THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG

Response by the American Chamber of Commerce in Hong Kong (AmCham) to the Hong Kong Competition Commission and Communications Authority's jointly issued draft guidelines under the Competition Ordinance published on October 9, 2014

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Thank you for the opportunity to comment on the Hong Kong Competition Commission (the "Commission") and the Communications Authority's jointly issued draft guidelines under the Competition Ordinance (the "Ordinance") on the First Conduct Rule, the Second Conduct Rule, the Merger Rule, Complaints, Investigations and Exclusions and Exemptions (together, the "Guidelines").

Overall, we understand the difficulty of preparing guidelines without the benefit of actual experience with enforcement in Hong Kong, and we commend the Commission for an impressive drafting exercise. However, AmCham is concerned that the Guidelines raise more questions than they provide answers to. AmCham is also concerned about the complexity – both procedural and substantive – that surrounds the implementation of the Ordinance, which should above all be understandable and easy to comply with.

This submission focuses on two main themes: the need to increase legal certainty, and a rebalancing in favour of an effects-based approach.

a) AmCham is concerned that the Guidelines, although they helpfully supplement the Ordinance, fall short of providing the level of legal certainty required to ensure its successful implementation. This may result in chilling businesses from competing as intensely and effectively as they have traditionally done in Hong Kong. This submission outlines the points on which further clarification is most needed to achieve this objective.

b) There appears to be a general disconnect between the Guidelines which put significant emphasis on "by object" infringements, and the legislative intent which is reflected in statements made by Government officials and the Legislative Council discussions, and which focused on the conduct's competitive effects. AmCham understands that the legislative intent was to favour a light-touch, effects-based approach to enforcement, except for hardcore cartels that were singled out prominently by way of a special categorization as "Serious Anti-competitive Conduct" ("SAC"). The Guidelines, however, highlight the limited, merely procedural implications of SAC. AmCham therefore suggests to refocus the Guidelines on clear enforcement against SAC, and a light-touch approach for non-SAC.

If the Guidelines fail to strike the right balance in terms of enforcement focus, undertakings will likely err on the side of caution and this may have a negative effect on competition and innovation in Hong Kong.[1] Certainly, an open market in a developed economy enacting a competition regime for the first time should make every effort to not over-enforce.

[1] The emphasis on object-based offences, the lack of clear guidelines and the absence of safe harbors will also act to deter vigorous competitive conduct.

I. First Conduct Rule

1. Resale Price Maintenance

On the topic of resale price maintenance ("RPM"), defined as setting a fixed or minimum resale price, AmCham contends that:

(i) the Guidelines are not sufficiently clear as to when/if RPM will be seen to be SAC;
(ii) the Guidelines are not sufficiently clear as to when RPM will be deemed to have the object of harming competition; and
(iii) the Guidelines should provide more real life examples to better illustrate the wide range of situations RPM covers.

To be clear, AmCham does not believe that RPM should, absent very unusual circumstances, be considered to be either SAC or an object offence. Unfortunately, the Guidelines appear (at worse) to treat RPM as both SAC and an object offence. The Guidelines are unclear on this issue. To illustrate the above, the Guidelines state in Section 3.7 that RPM is "considered by the Commission as having the object of harming competition", a view which is repeated in Section 5.6. This means that, according to the Guidelines, RPM arrangements "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 effect".[2] In Section 6.9, RPM is included in a list of conduct, which "typically" have the object of harming competition.

Section 6.64 expands the scope of object breaches by RPM "where an agreement involves direct or indirect RPM, the Commission takes the view that the arrangement has the object of harming competition."

At the same time, in several sections, the Guidelines recognize that vertical arrangements are "as a general matter, less harmful to competition" than horizontal arrangements, and "frequently generate efficiencies."[3] For example, Section 6.7 of the Guidelines state that "vertical agreements very frequently improve economic efficiency with a production chain... such agreements can lead to a reduction in transaction and distribution costs...". And indeed, the Guidelines list specific examples of situations in which RPM may lead to efficiencies or pro-competitive effects (see Sections 6.71-6.74). It is difficult to understand how RPM can be classified as an offence warranting per se treatment when the Guidelines themselves recognize certain efficiencies and pro-competitive effects from RPM. Further, if RPM is deemed as a "by object" offence (which in the current draft it appears to be), a party can only raise evidence of such efficiencies and pro-competitive effects through the economic efficiency exclusion, which sets a high bar of proof.

