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Submissions on Draft Guidelines
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Our ref

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Dear Sirs

Submissions regarding the Hong Kong Competition Commission and Communications Authority's Draft Guidelines

Allen & Overy is a leading global law firm spanning 46 offices around the world, including a substantial presence in Hong Kong. We have actively followed and participated in the development of competition law in Hong Kong, and many of our clients have a strong interest.

Allen & Overy sets out below its key submissions on the Hong Kong Competition Commission (**Commission**) draft Guidelines on the manner in which the Commission expects to interpret and give effect to:

(1) the First Conduct Rule (**Draft Guideline on the First Conduct Rule**);

(2) the Second Conduct Rule (**Draft Guideline on the Second Conduct Rule**);

(3) the Merger Rule (**Draft Guideline on the Merger Rule**);

(4) Complaints (**Draft Guideline on Complaints**); and

(5) Investigations (**Draft Guideline on Investigations**),

(together, the **Draft Guidelines**).

Allen & Overy appreciates the opportunity to comment on the Draft Guidelines and welcomes the Commission's willingness to seek comments and suggestions.

1. EXECUTIVE SUMMARY

Allen & Overy wishes to commend the Commission on issuing the Draft Guidelines. The Draft Guidelines are extensive, user friendly and reflect an approach that is overall consistent with the text and spirit of the Competition Ordinance (**Ordinance**) and with international practice. However, we believe there could be further clarifications that would be helpful to provide the Hong Kong business community with the certainty needed to allow for effective planning, a measured approach to reviewing current business arrangements, and implementation of compliance programmes in readiness for the full implementation of the Ordinance in 2015. We have set out our recommendations below.

2. DRAFT GUIDELINE ON THE FIRST CONDUCT RULE

Undertaking

2.1 Paragraph 1.7 of the Draft Guideline on the First Conduct Rule confirms that the First Conduct Rule applies to 'undertakings', which are defined as 'any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity'. Paragraphs 1.7, 2.2 and 2.4 confirm that an undertaking is a broader concept than a company, and may encompass a variety of companies, partnerships, individuals, cooperatives, associations or a group of entities within a 'single economic unit'. Paragraphs 2.8 – 2.11 confirm that entities may form the same economic unit as their agents and distributors.

2.2 Paragraph 2.6 of the Draft Guideline on the First Conduct Rule provides that the general test for whether separate entities form a single economic unit is whether an entity exercises 'decisive influence' over the commercial policy of the other, whether through legal or de facto control. However, both the Ordinance and the Draft Guideline on the First Conduct Rule are silent as to what may constitute this wide notion of 'decisive influence'. This concept, which is widely used for instance in Europe and China, has often been criticised for its lack of clarity. We also note that Section 5 of Schedule 7 to the Ordinance (Mergers) defines 'control' with reference to decisive influence over "*the activities of the undertaking*". It is not clear whether this distinction is of any consequence, or whether the Commission intends to equate the term '*activities*' with '*commercial policy*', and if the factors stipulated in Section 5 of Schedule 7 to the Ordinance should likewise apply to determining whether separate entities form a single economic unit under the First Conduct Rule.

2.3 This creates ambiguity for businesses wishing to rely on the 'single economic unit' concept to exclude their conduct from the First Conduct Rule. We would recommend that the final Guideline on the First Conduct Rule sets out a list of factors an undertaking may take into account in self-assessing whether it exercises 'decisive influence' over another entity. This could include for example factors such as the holding of veto rights on key commercial decisions (such as annual budgets or business plans) or on the appointment of directors or senior management.

2.4 Paragraphs 2.8 to 2.11 of the Draft Guideline on the First Conduct Rule provide that a 'genuine' agent is part of the principal's undertaking. Both therefore are within one economic unit and agreements between such an agent and the principal are outside the First Conduct Rule. In order to distinguish between what is a 'genuine' agent and an undertaking independent of the principal, paragraphs 2.9 and 2.10 set a test of 'commercial risk', that is illustrated by Hypothetical Example 1–the higher the commercial risk taken by the agent, the likelier it will be considered an independent undertaking. As above, since businesses may wish to consider whether they form a 'single economic

unit' with their agents or distributors in a self-assessment of compliance with the First Conduct Rule, it may be helpful to clarify the following:

(i) Is the test of a 'genuine' agent secondary to that of 'decisive influence' provided for in paragraph 2.6? For example, if an entity has 'decisive influence' over its distributor, will such entity still qualify to form a 'single economic unit' with the distributor regardless of the risks the distributor has to take?

