Certari Consulting

SUBMISSION TO HONG KONG COMPETITION COMMISSION

in response to the

DRAFT GUIDELINE ON THE FIRST CONDUCT RULE

DRAFT GUIDELINE ON THE SECOND CONDUCT RULE

DRAFT GUIDELINE ON THE MERGER RULE

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Certari Consulting Limited

Provides policy advice to governments, enforcement training to regulators, and compliance training to companies in relation to competition law and economic regulation.

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This Submission

Sets out the views solely of Certari Consulting Ltd.

Confidentiality is not asserted in relation to any part of this submission.

Executive Summary

1. Certari Consulting Limited is pleased to have the opportunity to offer the following comments on the draft guidelines on each of the three competition rules,[1] recently issued by the Competition Commission and Communications Authority. We consider the development of clear, certain and economically principled guidelines a matter of vital importance to the successful implementation of the *Competition Ordinance* (Cap. 619).

2. Certari Consulting Limited previously provided, on 10 November 2014, a submission[2] on the Draft Procedural Guidelines.[3] The present submission should be read in conjunction with that submission.

3. We commend the Commission on the plain language drafting of all guidelines and the effort that has been made to provide practical guidance on many points. In particular, the passages in the Draft Conduct Rules Guidelines listing factors the Commission will regard as inculpatory or exculpatory are likely to prove useful to undertakings.

4. We submit, however, that each of the Draft Competition Rule Guidelines should be amended to incorporate the changes proposed in the following paragraphs, and revised drafts issued for a further round of public consultation. Such revision of, and further consultation on, the Draft Competition Rule Guidelines is crucial, we submit, in order to develop guidelines that have maximum practical value for Hong Kong undertakings and in which the Legislative Council ("LegCo") can have confidence.

5. In particular, we submit that revised drafts of the guidelines should:

   - Include in the foreword to each of the guidelines a statement that the Commission will state its reasons for departing from its own guidelines, in

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1 Competition Commission and Communications Authority *Draft Guideline on The First Conduct Rule – 2014; Draft Guideline on the Second Conduct Rule – 2014; and Draft Guideline on the Merger Rule – 2014,* issued in October 2014 (collectively, "Draft Conduct Rule Guidelines").

2 Available online at: <http://www.compcomm.hk/files/submissions/S4_Certari_Consulting_Limited.pdf >.

3 Specifically, the Competition Commission and Communications Authority *Draft Guideline on Complaints -- 2014; Draft Guideline on Investigations -- 2014;* and *Draft Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders – 2014*, issued in October 2014 (collectively, "Draft Procedural Guidelines").

any case in which it does that.

- Confirm that whether an agreement has an "object or effect" that is anti-competitive will normally be assessed having regard to the effects that agreement is having in the relevant market or markets; that the Competition Commission may take action in respect of an agreement on the basis of it having an anti-competitive "object," where the agreement has not yet entered into force and so has not yet had any effects; and that where the Commission seeks to prove an agreement has an anti-competitive "object", it should do so by reference to the provisions of that particular agreement, the objectives of that particular agreement, and the economic and legal context of which that particular agreement forms a part.
- Elaborate on the criteria for application of the "overall economic efficiency" exclusion, and provide meaningful indicia of efficiency enhancement, ensuring it is possible for undertakings (especially SMEs) to assess for themselves whether the exclusion properly applies to conduct they are engaged in or are contemplating.
- Amend the categorization of resale price maintenance as harmful by object to confirm instead that resale price maintenance will be unlawful only where has or will have anti-competitive effects in the relevant market.
- Clarify the scope of "serious anti-competitive conduct," and hence the limits of the "warning notice" obligation and of the "agreements of lesser significance" exception, by specifically defining the boundaries of the conduct that constitutes "serious anti-competitive conduct" for the purposes of s 82 and s 5(2) of Schedule 1.
- Include in the *Draft SCR Guideline* guidance regarding the Communications Authority's approach to interpreting and applying the "dominant carrier" rule under new s 7Q of the *Telecommunications Ordinance,* and the relationship between that rule and the second conduct rule.