Further uncertainty arises from the possibility of RPM amounting to SAC, along with such universally condemned conduct as price-fixing and bid rigging. AmCham notes that the Guidelines state in Section 5.6 that RPM "may amount to Serious Anti-competitive Conduct in certain cases" without providing any indication as to the circumstances in which RPM will fall within the scope of serious anti-competitive conduct. While AmCham considers that RPM should **not** be classified as "SAC," the Guidelines should at least provide specific examples of the circumstances under which RPM might be so classified.

In addition, it would be helpful if the Commission would provide more examples in which the supplier genuinely claimed the existence of tangible efficiencies such as those described in Sections 6.71-75. At the moment, the only hypothetical example referring to RPM (Hypothetical

[2] See Section 3.4.

[3] See Sections 5.5, 6.6, 6.7, 6.8.

Example 15) is an extreme case in which the supplier does not even claim that the arrangement has pro-competitive effects (the justifications are that the RPM "ensures an orderly market" and "avoids customer confusion"). This is insufficient.

As currently drafted, the Guidelines do not provide sufficient certainty with respect to the extent to which efficiencies and pro-competitive justifications will be considered in analysing RPM. As a result of this uncertainty, businesses are likely to refrain from entering into potential RPM schemes even where these schemes are genuinely pro-competitive or where the supplier is a new entrant in a particular market.

In sum, AmCham believes the only way to avoid a chilling effect on efficient and pro-competitive conducts is to analyze RPM under an effects-based approach. AmCham further considers that purely vertical RPM should never be classified as "serious anti-competitive conduct", except when it is applied to implement a horizontal price fixing agreement among suppliers. In any case, given the significant procedural implications, greater clarity as to the specific circumstances when RPM would amount to SAC and an object breach would be welcomed.

2. Recommended and maximum resale price

The Guidelines are perhaps even more unclear with respect to how maximum and recommended resale prices will be analysed. The Guidelines appear to recognize both maximum and recommended prices are relatively common practices that typically have pro-competitive justifications. The Guidelines state that maximum and recommended resale prices are not considered to have the "object" of harming competition and at Section 6.9, it is indicated that recommended and maximum resale price restrictions may have the effect of harming competition.[4]

Further, however, the Guidelines go on to identify several circumstances under which recommended or maximum resale price arrangements "will be assessed in the same manner as RPM,"[5] (i.e. as having the "object" of harming competition): for example, when (i) combined with [unidentified] measures that make them work "in reality" as fixed or minimum prices; (ii) a "price monitoring system" is used; and (iii) there are measures "which reduce the buyer's incentive to lower the resale price," such as "printing a recommended resale price on the product." It is quite common to print the recommended price and indeed it is intended to be publicized. Furthermore, it is not within a company's control if downstream entities decide in their discretion to set prices at the recommended or maximum resale price. RPM agreements can be used to: sell old inventory especially in markets where goods may be seasonal; introduce new products; support short term sales; create a "buzz" about a brand; introduce new sales channels, etc. None of these should raise competition concerns but if they did it could only be analyzed under an effects test. Certainly these do not seem to be conditions that render recommended or maximum resale prices per se "by object" offences.

In addition, Hypothetical Example 16 may lead to confusion. While it is included in a paragraph covering "maximum prices" it is unclear whether it is a "maximum price" or a "fixed price". Indeed, given that the price imposed by the supplier (a new entrant) is already well below the "market price", retailers are unlikely to have the incentive to further discount the price. Thus, regardless of the nature of the obligation (fixed vs maximum) the retailers will price at HKD 5. In other words, if the obligation is a "fixed price", it is likely to have the same effect as a "maximum price". It would be useful to clarify the hypothetical by distinguishing different situations:

[4] See Section 6.65 and Section 6.9 Figure 1.