(ii) In addition to degree of commercial risk assumed, are there any other relevant factors to take into consideration when determining whether an agent or distributor is an independent undertaking?

(iii) In relation to 'degree of commercial risk assumed', are there certain factors that would be conclusive of an independent undertaking (e.g. whether a retailer has to actually purchase the product first)?

(iv) Are there any other examples to illustrate how an agent or distributor may be deemed to be part of a single economic unit as its principal?

Object or Effect of Harming Competition

2.5 Paragraph 3.4 of the Draft Guideline on the First Conduct Rule stipulates that agreements that, by their very nature, are so harmful to the proper functioning of normal competition in the market that there is no need to examine their effects have the 'object' of harming competition.

2.6 Paragraph 3.8 of the Draft Guideline on the First Conduct Rule indicates that in accordance with Section 7(1) of the Ordinance, an agreement with more than one object will be in breach of the First Conduct Rule if any one of its objects is to harm competition. The same applies with regards to one of the effects of an agreement is to harm competition. In our view, the final Guideline on the First Conduct Rule could provide guidance on whether:

(i) it would be possible, and sufficient to remedy a breach of the First Conduct Rule, if the aspects of the agreement that create an 'object of harming competition' or the 'effect of harming competition' can be severed, allowing the remainder of the agreement to operate;

(ii) how the test of whether an aspect of the agreement may have an object of restricting competition (and which may be severable) is linked to the discussions on 'ancillary restrictions' in paragraphs 3.19-3.23; and

(iii) further guidance on how severance might function in practice.

2.7 Paragraph 3.13 of the Draft Guideline on the First Conduct Rule provides that, as part of the analysis of anti-competitive effects on competition within a relevant market, a relevant factor to take into consideration would be the extent to which the parties individually or jointly have or obtain '*some degree of market power*', and the extent to which the agreement contributes to the creation, maintenance, strengthening or exploitation of that market power. Since the concept of market power is a matter of degree, and the degree of market power for concerns under the First Conduct Rule is less than the level required for the Second Conduct Rule, it would be helpful for the final Guideline on the First Conduct Rule to clarify if there are any further differences in the concept of '*market power*' between the First Conduct Rule and the Second Conduct Rule.

2.8 In the section considering the effect of harming competition under the First Conduct Rule, we think it would be appropriate for the Commission to acknowledge that small effects will not give rise to a contravention. Indeed, we think it would be in line with international best practice to state that a substantial or significant lessening of competition is required.

2.9 In relation to paragraph 3.22 of the Draft Guideline on the First Conduct Rule, we recommend that the Commission clarifies the test for whether an ancillary restriction is objectively 'necessary' by amending 'difficult or impossible to implement' to 'commercially difficult' (as impossibility is not an alternative test to difficulty but rather an extreme level of difficulty) and by providing more examples or additional factors which may be taken into consideration when determining whether an ancillary restriction qualifies as objectively necessary or proportionate.

Vertical Agreements

2.10 Paragraphs 6.8 – 6.9 of the Draft Guideline on the First Conduct Rule confirm that with the exception of resale price maintenance, vertical arrangements, such as exclusive distribution or customer allocation amongst distributors, generally will not be considered to amount to 'serious' anti-competitive conduct. However, paragraph 6.8 of the Draft Guideline on the First Conduct Rule indicates that competition concerns could arise where there is a 'some degree of market power'. This notion is not defined and absent a safe harbour threshold, businesses with 'some degree of market power' in Hong Kong will need to self-assess distribution arrangements on a case-by-case basis to determine whether competition risks arise. As above, we recommend the final Guideline on the First Conduct Rule offers some guidance in this respect.

2.11 We consider that the Commission should make it a priority in the context of drafting the final Guideline on the First Conduct Rule and preparing for the full implementation of the Ordinance to seek to understand what an appropriate safe-harbor for ordinary vertical arrangements might be in the context of the Hong Kong business environment. This would help create business certainty and would reduce compliance costs. Based on international experience, we consider that vertical arrangements will very rarely raise any issues where they impact less than around 30-40% of relevant supply or acquisition in the markets concerned.