I. Process for Development and Endorsement of Guidelines

6. While we welcome the opportunity to comment on the first draft of the

substantive guidelines we find it troubling that the Commission has, in conducting these important public consultations, allowed only eight weeks for the public, undertakings, and those that advise undertakings to peruse, assess and comment on the full set of six draft guidelines on different topics. The initial four-week consultation period seemingly was too brief for all but fifteen parties to provide comments. Also, it is not apparent from the draft guidelines or the Commission's website whether the Commission will follow up on comments offered in submissions, either individually by meetings with particular commentators or publicly by a further round of consultations on revised draft guidelines.

7. Competition agencies' guidelines represent important landmarks in economies' business jurisprudence. In Hong Kong, the proposal that guidelines would be issued by the Competition Commission, once it was established, assumed exceptional importance during deliberations by the Bills Committee and debate in LegCo on the Competition Bill, as the CEDB repeatedly sought to reassure LegCo and members of the public that the guidelines would resolve concerns regarding the "uncertainty" of the proposed law.

8. It is unusual for a legislature to seek to review a competition agency's guidelines. That the Legislative Council has required the Competition Commission to "consult" with it on guidelines the Commission proposes to issue reflects the exceptional importance attached to the guidelines in Hong Kong and legislators' concern that they should in fact provide meaningful guidance to the public to alleviate concerns about "uncertainty" and possible over-reach of the new law.

9. In this context, we are concerned that perceived shortcomings in the Draft Competition Rules Guidelines might cause LegCo to delay the Gazettal of notice of commencement of those provisions of the *Competition Ordinance* that are not yet in effect, if the guidelines are not revised before being submitted to LegCo. Further delay in the commencement of the *Competition Ordinance* would not be in the best interests of the SAR's economic development. (Except that delay would be justified if it were necessary to ensure the guidelines are made comprehensive and certain.)

II. Status of Guidelines

10. We reiterate our previous submission that, in order for guidelines to be effective in their role, it is essential that users – particularly, Hong Kong undertakings and those that advise them – must have confidence that the agency will itself adhere to its published guidelines. Guidelines generally are not legally binding and the enforcement agency issuing them must be able to revise its guidelines in light of experience gained over time. The agency issuing the guidelines should also be able to depart from them where circumstances require – but the agency should accept that it bears an onus of justifying any departure that it considers necessary to make.

11. The statement made by the UK communications regulator Ofcom in its guidelines has substantial merit and a similar statement should be adopted in all guidelines issued by the Hong Kong Competition Commission:

> These guidelines set out Ofcom's general approach to enforcement in the areas covered by the guidelines. They do not have binding legal effect. Where we depart from the approach set out in these guidelines, we will be prepared to explain why.[4]

12. A similar statement should appear in the foreword to each of the Competition Commission's guidelines, in order to give users confidence that the Commission's actual approach will in the normal run of cases conform to its announced intentions.

III. Misconstruction of "object or effect"

13. The expression "object or effect" (under ss 6 and 21) should be given a straightforward construction analogous to 'effect or likely effect.'

14. The word "object," construed in its context, is intended to apply where an agreement has not yet entered into force so has not yet had any assessable effects. It is not intended to require presumptions of harm in respect of categories of agreements, we submit.

15. Construing "object or effect" analogous to 'effect or likely effect' would:

- accord with the natural and ordinary meaning of the provision;

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[4] See, e.g., Ofcom *Enforcement Guidelines* (2012) para 1.25; see also Ofcom *Dispute Resolution Guidelines* (2011) para 1.8.

- be consistent with the scheme of the Ordinance (i.e. with the use of the identical form of words in the second conduct rule as well as the first); and
- "best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit", as required by the *Interpretation and General Clauses Ordinance* (Cap. 1) s 19.

16. We are deeply concerned, therefore, to observe that the Draft Guideline on the First Conduct Rule (hereafter "***Draft FCR Guidelines***") propose an interpretation of "object or effect" that appears to emulate the approach taken by the European Commission and EU courts towards restrictions by object under art. 101 of the Treaty on the Functioning of the European Union ("**TFEU**"). The Draft FCR Guidelines propose that:

> Certain types of agreements between undertakings can be regarded, by their very nature, to be so harmful to the proper functioning of normal competition in the market, that there is no need to examine their effects. Agreements within this category are considered to have the "object" of harming competition.[5]

17. We submit that:

- The Draft FCR Guidelines place too much emphasis on categories or "types" of agreements that are presumed to have an anti-competitive "object" and pay insufficient attention to anti-competitive "effects": the guidelines should focus on the kinds of adverse market effects the Commission will be concerned to detect and prevent, rather than the presumptions the Commission proposes to make.

