses and more information becomes available or as market share assessments and competitive analysis is undertaken. Market delineation is a means to an end, albeit an important one, and thus must be kept under review through the course of an investigation to ensure that the market's boundaries are appropriate to the assessment and consistent with all of the (developing) information that emerges as the analysis proceeds.

8. In the discussion at paragraphs 2.8-2.12, we believe that there needs to be discussion of the time period over which the switching behaviour by consumers will be evaluated. This section is silent on whether the switching must be "quick" or can occur more slowly. The market period, that is, the time over which consumer decisions are made can vary widely from market to market, and there is no single time period that is relevant for every market. We urge the CC to adopt language that says explicitly that the question of whether sufficient switching has occurred to render a SSNIP unprofitable will be evaluated over a time period that is reasonable for the product and market in question, that factors such as whether products are bought on the spot or on a contract basis will be considered and that the relevant time period for one market will not be precedential or indicative of the relevant time period for a different market.

9. Similar points as above apply to the discussion of Geographic Markets at 2.13-2.19. In addition, given the importance of digital markets, we recommend the CC expand its discussion of geographic markets to include a discussion of the manner in which it proposes to address Internet commerce as a part of its geographic market analysis.

10. The CC discusses aftermarkets at 2.23. For information, considerable guidance has now been issued at a European level in respect of relevant concerns associated with aftermarkets. For example, in 2012, the EC issued guidance in respect of the application of competition rules in relation to the car sector, which covers a number of relevant aftermarket issues (warranties, repair issues etc.).

11. The CC discusses two-sided markets at 2.25. Network effects are pertinent in this context and further guidance would be beneficial in terms of how relative market shares (and inequalities) and tipping points might be analysed by the CC in such markets. In other words, it is not only market definition that is complicated in two-sided markets but also the assessment of competition.

Assessment of Substantial Market Power

12. Paragraph 3.10 conflates two points that we believe deserve separate mention. While we agree with the fundamental point the CC is expressing here, we believe that it is important to distinguish between market share *levels* and market share *persistence*. In our view, the proper economic approach looks at the market share levels of the competitors at issue and their rivals. Market shares that are low, e.g., below 20%, are unlikely to be associated with substantial market power. Otherwise, more detailed analysis of behaviour in the market is needed. That is distinct from the question of whether shares persist and, beyond that, what inferences can be drawn from persistence. Persistently high shares of course call for deeper analysis to determine, as the CC recognises, if that persistence reflects competitive success in meeting consumer demand and innovating to respond to shifting tastes or from being insulated from competition. However, persistent modest shares also require deeper analysis, especially in markets with small numbers and more subject to coordinated behaviour, since persistence could indicate coordination to limit the scope of competition. While it is likely that such coordinated behaviour would fall under the scope of the First Conduct Rule, we can imagine circumstances in which the Second Conduct Rule would implicate it, as well. In any event, we urge that the discussion at 3.10 and 3.11 be expanded to recognise the distinction between share levels and share persistence and the different implications of each.

13. A similar point can be made with respect to the market concentration discussion. Persistently high levels of concentration may signal a very different competitive environment from one in which concentration levels have tended to rise over time. We also think it is worth noting in the Guidelines that the CC recognises that the level of concentration ratios or HHIs must also be accompanied by a discussion of which firms enjoy the highest shares over time. For example, an HHI of 1600 has very different meanings in a case where shares are stable across firms over time as opposed to a case where different firms have the larger shares in different years. While a subtle point, we think it is important to note for stakeholders that simply showing concentration levels is insufficient and that it will be necessary for all parties to dig deeper and gain an understanding of the underlying factors driving the concentration measures.

14. In paragraph 3.18, we suggest the CC consider changing "Persistently high market shares are a likely indicator of the presence of barriers to entry or expansion" to read, "Persistently high market shares may be an indicator of the presence of barriers to entry or expansion." The use of the term "likely" is inconsistent with other statements in the Guidelines suggesting that high market shares are not, by themselves, indicative of market power. Similarly, we believe that a statement asserting that they are an indicator of market power to be too strong.