Price Fixing

2.12 Paragraph 6.14 of the Draft Guideline on the First Conduct Rule provides a helpful explanation of how activities of a trade association or professional body may be found to have the object of harming competition by price fixing. In the example given, members of an association posting their prices at the association's website, or the association issuing price recommendations or fee scales would have the 'object of harming competition' if such actions or recommendations are *intended* to coordinate member pricing in the market. We would recommend that the final Guideline on the First Conduct Rules clarify whether intent to coordinate pricing is the trigger point upon which the Commission may feel obliged to conduct an investigation of price fixing activities in these circumstances. If it is the case, is a similar analysis relevant to exchanges of information amongst competitors?

Exchange of Information

2.13 In our view, the Draft Guideline on the First Conduct Rule could provide businesses with further guidance for determining what types of information exchange could be treated as price-fixing, or otherwise anti-competitive, and therefore captured by the First Conduct Rule. We recommend the final Guideline on the First Conduct Rule provides a list of types of information / factors the Commission will consider as having the object or effect of harming competition.

2.14 Paragraphs 6.9, 6.12 and 6.35 – 6.37 of the Draft Guideline on the First Conduct Rule indicate that the exchange of information on future price and quantity intentions will be assessed as a form of price fixing with the object of harming competition, meaning that the Commission will not need to consider the anti-competitive effect and can institute proceedings without a warning.

2.15 Paragraph 6.9 of the Draft Guideline on the First Conduct Rule provides that the "exchange of information other than future price and quantity information" may infringe the First Conduct Rule

where it has an anti-competitive object or effect. It may be helpful for the final Guideline on the First Conduct Rule to provide guidance as to the types of information and what use of this information will be prohibited.

2.16 The Draft Guideline on the First Conduct Rule appears to assume that mere unsolicited receipt of future price and quantity information from a competitor will result in an infringement, particularly if there is subsequent parallel conduct (e.g. see Hypothetical Example 3). By itself this result is too harsh, as a completely innocent action could result in liability. The final Guideline on the First Conduct Rule should explain how a contravention can be avoided by a person who inadvertently obtains sensitive information from a competitor.

2.17 Paragraphs 6.36 – 6.37 of the Draft Guideline on the First Conduct Rule confirm that the exchange of information on competitively sensitive information (such as future price intentions) through third parties including customers and suppliers may be considered a form of price fixing with the object of harming competition. However, in absence of clear guidance on this subject, the exchange of competitively sensitive information through third parties such as distributors, customers and suppliers will be of concern to businesses especially when negotiating future pricing and volumes. There is a potential during this process for a business to become aware of its competitors' pricing strategies and volume capabilities. In these circumstances, we would recommend that the final Guideline on the First Conduct Rule provide guidance on this issue, for example by way of a hypothetical or by setting out the elements required for a breach when third parties are involved, to provide businesses with comfort that their common dealings with distributors and customers do not contravene the Ordinance.

Resale price maintenance

2.18 Section 6 of the Ordinance prohibits agreements and concerted practices with the object or effect of preventing, restricting or distorting competition in Hong Kong.

2.19 We note the following paragraphs of the Draft Guideline on the First Conduct Rule suggest that resale price maintenance will be considered automatically as having the object of harming competition:

- Paragraph 6.64 states "*Where an agreement involves direct or indirect RPM, the Commission takes the view that the arrangement has the object of harming competition.*"
- Paragraph 5.6 states "*The Commission considers resale price maintenance as having the object of harming competition. The Commission notes that resale price maintenance is conduct falling within a literal reading of the definition of Serious Anti-competitive Conduct.*"
- Paragraph 6.10 states "*Agreements between competitors which fix, maintain, increase or otherwise control prices (generally termed price fixing) are examples of agreements with the object of harming competition.*"
- Paragraphs 5.6 and 6.64 provide that the Commission considers resale price maintenance has the object of harming competition, and is conduct that falls within the literal meaning of a 'price fixing' infringement, constituting serious anti-competitive conduct as defined in the Ordinance.