- The Commission is not bound to follow EU jurisprudence on restrictions by object under art. 101 of the TFEU when interpreting "object and effect."

- Rather, the Commission should construe the words "object and effect" according to their natural and ordinary meaning, having regard to the context in which they appear, and ensuring they are given "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit", in accordance with the *Interpretation and General*

5 Draft FCR Guidelines, para 3.4.

Clauses Ordinance (Cap. 1) s 19.

- The legislative intent behind the expression "object or effect" is readily discerned from the various reports leading to the Competition Bill and from the records of Bills Committee and LegCo deliberation on it, which make clear that "*per se*" type prohibitions were not intended.

- The construction of "object" that is proposed in the *Draft FCR Guideline* resembles the approach applied in the EU, but deviates from the EU approach in a manner which introduces real risks of over-deterrence and misapplication of the first conduct rule.

Proposed approach to "object" is not required by statutory language or local circumstances

18. The wording and scheme of the *Competition Ordinance* do not require certain categories of agreements to be deemed so pernicious to competition that "there is no need to examine their effects." The Ordinance could have provided expressly for particular types or categories of agreements to be deemed to prevent, restrict or distort competition but does not do so. LegCo went so far as to define "serious anti-competitive conduct"[6] but limited the role of that concept to confining the application of the "warning notice" procedure and the "agreements of lesser significance" exemption.[7]

19. Apart from not being required by the Hong Kong legislation, an approach to anti-competitive "object" that deems "types of agreements" to be anti-competitive is not appropriate in Hong Kong in the initial stages of the implementation of general competition law. An approach which deems categories of agreements to be anti-competitive without investigation of their effects "sensibly conserves resources of competition authorities and the justice system", as Advocate General Kokott has pointed out,[8] but the conservation of enforcement resources ought not to be the paramount consideration in the present setting. In Hong Kong, priority should be given to promoting legally compliant, competitive behaviour in business, rather than to cost-effective

6 Competition Ordinance s 2(1).

7 See, Competition Ordinance s 82 and s 5(2) of Schedule 1.

8 Opinion in *T-Mobile* case C-8/08 [2009] ECR I-4259, [2009] 5 CMLR 1701, para 43.

prosecution. The promotion of competitive behaviour in compliance with the law entails promoting widespread understanding of the law.

20. We submit that the approach to "object" proposed in the Draft FCR Guidelines would, if put into practice, result in the Commission seldom having to assess whether conduct has an anti-competitive "effect". This would not contribute positively to public understanding of the new law. In practice, the Commission's formal decisions (which should include detailed discussion of how and why agreements or conduct are held to be anti-competitive) are likely to serve a crucial educative role, helping businesspeople to understand the role of the law and how it works. It is important to recognize, also, that the legitimacy of an enforcement agency and the esteem in which it is held by the community depend largely on its ability and willingness to explain its decisions to the public.

Proposed approach to "object" is contrary to legislative intent

21. The proposed construction of "object" in the Draft FCR Guidelines effectively creates *per se* offences, since an agreement falling within a category that the Commission considers as "having the object of harming competition" would be unlawful, without the Commission having to prove that the particular agreement has any anti-competitive effect.

22. During the lengthy period of debate leading to development and enactment of the Competition Bill, concerns were regularly expressed that Hong Kong's small traders might be exposed to the risk of liability for "*per se* infringement" of the law, regardless of whether their conduct had any significant effect on competition in Hong Kong. These concerns were addressed not only by the "agreements of lesser significance" provisions in the *Competition Ordinance* ultimately enacted but also by assurances at key points in the development of the law that no *per se* offences would be legislated for. A sample of excerpts from the legislative history of the *Competition Ordinance* serves to illustrate this.