[5] See Sections 6.68 and 6.70.

- HKD 5 is a "maximum price" but retailers would not provide additional discounts given that the maximum price is already well below the market price (and because the marketing campaign prominently advertises the HKD 5 price);

- The maximum price is at or near the "market price" (say HKD 7 based on the facts in Hypothetical 16) and retailers regularly price below the maximum price).

In addition, the conclusion in Hypothetical Example 16 is that the agreement to fix the price may raise concerns of having the object of harming competition". We would like to better understand in what circumstances such a scheme "will" or "will not" raise these concerns.

AmCham further recommends that the Commission clarify how minimum advertised price programs will be analysed under the First Conduct Rule.

3. Economic Efficiency Defense

The Guidelines state that the first condition of the economic efficiency defense requires "*an assessment of the economic benefits generated by the claimed efficiencies having regard to the harm to competition".* AmCham considers that this statement goes beyond the requirements of this condition in the Ordinance, which simply states in Section 1(a), Schedule 1 that the First Conduct Rule does not apply to any agreement that contributes to improving production or distribution or promoting technical or economic progress. The Ordinance does not envisage an exercise of "weighing up" the economic benefits against the harm to competition with the requirement that the benefits be sufficient to compensate for the harm to competition.[6] However, the Guidelines have created this obligation.

AmCham appreciates that the Commission is of the view that no assessment can be made in a vacuum. Nevertheless, this goes beyond the requirement under the Ordinance, which only calls for a "contribution". Furthermore, AmCham considers that the reference in the Ordinance to the fact that consumers should be allowed a "fair share" of the resulting benefit does not provide a basis to the weighing exercise the Commission purports to conduct. The reference to a "fair share" may be a share of the said contribution, however small it may be.

As discussed at paragraph 1 above, the Guidelines confirm that the Commission recognises that RPM may lead to efficiencies and provide that where a company can defend an RPM arrangement on efficiency grounds (as per the criteria laid out in Section 1, Schedule 1 of the Ordinance), there will be no infringement of the First Conduct Rule. AmCham welcomes the Commission's emphasis on the possibility of relying on the economic efficiency defense in relation to RPM. However, experience from other jurisdictions indicates that it is very difficult in practice to justify a restriction on efficiency grounds once it has been categorised as a restriction by object. AmCham understands that the Commission intends to be open and lenient in its application, however, this should be very clearly stated in the Guidelines if indeed this is the Commission's position.

Moreover, AmCham questions how the Commission will be in a position to assess an undertaking's efficiency arguments in the context of the relevant market when it has not analysed the effects of the RPM arrangement on the relevant market. AmCham therefore considers that the Guidelines should give further clarification of how the Commission will assess the validity of the economic efficiency arguments in practice. Again, additional examples would be most useful.

[6] See Annex, Sections 2.8, 2.17. We suggest that the Commission use a different numbering system in the body of the Guideline and in its Annex. The present, same numerical system (e.g., there are in effect two Section 2.8 in the same Guideline) is somewhat confusing.

4. Analysis of effects

In AmCham's view, the emphasis of any analysis under the Ordinance and Guidelines must be on the effects of the identified conduct. This involves asking how the conduct has affected the market in terms of price, output, variety, quality, etc. Further questions include: are the effects short or long term, is the market subject to high levels of innovation and change, is the effect widespread, etc. AmCham recommends that consideration of pro-competitive effects and efficiencies be explicitly included in the effects analysis. As currently drafted, it appears that any such considerations are only weighed in deciding whether the economic efficiency exclusion applies. As noted in the Guidelines, this is a separate analysis from whether there is a possible violation of the First Conduct Rule. Further, as discussed above, the economic efficiency exclusion places a heavy burden on the party seeking to rely on it.