2.20 However, paragraph 6.9 of the Draft Guideline on the First Conduct Rule lists resale price maintenance (and indeed cartel type conduct) under the "examples of conduct which ***typically*** have the object of harming competition". Furthermore, Paragraph 3.5 of the Draft Guideline on the First

Conduct Rule indicates that a case-by-case assessment is sometimes required to determine whether any arrangement has the object of harming competition. Paragraph 3.5 provides as follows:

> *3.5 In order to determine whether an agreement entails such a sufficient degree of harm to competition that it may be considered as having the object of harming competition, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. In this respect, it is necessary to take into consideration the nature of the products affected, as well as the real conditions of the functioning and structure of the market in question.*

2.21 We recommend the Commission seeks to clarify in the final Guideline on the First Conduct Rule whether resale price maintenance will be considered automatically as having the object of harming competition or alternatively whether a case-by-case assessment is necessary as paragraph 3.5 suggests. In addition, it may be appropriate to amend paragraph 6.10 to state that "Agreements between competitors which fix, maintain, increase or otherwise control prices (generally termed price fixing) are examples of agreements ~~with~~ which typically have the object of harming competition."

Exclusions and Exemptions from the First Conduct Rule

2.22 Paragraphs 2.1-2.23 of the Annex to the Draft Guideline on the First Conduct Rule are helpful in explaining how agreements which produce overall economic efficiencies outweighing the harm to competition may nonetheless be exempt from the First Conduct Rule. We suggest that it would be helpful for the Commission to provide further guidance in this area, with hypothetical scenarios or otherwise, for example with regards to how businesses may assess whether the efficiencies are 'sufficient to compensate for the harm to competition', particularly when the efficiency is qualitative rather than quantitative.

2.23 Section 2 of Schedule 1 to the Ordinance provides that agreements or conduct are excluded from the First Conduct Rule and Second Conduct Rule to the extent that the relevant agreement or conduct is made or engaged in for the purpose of complying with a legal requirement, and paragraphs 3.1-3.3 of the Annex to the Draft Guideline on the First Conduct Rule clarify that the legal requirement must 'eliminate any margin of autonomy' and that the undertaking can not have 'scope to exercise its independent judgment'. Given the desire for business to remain compliant with Hong Kong law, and to avoid any potential conflict with any Hong Kong regulatory authorities, it would be helpful if the final Guideline on the First Conduct Rule could illustrate the application of the exemption with examples of how a legal requirement may 'eliminate any margin of autonomy' and what would constitute 'scope to exercise independent judgment'.

3. DRAFT GUIDELINE ON THE SECOND CONDUCT RULE

The Second Conduct Rule

3.1 Section 21(1) of the Ordinance prohibits an undertaking that has a 'substantial degree of market power' in a market from abusing that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

3.2 Paragraph 1.4 of the Draft Guideline on the Second Conduct Rule provides examples of market power as the ability for an undertaking to profitably raises prices above, or reduce quality or variety of products below, 'competitive levels'. It may be helpful for the final Guideline on the Second Conduct Rule to provide guidance as to the what 'competitive levels' would mean, how it could be measured before and after the alleged market abuse, and illustrate the concept with hypothetical examples.

3.3 In our view, it would be appropriate to amend paragraph 1.5 of the Draft Guideline on the Second Conduct Rule to remove the circularity in its second sentence so that it reads *"The Second Conduct Rule only applies where an undertaking with a substantial degree of market power in a market abuses that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. ~~Abusive conduct is therefore conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong.~~ Some typical examples of abusive conduct are discussed in the Guideline. The category of abusive conduct is however, an open one."*

3.4 Paragraph 1.6 of the Draft Guideline on the Second Conduct Rule states the Second Conduct Rule is not concerned with "preventing firms from gaining market power or being able to exercise it to increase their profits *for a time*." We recommend the final Guideline on the Second Conduct Rule includes a definition of 'for a time'.

3.5 Paragraph 1.8 of the Draft Guideline on the Second Conduct Rule suggests that undertakings with a substantial degree of market power have a 'special responsibility' not to engage in conduct which harms competition. In our view, this concept (which we understand is drawn from European competition law) is not appropriate for the Hong Kong regime and we recommend that it be deleted.

Defining the Relevant Market

3.6 Paragraph 2.7 of the Draft Guideline on the Second Conduct Rule states that market definition has no precedential value and a defined relevant market in one case will not bind the Commission in another. Paragraph 2.7 also states that the Commission will have regard to previous cases when defining the relevant market. We recommend that the Commission consider amending the final Guideline on the Second Conduct Rule to clarify that a defined market in one case will be binding in another case if all facts are the same.