23. In its 2006 report, the Competition Policy Review Committee recommended there should not be any *per se* offences:

> 69. The CPRC further recommends that such conduct should not be an offence *per se*, but rather, the particular conduct must be proven –
> a) to have been carried out with the intent to distort the market; or
> b) to have the effect of distorting normal market operation and lessening competition.[9]

24. The Government's 2008 paper "Detailed Proposals for a Competition Law" expressly proposed there would be "no *per se* infringements":

> Proposal 28: There should be no *per se* infringements and the Commission would be required to conclude that conduct had the purpose or effect of substantially lessening competition before it could determine that an infringement had taken place.[10]

25. The Government's Briefing Paper on introduction of the Competition Bill confirmed that the Bill did not provide for *per se* contraventions:

> The Bill regulates business conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong, including those conduct engaged in places outside Hong Kong. In other words, the conduct itself, or 'per se', would not be a contravention of the Bill, without such object or effect.[11]

26. The expressed intentions of the Government and the expectations of LegCo in relation to the Competition Bill are relevant, first, as guides to statutory construction of the *Competition Ordinance*, providing a clear signal as to the meaning the legislature intended the statute to have.

27. In addition, the Competition Commission has a statutory obligation to "consult the Legislative Council" before issuing guidelines.[12] While the Commission's guidelines are not subsidiary legislation,[13] so are not subject to vetting or negative vetting,[14] it is foreseeable that if draft guidelines diverging in an important respect from what LegCo had intended (e.g. on *per se* liability) are disclosed to LegCo, then LegCo might cause the commencement of the remaining provisions of the *Competition Ordinance* to be further delayed.

Recommended interpretation of "object"

28. Construed according to its natural and ordinary meaning, "object or effect"

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9 Competition Policy Review Committee, *Report on the Review of Hong Kong's Competition Policy* (2006), para 69.

10 Commerce and Economic Development Bureau *Detailed Proposals for a Competition Law – A Public Consultation Paper* (May 2008), p @@.

11 Commerce and Economic Development Bureau "Competition Bill Briefing Paper" CB(1)2301/09-10(03), 28 June 2010, para 5.

12 Competition Ordinance s 35(4); s 59(3); Sch 7, cl 17(4).

13 Competition Ordinance ss 35(8), 59(7), Sch 7, cl 17(8).

14 Interpretation and General Clauses Ordinance (Cap. 1) ss 34, 35.

requires an assessment either of the "effects" of an agreement that has come into operation or of its "object" if the agreement has not yet come into operation and therefore not yet had any effect. That is, "object" is prospective, referring to the effects that are foreseeable or likely to flow from the agreement, if it were to come into operation. Such an object can be assessed by regard to the provisions of the particular agreement, its objectives and context, without constraining analysis by placing the agreement into some "type" or category.

29. We submit that the Draft FCR Guidelines should be amended as follows:

- Whether an agreement has an "object or effect" that is anti-competitive will normally be assessed having regard to the effects that agreement is having in the relevant market or markets.

- Exceptionally, the Competition Commission may take action in respect of an agreement on the basis of it having an anti-competitive "object," where the agreement has not yet entered into force and so has not yet had any effects.

- When the Commission seeks to prove an agreement has an anti-competitive "object", it should do so by reference to the provisions of that particular agreement, the objectives of that particular agreement, and the economic and legal context of which that particular agreement forms a part.

- The "hypotheticals" should be revised to emphasize these principles, to illustrate the kinds of "effects" to which the Commission will have regard, and the approach to anti-competitive "object", in an exceptional case.

Analysis should focus on the content and context of particular agreements -- not "types" of agreements

30. The Commission's attention and analysis should focus on the particular agreement and its objectives and context. This seems to be recognized in paragraph 3.5 of the Draft FCR Guidelines but is not reflected in the subsequent guidance, which appears to emphasize instead the broad "types of agreements" that are presumed "by their very nature" to be so harmful that effects analysis is not required. If this means that the harmfulness of an agreement depends on it

being classified as belonging to a broadly-defined type or *category*, rather than on the content, objectives and context of the *particular* agreement, we submit that this would be a wrong approach.

31. A detailed paper on the "object" test commissioned in 2009 by the Swedish Competition Authority provides, in our view, the best summary of European law in connection with the "object" test:

> The CFI prescribes in *GlaxoSmithKline Services v Commission* a two step test for the assessment of "object". Analysis of the cases where agreements have been found to restrict competition by object shows that the two step test is clearly in line with the case law of the ECJ.
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> First, the text of the agreement must be analyzed. If the text "in itself" reveals that the agreement restricts competition "by its nature", it can be presumed that the agreement harms the welfare of consumers and consequently that the agreement has an anti-competitive object.
>
> Second, it must be assessed whether the presumption based on the text and the nature of the agreement can be rebutted on the basis of the facts of the case. The thoroughness of the second leg of investigation may vary depending on the facts of the individual case. If it is apparent that there are no particular circumstances which suggest that the presumption of reduced competition and harm to consumers may be rebutted, the second step of the analysis will be brief. If the case exhibits special characteristics which suggest that the effect of the clauses in question is not apparent, a more extensive analysis must be carried out.
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> The two steps of the analysis are interrelated. An agreement cannot be classified as "in itself" restrictive of competition, without taking into account the context in which it is to apply. The facts decisive for the second part of the analysis will thus, at least to a certain extent, be taken into account in the first part of the analysis.[15]