15. We suggest adding one additional point to the discussion at 3.24. Even if sunk costs *are* strictly necessary for entry to be accomplished, that is not sufficient for them to represent an entry barrier. There is, we think, a next step in the analysis: are the sunk costs high relative either to the total cost of entry or relative to the profit opportunity. If sunk costs are "large" in absolute terms—a contextual term, to be sure—but not so relative to the cost of entry or profit opportunity, then their significance as an entry barrier is smaller than in the opposite case. We believe the Guidelines should recognise that eventuality.

16. We appreciate the recognition of the countervailing power of buyers who have credible alternatives to an existing supplier, alternatives that give them the ability to defeat the exercise of market power. In the discussion at 3.31-3.34, we suggest expanding the discussion to recognise that buyer power is a more credible response to the exercise of market power when the switching costs are low relative to the cost savings resulting from switching. More generally, we suggest the CC explicitly note that buyer power is meaningful only to the extent that it can defeat the profitable exercise of substantial market power. It is only in that sense that buyer power can be countervailing and we think the clarity of the Guidelines is enhanced by noting that point specifically.

17. With respect to the points made in 3.32 and 3.33, we note that the ability of buyer power to be a deterrent to the exercise of market power turns importantly on the extent to which a seller has the ability to price discriminate. While contracts of different terms, for example, can give one buyer the ability to defeat the exercise of market power today while other firms do not have that ability, more generally, in a case where a seller cannot readily discriminate in price across customers, buyer power is more powerful. We suggest that the Guidelines be amended to make that point explicit and to offer guidance as to the kind of evidence that will support—or defeat—an argument about the relevance of buyer power.

18. In the section concerning particular issues in the assessment of substantial market power, we were struck by the absence of a discussion of the relevance of an assessment of the vigour of downstream competition. If there is a vertical arrangement in which an upstream firm has a dominant position, its ability to price at supra-competitive levels may still be constrained by the intensity of the competition faced by its customers. If manufacturer A sells to customers who sell into a market where there are many alternatives, prices by A must be set at levels that allow its customers to compete effectively downstream. In this case, the appearance of market power may be competitively insignificant because of the downstream constraint.

Examples of Conduct that may constitute an abuse

19. With respect to the discussion of predatory pricing, we are concerned that the CC is expressing a willingness to infer predatory intent from documentary and other evidence (see 5.5(b), for example). In our experience, it is rare that documentary evidence is so clear that an inescapable conclusion regarding predatory intent behind a certain behaviour can be reached. More typically, such intent can only be inferred and the inferences are very often subject to challenge. For that reason, we urge the CC to make the issue of recoupment much more central to its analysis of predatory conduct. In a typical case where predatory intent can only be inferred, the issue of whether a predatory investment can be recouped with

reasonable certainty in a reasonable period of time is very often determinative. We urge the CC to adopt a stronger and clearer position that an analysis of the recoupment question – and crucially the relevant costing standards - will be central to a determination of whether a pricing strategy amounts to predation.

20. We also urge the CC to clarify further its Guidelines with respect to alleged margin squeeze. A margin squeeze may involve charging a downstream price that is too low relative to the input cost (over which market power must exist), or charging a wholesale price that is too high relative to downstream prices. In both cases, a downstream competitor would not be able to realise a sufficient price-cost margin to operate profitably. However, the existence of this differential is not in itself sufficient. Other considerations may be important also, such as player asymmetries.

21. It is a well-known principle in economics that there is a defined amount of so-called "monopoly profits" that can be realised in a series of vertical transactions. The prices charged at each level of the vertical chain determine the allocation of those profits across all of the participants in the vertical chain. The shifting of profits from downstream players to upstream suppliers does not necessarily affect competition. It does not necessarily increase the price charged to consumers nor does it confer market power on any participant that does not already exist. Put differently, the pricing behaviour may be a reflection of what economists call rent-seeking behaviour, but, without a specific set of circumstances, may not be anti-competitive.

22. We appreciate the CC's discussion of IP licensing and FRAND terms in its discussion of refusal to deal. We believe that the issue of FRAND licensing is the most likely form of a unilateral refusal to deal that the CC is likely to encounter. We note that there remains substantial uncertainty about the standards to be applied in determining whether patents are *standard essential patents (SEPs)* and urge the CC to set forth, at a minimum, the criteria that it will consider in determining whether a patent is SEP and whether FRAND licensing obligations are triggered. To be clear, we do not encourage the CC here to adopt a hard-and-fast rule on what criteria must be met for a patent to be an SEP. Rather, because there is so much uncertainty in major jurisdictions and in Courts about what constitutes an SEP, any guidance the CC can give about how it will analyse that issue will be most helpful to stakeholders.