3.7 Paragraph 2.22 of the Draft Guideline on the Second Conduct Rule indicates that where suppliers are able to differentiate between groups of buyers in terms of price, it may be appropriate to assess these groups of buyers as separate markets. Paragraph 22 notes that undertakings might be able to discriminate between buyers because some buyers face such high switching costs that they are "locked in" to purchasing a particular product. We recommend that the final Guideline on the Second Conduct Rule clarifies what "locked in" means. In our view, the key question is whether there is competition and choice for customers at the time of purchase.

Assessment of Substantial Market Power

3.8 Paragraph 3.2 of the Draft Guideline on the Second Conduct Rule defines 'substantial market power' as "the ability profitably to charge prices above competitive levels, or to restrict output or quality below competitive levels, for a sustained period of time."

3.9 Furthermore, paragraph 3.2 of the Draft Guideline on the Second Conduct Rule suggests that "normally a period of two years can be considered to amount to a sustained period." In our view, a period of two years seems arbitrary. We recommend the Commission consider including some explanation why a temporary acquisition of market power may not be considered substantial in the final Guideline on the Second Conduct Rule.

3.10 Paragraphs 3.7 and 3.8 of the Draft Guideline on the Second Conduct Rule confirm the Commission's view that the assessment of market power should not rely on any single factor and it will take into account combined market shares, market concentration, barriers to entry or expansion, the parties' competitive advantages, and the existence of any countervailing power on the part of buyers or suppliers.

3.11 While the Commission's approach in paragraphs 3.7 and 3.8 of the Draft Guideline on the Second Conduct Rule does create a degree of uncertainty, we also understand the reluctance to set a somewhat arbitrary market share threshold. In this regard, we note the International Competition Network's Recommended Practices on Dominance / Substantial Market Power suggest that while market share thresholds may be beneficial for business certainty, there is a risk of over-emphasizing market shares. In our view, a negative side for business with a more formulaic approach is that a market share threshold can, over time, begin to create false presumptions of market power without due consideration of industry realities and dynamics.

3.12 It is also worthy to note that the concept of 'substantial market power' is drawn from the Australian competition law, where no market share thresholds are used. Business certainty in this regard has been established over time, having regard to regulator and court decisions. Having said this, we also note it is rare for substantial market power to exist in Australia with a market share of less than 30%.

3.13 It is contemplated under Section 21(3)(d) of the Ordinance that the Commission will specify in the Draft Substantive Guideline "other relevant matters [*in addition to market share, power to make pricing and other decisions, barriers to entry as stated in section 21(3)(a)-(c) of the Ordinance – our own emphasis*] which may be taken into account in determining whether an undertaking has a substantial degree of market power in a market". Paragraphs 3.1-3.8 of the Draft Guideline on the Second Conduct Rule are dedicated to elucidating the market as to the Commission's interpretation of those stated matters and they appear to have fallen short of the objective or requirement under Section 21(3)(d) of the Ordinance.

Abuse of Substantial Market Power

3.14 Paragraph 4.11 of the Draft Guideline on the Second Conduct Rule provides that conduct might have the actual or likely effect of harming competition where it results in or is likely to result in, among other things, higher prices. We recommend that the final Guideline on the Second Conduct Rule provides guidance on whether exploitative conduct such as excessive pricing may be captured by the Second Conduct Rule as conduct that may result in higher prices. In this regard, we note that excessive pricing is prohibited in the EU, Singapore and China. For example, Article 17(i) of China's Anti-monopoly Law prohibits undertakings with a dominant market position from abusing that position to sell commodities at unfairly high prices. However, in Australia (which has a market power prohibition similar to Hong Kong's) it is clear that merely charging a high, or discriminatory, price cannot of itself contravene the law.

3.15 In our view, the final Guideline on the Second Conduct Rule should state clearly that pricing and production decisions of undertakings (including alleged high prices and policies of price discrimination) will not contravene the Second Conduct Rule unless there is the object or effect of harming the *process* of competition. This means that mere allegations of so-called exploitative conduct will not be investigated by the Commission.

