Asia Pacific Carriers' Coalition

(incorporated in the Republic of Singapore)

Submission in response to Draft Guidelines issued by Hong Kong Competition Commission and Office of the Communications Authority

18 December 2014

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STATEMENT OF INTEREST

This submission is provided by the Asia Pacific Carriers' Coalition ("**APCC**") in response to the 9 October 2014 joint invitation by the Hong Kong Competition Commission ("**Commission**") and the Communications Authority ("**CA**") to comment on the following documents in draft form (collectively, the "**Draft Guidelines**"):

- "Draft Guideline on The First Conduct Rule - 2014" ("**Guideline on FCR**");
- "Draft Guideline on The Second Conduct Rule - 2014" ("**Guideline on SCR**");
- "Draft Guideline on The Merger Rule - 2014" ("**Guideline on Merger Rule**").

The APCC is an industry association of global and regional carriers operating in Asia-Pacific, formed to work with Governments, National Regulatory Authorities and Consumers to promote open market policies and best-practice regulatory frameworks throughout the Asia-Pacific region, that will support competition and encourage new and efficient investment in telecommunications markets.

APCC submissions reflect the consensus of opinion among at least a majority of its members. Therefore none of the views expressed in this submission should be attributed to any individual member of the APCC.

I. SUMMARY OF ISSUES

In summary, the APCC wishes to raise for consideration by the Commission and the CA the following issues:

- Guidelines should be "ordinarily binding" – although the APCC recognizes that guidelines issued by the Commission and the CA cannot legally bind the Competition Tribunal and other courts, the APCC submits that the *Draft Guidelines* would be perceived as speaking with greater authority and would give telecommunications licensees and other undertakings greater confidence if they state on their face that the Commission and CA regard them as "ordinarily binding" and will depart from them only where exceptional circumstances require that.

- The APCC submits it is highly desirable for the *Guideline on SCR* to include guidance on interpretation of the new rule prohibiting exploitative conduct by "*a licensee in a dominant position in a telecommunications market*"[1] and the relationship between that rule and the second conduct rule, which prohibits anti-competitive conduct by "*an undertaking that has a substantial degree of market power in a market*." (This is not a matter merely of inter-agency procedure, so should not be left to the MOU to be agreed between the Commission and the CA.)

- While useful guidance on a range of important matters is provided in the *Draft Guidelines*, the APCC submits that there is a subset of issues in respect of which more specific guidance would be of value to telecommunications licensees and other undertakings alike (e.g. stating the kinds of factors that would make a finding of liability more likely or less likely).

- Although the APCC recognizes that certain kinds of agreements between rival undertakings have been recognized by the OECD and other bodies as "hardcore conduct", the APCC is concerned that the approach in the *Draft Guidelines* of classifying certain kinds of agreements as having an anti-competitive "object", in which case "there is no need to examine their effects"[2] may not be conducive to promoting understanding of the law and may in fact result in inefficient over-deterrence.

- The approach intended to be taken to assessment of commitments offered in the context of mergers and the weight that will be attached to forms of economic efficiencies that are not readily quantifiable.

The APCC respectfully requests these submissions be taken into account by the Commission and CA in formulating a further set of *Draft Guidelines*, for public comment.

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

2 Guideline on FCR, para 3.4.

The APCC would be pleased to expand on any comment set out in this filing, if required by the Commission or CA.

II. GUIDELINES "ORDINARILY BINDING"

Competition agencies' guidelines have value to the business community and the public only to the extent that businesspeople and members of the public have confidence that the agency will in fact follow its own announced guidelines when practical issues arise.

The APCC recognizes, first, that the Competition Tribunal and other courts are not bound by the Commission's interpretation of the Ordinance and, secondly, that the guidelines can and should be updated over time as experience and knowledge develop. Within these limits, however, business and public confidence in the guidelines can be increased by the Commission stating expressly its commitment to follow its own guidelines and treat them as being ordinarily binding on itself.

The Commission should commit itself to such a position and state that it will depart from its guidelines only where exceptional circumstances arise that require it to do so, the APCC submits.

III. GUIDANCE ON "DOMINANT LICENSEE" CONDUCT RULE

The *Competition Ordinance* amends the *Telecommunications Ordinance* by inserting in the latter a new section 7Q providing that "*[a] licensee in a dominant position in a telecommunications market must not engage in conduct that in the opinion of the Authority is exploitative.*"[3]

Section 7Q goes on to define "dominant position" by reference to criteria that closely resemble those set out in the draft *Guideline on SCR* at paragraphs 3.1 – 3.8. It appears to the APCC, however, that "dominant position" must necessarily mean something different to "substantial degree of market power": the Legislative Council clearly has set a different threshold, by employing different words.