The Guidelines also seem to place heavy emphasis on market share of the undertaking(s) involved. While AmCham supports the creation of safe harbours, market share should not be a primary or presumptive indicator of effects, and more emphasis should be placed on weighing actual effects, both pro and anti-competitive, in a full analysis of the conduct.

The Guidelines also state that "if an agreement has more than one effect, it is considered to have an anti-competitive effect if one of its effects is anti-competitive."[7] This statement precludes any weighing and therefore AmCham suggests it should be deleted, in favour of a weighing analysis similar to the "rule of reason" in the US. Further, AmCham recommends that the standard for finding a violation of the First Conduct Rule should be higher than any single anti-competitive effect, perhaps something like "substantial" anti-competitive effects, which would better align with the standard in other jurisdictions.

5. Vertical agreements

The Guidelines do not provide a "safe harbour" market share threshold below which the Commission considers that vertical agreements will be deemed not to have anti-competitive effects. The Guidelines only indicate that vertical agreements are only likely to raise competition concerns where there is some degree of market power at either level of the supply chain.[8] The Guidelines also do not indicate whether in due course, the Commission may consider a block exemption for vertical agreements.

This situation creates significant legal uncertainty, especially in a new regime such as Hong Kong. The concept of "market power" under the First Conduct Rule (see Section 6.8) is not defined and is to be distinguished from "substantial market power" (Second Conduct Rule) for which limited guidance is provided. Businesses will have to self assess by reference to a concept for which no guidance is provided.

Furthermore, the current approach raises the risk that, with "market power" already established, the Commission will consider that anti-competitive effects are in part proven, if not presumed. The Guidelines should confirm explicitly that the "market power" threshold will effectively act as a threshold and will only be one of many factors considered as part of the effects analysis (see paragraph 4 above).

With regards to effects, as explained at paragraph 4 above, AmCham considers it would be helpful if the Guidelines could specify that the effects would have to be material/substantial.

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[7] See Section 3.12.

[8] See Section 6.8.

In short, AmCham considers it would be helpful, in the first few years of implementation of the Ordinance, to provide a "safe harbour" market share threshold below which vertical agreements will be deemed not to raise competition concerns.

6. RPM in the context of a franchise

AmCham notes that the Guidelines acknowledge that RPM "*may be of assistance in a franchise or similar selective distribution system for the purpose of organising a coordinated price campaign of limited duration".* It is unclear whether this is the only scenario in the context of a franchise or selective distribution system whereby the Commission will consider that RPM may be helpful. AmCham believes that there are a number of other circumstances in which an RPM arrangement is necessary and beneficial for the proper functioning of a franchise or selective distribution system in order to preserve the uniformity and brand of the franchised network.

AmCham also considers that it would be helpful if the Guidelines included examples of a distribution system where RPM may assist the effective operation of the franchise. The use of distributors in Hong Kong is widespread and so the more guidance provided on this issue the more useful the Guidelines will be.

7. Single economic unit

Sections 2.4-7 of the Guideline on the First Conduct Rule outline the Commission's approach in determining whether two or more entities should be considered as a single economic unit. Although it is noted that joint ventures are discussed later in the Guidelines at Sections 6.82-84, AmCham considers that it would be useful if the Commission addressed its approach towards joint control for the purpose of defining a "single economic unit" alongside Sections 2.4-7.

This definition may be particularly important in the Chinese context. As the Commission is aware, there are many industries in the Mainland where foreign players are required to partner with a local undertaking (e.g., under foreign investment rules). As a result, many companies active in Hong Kong belong to groups where some of the activities in the Mainland may be performed by a joint venture in which the foreign player only has joint control. The Commission should explain whether such joint ventures will be deemed to be part of the same group. A hypothetical example could read as follows:

> SpeedCar is a German car manufacturer. Its wholly owned Hong Kong subsidiary imports sports cars into Hong Kong and resells them in Hong Kong and Mainland China. SpeedCar owns 50% of KuaiChe, a sino-foreign joint venture in China which manufactures SUVs and resells them in the Mainland and in Hong Kong. SpeedCar and KuaiChe regularly exchange information, including the price of cars. They want to ensure that their respective cars (which belong to different segments) are priced in a way that they do not undermine each other's business but rather compete strongly with other brands (SpeedCar and KuaiChe are new entrants and have low market share).