Exclusions and Exemptions from the Second Conduct Rule

3.16 We note that economic efficiencies are relevant in determining an exemption under the First Conduct Rule but that this concept is absent as an exclusion or exemption from the Second Conduct Rule. Presumably, if overall economic efficiencies can justify agreements between undertakings which restrict competition, a similar concept should apply to unilateral conduct regardless of whether an undertaking has market power, since the restriction to competition is outweighed by the greater efficiency. As such, it may be helpful for the final Guideline to the Second Conduct Rule to clarify how economic efficiencies would factor into a determination whether an undertaking has breached the Second Conduct Rule.

4. DRAFT GUIDELINE ON THE MERGER RULE

4.1 The Draft Guideline on the Merger Rule provides an opportunity to clarify how the Commission and the Communications Authority would cooperate, exchange information, and decide in case of a disagreement in the context of a merger. We understand, based on public comments made by members of the Commission, that a memorandum of understanding between the two authorities is currently been drafted. It may be helpful to refer to this memorandum of understanding in the Guideline on the Merger Rule, so as ensure full transparency on the way the Commission will assess merger cases.

Scope of the Merger Rule

4.2 Paragraph 2.12 of the Draft Guideline on the Merger Rule could be further clarified with respect to what level of sales from a parent company to a joint venture will be considered sufficient to limit the joint venture's autonomy.

4.3 We suggest that the Commission, in paragraph 2.16 of the Draft Guideline on the Merger Rule, adds to the list of transactions unlikely to raise competition concerns operations by which licence carriers acquire security or control in businesses that are unrelated to the licence carriers' telecom activities. Although the Commission helpfully considers that an acquisition of a licence carrier by a bank, an insurance company or an exchange participant is unlikely to give rise to competition concerns, we consider that it would be helpful to clarify what would be the effect of such a presumption. The cases in which this presumption would be rebutted could also be outlined in the final Guideline on the Merger Rule. For instance, the Commission may be concerned with an acquisition by an undertaking which already controls another licence carrier, despite the fact that this undertaking meets the criteria listed in paragraph 2.16.

Competition Assessment

4.4 We consider that the post-merger HHI in paragraph 3.16 of Draft Guideline on the Merger Rule indicating an un-concentrated market may be slightly too low. In comparison, the JFTC (Japan) applies a 1,500 threshold, while the KFTC (Korea) applies a 1,200 threshold for markets considered un-concentrated. Considering the relatively concentrated nature of the Hong Kong economy, we suggest that the current 1,000 threshold is raised to reflect the East Asian practice and the local market conditions. Similarly, the second threshold in paragraph 3.17 of Draft Guideline on the Merger Rules could be raised from 1,800 to 2,500 to reflect the expansion of the "less-concentrated" category of markets.

Procedures and Enforcement

4.5 It would be helpful if paragraph 5.15 of Draft Guideline on the Merger Rule included more detail on the process and the principles applied when considering what information contained in the commitments should be considered confidential and omitted from the register of commitments.

4.6 We suggest that the Commission could also clarify the rules for the appointment and the general functioning of corporate monitors (monitoring trustees). Orders made by the Tribunal under Schedule 4 to the Ordinance refer to the appointment of monitoring trustees, and the parties to a merger would benefit from the certainty attached to a clear appointment process at the Commission level, in particular because the parties will often wish to avoid a merger being brought before the Tribunal. Such a clarification would be particularly welcome as there is no internationally accepted practice of monitor appointment. The people and companies who are qualified to act as monitors vary from one jurisdiction to another. Monitors are sometimes proposed by the parties (such as in the EU), while in other cases the parties propose a list of monitors, leaving the ultimate choice to the authority (such as in the US and PRC).

4.7 It would be helpful for paragraph 5.23 of Draft Guideline on the Merger Rule to further clarify what elements may be taken into account when the Commission considers rescinding a decision, and in particular what weight will be given to external factors and factors that are outside of the control of the parties.

4.8 Paragraph 5.35 of Draft Guideline on the Merger Rule provides that a party submitting information to the Commission may request confidential treatment of that information and that such request should be accompanied by reasons justifying the claim to confidentiality. We suggest that it would be helpful for the Commission to clarify the process for determining confidentiality where the party and the Commission disagree.