32. The two-step analysis of restrictions by "object" has two critical implications for the *Draft FCR Guidelines*:

- First, the text of the impugned agreement (or features of the concerted practice or decision) must be examined closely. It would be a grave error to begin and end with a superficial identification of the agreement as belonging to a category that is commonly regarded as harmful.

- Secondly, it is essential the Commission must examine the circumstances of the particular case and consider with an open mind whether the presumption of anti-competitive harm that arises from the "very nature" of an agreement is rebutted on the facts of the particular case. Again, it would be a grave error to begin and end with a superficial identification of the agreement as

15 Olav Kolstad "Object contra effect in Swedish and European competition law" (Konkurrensverket, 2009) at 55 – 56.

belonging to a category that is commonly regarded as harmful.

33. If the *Draft FCR Guidelines* were to adhere to an EU-influenced approach to the "object or effect" test, it would be essential for the guidelines to be amended, we submit, to properly reflect the two-step test described above, placing due emphasis on the particular terms, objectives and context of the individual agreement and not just its "type" or the category to which it belongs. We submit, however, that the Competition Commission ought not to adopt an approach resembling EU law on "restrictions by object", for the reasons set out earlier: the preferable construction is that "object or effect" has a similar meaning to 'effect or likely effect' and "object" requires a determination as to the effects the particular agreement would have, if it entered into operation.

IV. Clarification of the "Overall Economic Efficiency" Exclusion

34. The "Annex" to the Draft FCR Guidelines sets out guidance on the exclusions and exemptions from the first conduct rule. The clarity of this guidance, and the workability of the proposed interpretations, will be of the utmost importance to undertakings, who will be concerned to understand thoroughly the exclusions and exemptions in order to be able confidently to "self-assess" whether their arrangements are lawful or not.

35. We note that the guidance provided in respect of the exclusion for agreements enhancing "overall economic efficiency" indicates an approach conforming in key respects with the approach of the European Commission and EU courts to article 101(3) of the TFEU.

36. While the guidance provided at Annex paragraphs 2.1 – 2.23 is commendably concise, we submit that this guidance appears to preserve much of the sophistication of the EU approach while providing only a fraction of the explanation that is made available in the various relevant EU instruments. This approach seems likely to have an asymmetric impact on large and small undertakings. Large undertakings and their advisors will be able to take the cues provided by the very brief guidance in the Annex and develop analyses to support self-assessment using principles, arguments and techniques that have been tested in a similar context overseas. Small undertakings are likely to

struggle to understand from the very brief guidance in the Annex whether agreements they are considering are lawful, or not.

37. We submit that small undertakings would be greatly assisted by inclusion in the Annex of more straightforward guidance, such as a checklist, for example, indicating the kinds of questions they should be asking themselves and the kinds of facts that must be taken into account when self-assessing whether the exclusion applies or not. Guidance should also be provided as to how self-assessments should be substantiated and documented, in case of any later enquiry by the Commission.

V. 'Per se' prohibition of maximum resale price maintenance

38. The Commission is right to identify resale price maintenance as being among the ways in which competition potentially can be harmed – though harm is only likely in quite confined circumstances. We are concerned to note, however, that the Draft FCR Guidelines propose that: "[w]here an agreement involves direct or indirect RPM, the Commission takes the view that the arrangement has the object of harming competition."[16] Agreements for resale price maintenance should not be deemed to have an anti-competitive "object," we submit, as such agreements often have economically efficient and legitimate purposes and do not cause harm to the competitive process or to consumers.

39. As the Commission will be aware, the US Supreme Court held in *State Oil Co v Khan*[17] that maximum resale price should be examined pursuant to the rule of reason, rather than subject to *per se* illegality; and in *Leegin Creative Leather Products, Inc v PSKS, Inc*[18] the Supreme Court held that agreements on minimum resale prices should no longer be *per se* illegal but rather tested under the rule of reason.