8. Agents and distributors

The Guidelines state that businesses that distribute their products through third parties may or may not form part of the same single economic unit as their agents or distributors. The Guidelines go on to explain when an agent will be considered to be a separate undertaking and Hypothetical Example 1 expands on this.

However, the Guidelines do not consider when a distributor will or will not be part of the same single economic unit as its principal. AmCham believes that further guidance and an additional

hypothetical example in relation to distributors would be helpful in this section, especially in light of the fact that distributor relationships are a common feature of the Hong Kong economy.

9. Market sharing

As one of the four SACs, market sharing needs to be explained with greater clarity and examples. AmCham suggests that the Guidelines should provide more insight into the often complex, borderline situations that can give rise to an allegation of market sharing. While the example provided in Hypothetical Example 6 is very straightforward, businesses need more guidance when more subtle issues arise, for instance when a non-compete clause is inserted in a co-marketing or co-promotion agreement. More examples could help offer more guidance.

Furthermore, AmCham considers that the term "gentleman's understanding", referred to in Section 6.16, is vague and appears to create a new concept. It is unclear how this differs from a "gentleman's agreement" and whether parallel behaviour would be sufficient to infer a "gentleman's understanding". It would be helpful if the Guidelines included an explanation of what constitutes a "gentleman's understanding" and a hypothetical example to demonstrate how this could arise in practice.

10. Bid rigging

Bid rigging is also one of the SACs and therefore can be expected to be an enforcement priority. As such, it is critical that the Guidelines be more comprehensive about the multiple scenarios which could give rise to an allegation of bid rigging. For instance, it is unclear whether situations in which the customer is informed/aware of the arrangement would amount to bid rigging. It would be helpful if the Commission clarified this point.

11. Joint Buying

As to joint buying, AmCham would question the Guidelines' treatment of a "buyers' cartel" as a form of price fixing which "has the object of harming competition." In practical terms, there may be little difference in effect between "joint buying arrangement" and a so-called buyers cartel. Further, both can be used by smaller undertakings to achieve purchasing efficiencies. Yet, in Sections 6.24 – 6.26, the two are distinguished, with one being lauded and one being condemned as an objects breach. Adding to this confusion, it appears at Section 6.27 that an alleged buyers' cartel would be analyzed as to its effects. Indeed, the commentary in Sections 6.27 – 31 suggest such arrangements have clear benefits and could only be analyzed under an effects test. Once again, the Guidelines' lack of clarity should be addressed, and the temptation to rely on object breaches resisted.

12. Trade associations

AmCham welcomes the Commission's efforts to address the role of trade associations in Hong Kong, in particular how they will be expected to function in compliance with the Ordinance. The requirements for the rules of admission to membership provide clear guidance to trade associations on how membership criteria should be set and applied.

AmCham, however, expresses concern at the way the fact pattern in Hypothetical Example 14 may be construed by the Commission as a "by object" infringement. As stated in other sections of this submission, AmCham is concerned that the use of "by object" infringement is being used too quickly, too often, thereby allowing the Commission to shift the burden of proof when such was clearly not the intention of the legislator.

13. Group boycotts

AmCham notes that "group boycotts" are categorised as an example of conduct which typically has the object of harming competition. In other leading jurisdictions, such as the EU, the only conduct identified as "hardcore restriction" with the object of harming competition are the four conduct categorized as SAC in the Ordinance (price fixing, market-sharing, output restrictions and bid rigging). Furthermore, group boycotts are described as part of a cartel rather than a stand-alone violation. Because group boycotts are not one of the four SACs, AmCham considers that the Guidelines go beyond what is stated in the Ordinance when referring to group boycott as a "by object" infringement.