Since the "exploitative" use of "dominance" clearly has a very close relationship to the "abuse" of "a substantial degree of market power," and since the *Draft SCR Guideline* expressly "is jointly issued by the Competition Commission … and the Communications Authority", the APCC submits that it is necessary and appropriate that the *Draft SCR Guideline* should deal directly with how the Authority will interpret and give effect to the rule under s 7Q.

The APCC submits it is highly desirable for the *Guideline on SCR* to include guidance on interpretation of the new rule under s 7Q prohibiting exploitative conduct by a dominant licensee. Such guidance should clarify:

- The nature and degree of the difference between having "a dominant

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

position in a telecommunications market" and "a substantial degree of market power in a market"; and

- What the Commission takes to be the meaning of "exploitative conduct" for the purposes of s 7Q and how exploitative conduct differs from "conduct that prevent[s], restrict[s] or distort[s] competition in Hong Kong" under the second conduct rule.

These questions are not matters merely of inter-agency procedure, so should not be left to the MOU to be agreed between the Commission and the CA under *Competition Ordinance* s 161.

IV. OPPORTUNITIES FOR MORE SPECIFIC GUIDANCE

The APCC considers that the *Draft Guidelines* in many instances provide guidance that is useful and clearly expressed. On certain points, however, the APCC would welcome further clarification.

The draft *Guideline on SCR* states that in industries characterized by rapid technological change "market boundaries may shift rapidly over time and this can pose particular challenges when defining the relevant market."[4] How does the Commission propose to respond to these challenges? In particular, how will the Commission's intended approach to market definition differ in markets characterized by rapid innovation?

The draft *Guideline on SCR* states that "[t]he Commission will not generally consider supply-side substitutability or potential competition when defining the relevant market. Rather, they will be considered at a later stage in the analysis".[5] Does the Commission mean by "a later stage" that supply-side substitutability and potential competition will be taken into account only in the assessment of market power?

The draft *Guideline on SCR* accepts that regulation and intellectual property rights may limit market entry and expansion.[6] In light of the significance of these categories of barriers, the APCC submits that the draft *Guideline on SCR* should provide specific guidance as to the manner in which such barriers will be taken into account when assessing market power.

The draft *Guideline on SCR* states that "[i]n essence, buyers will have countervailing buyer power if they have a choice between alternative suppliers."[7] The APCC submits that this statement requires further elaboration, since buyers will often have a choice between suppliers but completely lack countervailing power against suppliers: it is the impact or potential impact on suppliers of buyers' choices that is

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4 Guideline on SCR, para 2.26.

5 Guideline on SCR, para 2.31.

6 Guideline on SCR, paras 3.21-22.

7 Guideline on SCR, para 3.30.

material. Concentration among buyers may be indicative but is not determinative and only one of the relevant factors.

In its discussion of predatory pricing, the draft *Guideline on SCR* should also refer, the APCC submits, to the need to have regard to economic conditions affecting pricing decisions in the relevant market or markets. It is not only the question of "whether the undertaking is pricing below an appropriate measure of cost"[8] that is relevant, but also why the supplier may have chosen or been forced by adverse market conditions to do so.[9]

V. AGREEMENTS DEEMED HARMFUL BY "OBJECT"

The APCC notes that the draft *Guidelines on FCR* propose that various forms of agreements would be considered "as having the object of harming competition." Different paragraphs in chapter 3 of the draft *Guideline on FCR* appear to be mutually inconsistent, however, and the APCC requests clarification:

- Paragraph 3.4 indicates that "certain types of agreement" are anti-competitive "by their very nature" so that "there is no need to examine their effects." Similarly, paragraph 3.7 refers to "the category of agreements which have the object of harming competition".

- Conversely, paragraph 3.5 states that "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 order to determine whether an agreement has an anti-competitive object.

It therefore is unclear to the APCC whether the Commission proposes that it will regard a particular agreement as having an anti-competitive object: (i) if it belongs to a type of agreement that is regarded as anti-competitive by its nature; or (ii) only where an anti-competitive object becomes apparent upon examination of that particular agreement and the particular circumstances in which it operates.