Discussion of Hong Kong Competition Commission Enforcement Guidelines: The Merger Rule

Market definition and safe harbours

1. The CC sets out a screening mechanism for the review of mergers by way of "safe harbours". Although, the CC also notes that these safe harbours are only indicative in nature. The CC has identified two safe harbour measures including a four-firm concentration ratio (CR4) and a Herfindahl-Hirschman Index (HHI). The CC notes that both measures will involve identifying the relevant market and assessing market shares.

2. In order to give market players certainty around the application of a safe harbour and those mergers that the CC would and would not investigate, the CC may wish to consider providing some clearer bright-line safe harbours using simple metrics, for example mergers that involve specified turnover thresholds.

3. By using concentration measures and indices, the CC is effectively tying the safe harbours to the definition of the market and the assessment of market shares of the different players. Both of these may be complex tasks, and may need to be refined over the course of an investigation. Indeed, the CC notes at para 3.11 that there may be multiple definitions that may be relevant and, for that matter, that there may be circumstances in which it may not be necessary to establish a clear market definition. The CC also notes at para 3.37 that market shares may be calculated using a wide range of metrics for example the number of subscribers, call minutes, data volume and even transmission capacity or bandwidth.

4. Collating this information and undertaking the required analysis is time-consuming. While all this may be necessary for a full investigation, for the purposes of determining a quick safe-harbour, such analysis may be excessive. Simple turnover tests may suffice. This would also make it easier for the firms themselves to determine whether or not they consider it beneficial to notify the CC of their intention to merge.

Failing firms

5. At para 3.49(c), the CC sets out a failing firm condition where it puts the obligation on the failing firm itself to have made efforts to elicit reasonable alternative offers which may have posed less severe a danger to competition. Placing this onus on the failing firm itself to seek out and gain alternative bids for its business is a particularly onerous obligation to place, and may actually have significant unintended detrimental market effects.

6. Requiring a failing firm to go proactively to a series of competitors highlighting that it is close to exiting the market and is seeking a buyer for its assets could lead to numerous bids for the assets at amounts far less than might have been appropriate and which may result in inefficient allocations of the assets (i.e. to competitors who may not make the most efficient use of them). This in turn would have detrimental effects on consumers within the market.

7. Instead, the CC itself ought to consider the counterfactual, and to determine whether a less anti-competitive outcome could have existed. If the CC at that stage were to consider that alternatives would have been more appropriate, it may then set those out as part of its determination and remedy package. Such a process would also save the CC the effort of determining an appropriate value for the assets, as the parties themselves would have determined this as part of their original negotiations (i.e. a price would have been set for the assets).

Barriers to entry – structural

8. At 3.62, the CC rightly notes that network effects are a feature of telecommunications markets. The CC may wish to provide additional guidance on how it envisages assessing such network and platform effects when assessing mergers. Whilst important for the assessment of barriers to entry, mergers may also facilitate step changes in volume which in turn can give the merged firm significant market power on the back of "market tipping" (i.e. the merged firm gaining an unassailable advantage through the merger).

9. Determining how close to tipping a market may be pre- and post-merger will be relevant analysis for the CC and it may wish to set out the types of information it would look to assess network effects (e.g. customer perceptions, calling circles).

Procedures and enforcement

10. The CC notes that there is no requirement to notify a merger and that voluntary notification of a proposed merger is open to firms if they are seeking confidential informal advice. Whilst this is a perfectly tenable position for the CC, it should ideally also state in the guidelines that it would issue a public statement the moment a formal investigation into a merger is launched (at 5.26, the CC notes that it "may" publish such a notice) and at the same time set out a public timetable for its investigation. Rather than leaving it as an option, the CC should confirm that it would publish a formal notice. Such certainty is important for stakeholders and third parties who may wish to submit views and guidance in a timely fashion to feed into the CC's investigation. This is especially relevant in the context of other formal deadlines within the HKCO (e.g. the six month time limit for proceedings to be brought before Tribunal).

Many thanks for permitting A&M to once again be part of the process of implementing the HKCO. I appreciate the opportunity and look forward to our on-going involvement.

Yours faithfully

Keith Williamson

Managing Director
Asia Head - Global Forensic and Dispute Services

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