Like RPM, two fundamental issues arise with the Guidelines in respect of group boycotts (and other non-SAC conduct). First, the conduct is not classified as SAC under the Ordinance. SAC is created by statute; it cannot be created directly or indirectly by the Commission or the Guidelines. Second, breaches cannot be object breaches by mere fact. Absent a clear showing that every group boycott (or other conduct) can never be justified or pro-competitive, the effects test should be used. No short-cuts should be allowed in the analysis nor should an undertaking be so easily forced into employing the very limited efficiency defence.

14. Information Exchange

The Guidelines explain that improper information exchange about future pricing intentions may take place via customers or suppliers and would be considered a form of price fixing. However, there are many situations in real life where third parties, in the negotiation process, convey non-price information or information received by one counterpart to another counterpart who competes with the first one. This is not problematic if this is the reflection of the proper operation of a competitive market. The Guidelines should therefore clarify that an element of intention (i.e. the expectation to receive, on a systematic basis, information from a competitor via the customer or supplier) should be established for the Commission to take issue with the information exchange.

Finally, when discussing the kind of information that might be competitively sensitive, the Guidelines do not provide a threshold which determines whether data is considered to be historic for the purpose of information exchange. AmCham notes that the Commission considers that whether data is historic depends on the specific characteristics of the relevant market. However, AmCham believes that greater clarity could be given by providing an illustrative timeframe. Some markets may justify short periods of time for the data to be considered historic, others may require longer periods. AmCham therefore submits that the Commission should incorporate guidance into the Guidelines to assist businesses assessing the adequate time period, as well as provide examples to illustrate such guidance.

15. Parallel behaviour

AmCham welcomes the Commission's acknowledgement that parallel behaviour by competitors in the market does not mean that the competitors are involved in a "concerted practice" or have made an agreement. AmCham agrees that in a highly competitive market (especially a small economy like Hong Kong's), competitors will react almost immediately to each other's lower pricing in order not to lose customers. However, it is unclear from the Guidelines whether the acknowledgement in relation to parallel behaviour applies equally to increases in prices as it does to reductions in prices. In this regard, it would be helpful to also include increased prices as an example of parallel behaviour in a reactive market.

In addition, in other jurisdictions including the United States and China, parallel behaviour is only considered a "concerted practice" if there are also "plus factors" (e.g. established communications between the parties), which given an indication an agreement of some type has been formed. It

would be helpful if the Commission could indicate what types of "plus factors" would be sufficient in Hong Kong to form a "concerted practice".

16. Hypothetical examples

AmCham welcomes the inclusion of hypothetical examples throughout the Guidelines. However, some of these examples do not include sufficient legal analysis to provide helpful guidance. The hypotheticals should address SAC, object and effect, and give clear guidance as to when breaches may or may not occur. For example, Hypothetical Example 3 in relation to concerted practices depicts an exchange of sensitive information as a concerted practice but does not state whether this would have the object or effect of harming competition. AmCham believes it would be more helpful to businesses if this, and the other hypothetical examples, state whether the Commission would interpret them to have the object and/or effect of harming competition. Similarly, Hypothetical Example 14 does not sufficiently explain why the conduct may be sufficient to be considered a "by object" infringement.

Another instance of an unclear analysis is Hypothetical Example 21, which AmCham considers to be overly simplistic. First, the example does not expand on the nature or scope of the stated tariff coordination. Second, there is no information in regard to the number of seats increasing or decreasing, airport slots, supply side substitutability, new competition or new demand, etc. By not including relevant facts or not taking into account any justification arguments that Airlines A and B could make, or the possible benefits the agreement could produce the hypothetical case study fails to assess the relevant circumstances in full and is therefore an incomplete example of how the economic efficiency defense may be exercised in practice. In short, it appears that price fixing is assumed.

In addition, the competition law analysis that would apply to a joint venture in the aviation industry is very industry-specific and is unlikely to be at all useful to players in other industries. The Commission may therefore consider replacing Hypothetical Example 21 by a fact pattern that would apply across industries.