The APCC submits that the latter approach is greatly to be preferred. Agreements are too diverse, and market conditions are too variable, for any generalized rule based on types or categories of agreements to consistently deliver economically sound outcomes.

Lastly, the APCC observes that minimum resale price maintenance (RPM) is proposed to be regarded as having the object of harming competition.[10] Harm is only likely to result from RPM in limited circumstance. Often, RPM is efficient and causes no harm to consumers. Accordingly, agreements for resale price maintenance should not be

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8 Guideline on SCR, para 5.5.

9 See, *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5.

10 Guideline on FCR, paras 5.6, 6.64.

deemed to have an anti-competitive "object," the APCC submits. Rather, Hong Kong should follow Brazil, Canada, Mainland China, Egypt, India, Mexico, Peru and South Korea[11] by applying a 'rule of reason' analysis to minimum resale price maintenance.

VI. GUIDANCE ON MERGERS

The merger rule under *Competition Ordinance* schedule 7, section 4 applies to mergers involving an entity that (directly or indirectly) controls a carrier licence.

The APCC welcomes the delineation of "safe harbours" in the draft *Guideline on the Merger Rule*.[12] In order for the safe harbours to be meaningful, however, they should be more than merely "indicative in nature", as the draft states. The draft guideline "does not categorically rule out intervention" in mergers that fall below the safe harbour thresholds.[13] Subsequently, the draft guideline states that "meeting one or both of the safe harbour thresholds does not necessarily mean that the proposed transaction does not give rise to competition concerns. The Commission may still commence an investigation in appropriate circumstances."[14] The *Guideline on the Merger Rule* should rule out intervention in the case of such mergers, if "safe harbours" are to be "safe", the APCC submits.

Following discussion of the "net economic benefit" analysis, the draft *Guideline on the Merger Rule* notes that some kinds of efficiencies "are potentially substantial but are generally less verifiable" or "are less likely to be merger-specific" or "may not be as identifiable". While quantifiable efficiencies are more easily factored into a "net economic benefit" analysis, the APCC submits that efficiencies that are less verifiable, less likely to be merger-specific, or less readily quantified are nevertheless "economic efficiencies" that are relevant under the test required by the statutory exclusion in s 8 of Schedule 7. The draft *Guideline on the Merger Rule* should therefore explain the approach that will be adopted in taking them into account.

The APCC welcomes the Commission's commitment in the draft *Guideline on the Merger Rule* "to provide informal advice on a confidential basis" to merging parties and their advisors.[15] Such informal guidance will particularly have value in the early years of the regime, the APCC considers, before decisions are made which demonstrate the Commission's approach to implementing the merger provisions. The APCC submits that it would be desirable for the *Draft Guidelines* generally to indicate the Commission's willingness to provide informal advice, including on investigations, the first conduct rule, and the second conduct rule.

In relation to commitments under s 60 of the Competition Ordinance, the draft *Guideline on the Merger Rule* states that "[i]n general, structural remedies will be

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11 Elhauge E and Geradin D *Global Competition Law and Economics* (2nd edn, 2011) p 773.

12 Guideline on the Merger Rule, paras 3.12 – 3.19.

13 Guideline on the Merger Rule, para 3.19.

14 Guideline on the Merger Rule, para 5.6.

15 Guideline on the Merger Rule, para 5.4.

preferred by the Commission" while "[b]ehavioural remedies, on the other hand, are less likely to address competition concerns".[16] The APCC submits that the draft Guideline on the Merger Rule should provide specific guidance as to the approach that the Commission intends to adopt to the evaluation of remedies offered in the context of a merger commitment.

In relation to the use of information, the APCC is concerned to note the draft *Guideline on the Merger Rule* asserts that information received by the Commission for particular purposes "*cannot be confined to use only in those processes*." The draft guideline asserts that: "[t]*he Commission can use any information received by it, with or without notice, for other purposes under the Ordinance*." The APCC submits that information acquired by the Commission by exercise of its powers can only be used for the particular purpose for which that power was exercised and requests that the Commission expand on its guidance on this point.

VII. CONCLUSION

The APCC respectfully requests the foregoing submissions be taken into account by the Commission and CA in formulation of a further set of *Draft Guidelines* for public comment.

Confidential treatment is not requested by the APCC in respect of any part of this submission.

The APCC would be pleased to expand on any comment set out in this filing, if required by the Commission or CA.

16 Guideline on the Merger Rule, para 5.12.