40. While some other nations retain *per se* rules against minimum resale price maintenance, we submit that Hong Kong would be better served by following the example of those nations – including Brazil, Canada, Mainland China, Egypt, India, Mexico, Peru and South Korea – that apply a rule of reason

16 Draft FCR Guidelines, para 6.64.
17 522 US 3 (1997).
18 551 US 877 (2007).

analysis in cases of minimum resale price maintenance (or vertical minimum price fixing).

VI. Clarification of "Serious Anti-Competitive Conduct"

41. The meaning of the term "serious anti-competitive conduct" is important because it defines the limits of the "warning notice" obligation and the "agreements of lesser significance" exception, under s 82 and s 5(2) of Schedule 1.

42. The disapplication of the warning notice procedure and the "agreements of lesser signficance" exception are significant consequences for undertakings. We do not dispute that undertakings should be fully exposed to penalties in respect of any "serious anti-competitive conduct" in which they engage. In light of the potential impact on an undertaking of being exposed to such liability, however, we submit the boundaries of "serious anti-competitive conduct" should be clearly drawn.

43. We note that the Draft FCR Guidelines state: "vertical arrangements are generally not considered to be Serious Anti-competitive Conduct."[19] This should be regarded by undertakings as helpful guidance. Further and more specific guidance on the meaning and limits of the four forms of conduct referred to in the definition (fixing prices, allocating markets, restricting output or rigging bids) would also be helpful, we submit. Such guidance might take the forms of both inclusions and exclusions of particular kinds of conduct.

44. We concerned by the proposition that "the category of serious anti-competitive conduct is an open one."[20] On the contrary, the definition in s 2(1) is exhaustive. The paragraph is more accurate in referring to the "requirement that Serious Anti-Competitive Conduct must accord with the terms of the definition in section 2(1) of the Ordinance".[21] While the scope of the definition cannot be expanded, except by amending legislation, but the Commission's intended interpretation of it can, of course, be articulated in guidelines.

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19 Draft FCR Guidelines, para 5.5.

20 Draft FCR Guidelines, para 5.7.

21 Ibid.

VII. Guidance on section 7Q "Dominant Carrier" Rule

45. Among other consequential amendments, the *Competition Ordinance* amends the *Telecommunications Ordinance* by inserting a new section 7Q, which provides:

> A licensee in a dominant position in a telecommunications market must not engage in conduct that in the opinion of the Authority is exploitative.[22]

46. Section 7Q defines "dominant position" in terms that closely resemble the criteria set out in the Draft SCR Guidelines, such as market share, power to make pricing and other decisions, barriers to market entry, degree of product differentiation and sales promotion.[23]

47. It is apparent that "dominant position" under s 7Q must necessarily mean something different to "substantial degree of market power" under the second conduct rule. LegCo has employed a different form of words so must have intended a different threshold to apply.

48. We submit it is appropriate and desirable that the Draft SCR Guidelines should deal directly with how the Authority will interpret and give effect to the rule under s 7Q. It is evident that the "exploitative" use of a position of "dominance" is closely related to "abuse" of "a substantial degree of market power." Also, the Draft SCR Guidelines are expressly "jointly issued by the Competition Commission … and the Communications Authority". Accordingly, the Guideline on SCR should be amended to include guidance on interpretation of the new s 7Q prohibition on exploitative conduct by a dominant licensee.

49. In particular, the Draft SCR Guidelines should explain the difference between having "a dominant position in a telecommunications market" (s 7Q) and "a substantial degree of market power in a [telecommunications] market" (second conduct rule). The Guidelines on SCR should also elaborate the meaning of "exploitative conduct" for the purposes of s 7Q and how exploitative conduct differs from conduct that causes the "prevention, restriction or distortion of competition in Hong Kong" under the second conduct rule.

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22 Telecommunications Ordinance s 7Q, inserted by Competition Ordinance Sch 8, cl 13.

23 Draft SCR Guidelines, paragraphs 3.1 – 3.8.

VIII. Conclusion

50. In conclusion, we submit that the Competition Commission and the Communications Authority should proceed to reissue each of the Draft Conduct Rules Guidelines for a further round of consultation, incorporating in revised drafts for comment changes that address the concerns identified above.

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