As a general point, AmCham notes that the Guidelines state that the category of SAC is an open one. Importantly, the Guidelines do not always identify in the hypothetical examples whether the conduct described would be considered to be serious anti-competitive conduct. Hypothetical Example 14 describes conduct by a trade association which may be considered to have the object of harming competition, however, it is not clear whether it could amount to SAC. Due to the procedural implications of conduct being categorised as SAC, AmCham believes it is important for the Guidelines to clarify which of the conducts and examples outlined will be deemed to be SAC by the Commission. We emphasize the need for serious anti-competitive and non-serious anti-competitive examples as per the statutory structure (and the deletion of object examples) to be included by the Commission.

II. Second Conduct Rule

17. Definition of "substantial market power"

AmCham expects that the Commission will employ the general definition of substantial market power and dominance: i.e., the ability over time (say two years) to act without substantial competitive constraints. This appears to be reflected in Section 3.2 of the Guidelines.

Pre-judgment of outcomes may inadvertently result in limited market analysis. In short, a substantial market power finding should be based on a comprehensive analysis. However, AmCham considers that the absence of a market share threshold in relation to the definition of "substantial market power" (i.e., a safe harbour for smaller market players) creates a significant

degree of uncertainty as to how the Second Conduct Rule will be applied in practice. AmCham considers that the objective of the Guidelines is to provide clarity and guidance in respect of the practical implementation of the Ordinance. Providing a market share threshold below which there is a presumption of no substantial market power would help in this regard.

A number of antitrust regimes in jurisdictions around the world provide such thresholds. For example, the European Commission considers dominance as unlikely if the undertaking's market share is below 40%; and the UK Competition and Markets Authority considers that it is unlikely that dominance would be established in respect of an undertaking with a market share below 40%.

In our view, the publication of the Guidelines provides the Commission with the opportunity to look at the established market practice and approach of other competition regulators and provide clear guidance on the size of market share that will typically indicate, along with other factors, a lack of substantial market power in Hong Kong. AmCham therefore considers that the Commission should include such an indication in the final version of the Guidelines, and recommends that the Commission set a threshold of 40%, *below* which there is a presumption of a lack of substantial market power. At a minimum, AmCham further recommends that it be made clear that there is no presumption that substantial market power exists *above* such threshold.

Further, the distinction between what constitutes market power under the First Conduct Rule and "substantial market power" under the Second Conduct Rule is unclear. The Guidelines acknowledge that the degree of market power under the First Conduct Rule is less than "substantial market power" under the Second Conduct Rule but give no indication as to how the difference is determined. AmCham believes that a clearer distinction should be made in the Guidelines, either through market share indications or tangible examples.

18. Abuse of substantial market power "by object"

AmCham considers that the Guidelines do not provide sufficient guidance as to the circumstances when an abuse of substantial market power will be considered to have the object of harming competition. As the Commission has stated, "by object" violations are intended to target conduct that is "so harmful to the proper functioning of normal competition in the market, that there is no need to examine [its] effects."[9] Conduct falling under this prong will therefore be analysed on a per se (indeed, strict liability) basis. To avoid a chilling effect on legitimate and pro-competitive unilateral conduct, AmCham recommends that the categories of conduct potentially falling under the "by object" prong of the Second Conduct Rule be restricted and clearly defined. AmCham considers that the only relevant conduct should be conduct with horizontal or cartel-like aspects (i.e., conduct that also violates the First Conduct Rule).

The Guidelines provide one example, predatory pricing, which "may" be deemed to have the object of harming competition. AmCham considers that such conduct would be more appropriately analysed under the "effect" prong, as opposed to being subject to an unequivocal ban that likens it to cartel conduct. Of all of the types of potentially abusive single-firm conduct, there is a relatively high bar to proving predatory pricing in most antitrust regimes. This is because, as the Commission recognizes, "charging low prices is… the very essence of competition" (see Section 5.3). Indeed, the Commission states it "will be wary of the risk" of applying the Second Conduct Rule to alleged predatory pricing and that it "may" consider foreclosure effects and ability to recoup short-term losses (see Sections 5.3, 5.4, and 5.6). AmCham agrees that these factors should be considered and therefore alleged predatory pricing should not fall under the "by object" prong. To analyse predatory pricing – or any other purely unilateral conduct – on a per se basis under the "by object" prong would contravene international norms and likely result in a chilling effect on discounting and other pro-competitive conduct.