5. DRAFT GUIDELINE ON COMPLAINTS

5.1 Section 37(1) of the Ordinance provides that any person (a **Complainant**) who suspects that a party is in contravention of, or about to contravene, a Competition Rule may contact the Commission to express their concerns and to make a complaint, and section 37 (2) of the Ordinance provides the Commission with the discretion to decide which complaints may warrant investigation. As noted in our Submission regarding the Hong Kong Competition Commission and Communication Authority's Draft Guidelines on Procedural Rules dated 10 November 2014 (**Submission on Procedural Rules**), the practical effect of this discretion is that the Commission has very significant power over enforcement of the Ordinance. As such, we would recommend the following additional clarifications in order to provide the business community with more guidance on the complaint procedure.

5.2 Paragraphs 3.3-3.5 of the Draft Guideline on Complaints provide that the Commission may, upon specific occasions, disclose the otherwise confidential identity of a Complainant to a party without the Complainant's consent. We suggest that the Commission should inform the Complainant of such disclosure in writing, and preferably in advance of the disclosure, and that this should be reflected in the final Guideline on Complaints.

5.3 Paragraph 5.4 of the Draft Guideline on Complaints provides that the Commission will likely inform the Complainant of the outcome of the matter if the Commission's consideration of the matter is completed. It would be helpful if the Draft Guideline on Complaints could add that such notification from the Commission will be in writing.

5.4 Section 55 of the Ordinance provides that it may be a criminal offence to knowingly provide false or misleading information to the Commission. We suggest that the Commission should mention that complaints must not contain information known to be false or misleading, and the potential consequences of an offence under section 55 of the Ordinance as a further caution in the final Guideline on Complaints.

6. DRAFT GUIDELINE ON INVESTIGATIONS

6.1 Sections 37 and 39 of the Ordinance grant the Commission discretion to conduct investigations into a matter relating to potential contraventions of the Ordinance. Under section 39(2) of the Ordinance, the Commission may only 'conduct an investigation' where it has reasonable cause to suspect that a contravention has taken place, is taking place, or is about to take place. As noted in our Submission on Procedural Rules, the Ordinance grants the Commission strong powers and we suggest that it would be of assistance to the business community if the Commission could provide further clarification on the following points.

6.2 Paragraph 3.4(d) of the Draft Guideline on Investigations provides that one factor to consider whether a matter warrants further investigation is 'the likelihood of a successful outcome resulting from an investigation under Part 3 of the Ordinance'. It would be helpful for the Draft Guideline on

Investigations to include a definition of what is meant by a 'successful outcome'. For example, does it refer to discovery and rectification of anti-competitive behaviour, or a finding that alleged behaviour does not contravene the Ordinance, or both (i.e. that the Commission has simply reached a finding)?

6.3 Paragraph 5.3 of the Draft Guideline on Investigations provides that the Commission will proceed to the Investigation Phase only when it is satisfied that it has reasonable cause to suspect a contravention of a Competition Rule and that the matter warrants further investigation. We suggest that the Draft Guideline on Investigations clarify whether the factors raised in paragraph 3.4(d) of the Draft Guideline on Investigations also apply at this stage of the Commission's considerations.

6.4 Paragraph 5.9 of the Draft Guideline on Investigations lists out certain matters to be included under a written request for documents and information (a **section 41 notice**). Notices for document production issued by the Securities & Futures Commission specify whether the recipient of a notice is the target of an investigation and we suggest that a section 41 notice should likewise specify whether the recipient is the target of an investigation by the Commission.

6.5 Paragraph 6.9 of the Draft Guideline on Investigations provides that the Commission, if required to produce confidential information in accordance with any court order or law, will in most cases endeavour to notify and consult the person who provided confidential information prior to making such a disclosure. We suggest that the Commission clarifies whether it will likewise endeavour to notify and consult a person who provided confidential information prior to disclosure under situations other than as required by any court order or law (i.e. under the other situations set out in section 126(1) of the Ordinance), and if so, which situations it will endeavour to do so.

6.6 Paragraph 7.6 of the Draft Guideline on Investigations provides that the Commission will inform a Complainant if the Commission proposes to take no further action in relation to a matter. We suggest that the last sentence be amended so that it reads "*When the Commission's decision to take no further action is influenced by parties changing their conduct in response to the Commission's enquiries, the Commission will inform the Complainant of this outcome in writing*".

Yours faithfully

Allen & Overy

Allen & Overy