[9] See Draft Guideline on the First Conduct Rule Section 3.4.

AmCham further recommends that with respect to any "by object" analysis, the Commission should clarify to what extent evidence of pro-competitive intent or legitimate business justifications will be taken into account.

19. Abuse of substantial market power "by effect"

The Guidelines state that under the "effect" prong of the Second Conduct Rule, the Commission will look at "actual or likely anti-competitive effect." AmCham recommends that the Commission further clarify the degree of anti-competitive effect that would fulfil the "effect" requirement, e.g., "substantial" anti-competitive effects. This would better align the standard with other jurisdictions.

While some of the examples in the Guidelines seem to consider pro-competitive effects and justifications (see, e.g., Hypothetical Examples 7 and 9), the Guidelines do not explicitly provide for a weighing of pro-competitive effects against any anti-competitive effects. Furthermore, the Guidelines provide in Section 4.4 that an undertaking may be able to demonstrate that its conduct is "*indispensable and proportionate to the pursuit of some legitimate objective unconnected with the tendency of the conduct to harm competition*". The Guidelines do not provide any further elaboration of the circumstances in which this may be the case. The Guidelines should provide that the Commission will take a pragmatic approach to state that there is a reason for behaviour which may otherwise be considered abusive.

There is no reference in the Guidelines to the relevance of efficiencies as a defense, as is the case for the First Conduct Rule under Section 1 of Schedule 1 of the Ordinance. If economic efficiencies can justify agreements which may be harmful to competition, the same should also logically apply to unilateral conduct. European Competition law[10] provides that an undertaking has the possibility of demonstrating that its conduct is objectively necessary **or** that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers. In this context, the European Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking. AmCham contends that Section 4.4 is insufficiently specific, and further clarity is needed as to whether the Commission will assess conduct in the context of a legitimate objective on the same basis as the European Commission.

Overall, AmCham suggests that the Guidelines clarify to what extent such effects and justifications will be considered, and recommends that the Commission consider a balancing approach similar to the "rule of reason" analysis in the US. AmCham also considers that further guidance and hypothetical examples in relation to the "legitimate objective" should be incorporated into the Guidelines.

20. Entry Barriers

AmCham appreciates the detailed explanations regarding entry barriers in the Guidelines. With respect to intellectual property rights, AmCham agrees with the statement that "IPRs do not automatically give rise to barriers and do not necessarily imply substantial market power" (see Section 3.22). However, in the same Section, the Guidelines also state that IPRs may also amount to legal barriers "when they prevent or make more difficult entry or expansion by (potential) competitors." AmCham considers that the standard of making entry "more difficult" is both vague and too low and should be appropriately qualified with wording such as "significantly impeding" entry or expansion.

[10] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), section III D.

With respect to strategic barriers, it is unclear what "strategic brand proliferation" is or how it would constitute an entry barrier (see Section 3.29). Another example in the same Section states that in "build[ing] excess capacity to send a signal to potential new entrants", a company could squeeze new entrants. This is not an example of a strategic barrier, but rather conduct that could become abusive conduct (e.g., predatory pricing). As written, however, this example seems to indicate that excess capacity could in itself be an entry barrier. AmCham therefore recommends that these two examples be deleted from Section 3.29 of the Guidelines.

21. Refusals to deal

AmCham supports the Commission's explanation that a refusal to deal is only likely to be abusive in "very limited or exceptional circumstances" (see Section 5.15). However, in Section 5.18 the Guidelines state that the Commission will consider whether undertakings in the downstream market are able to duplicate indispensable inputs "only at unreasonable cost." AmCham recommends that the concept of "unreasonable cost" be clarified by reference to some objective standard.

AmCham also concurs with Sections 5.12-5.14 (margin squeeze) and 5.20 and 5.21, which recognize the basic premise that refusal to license IPRs may "only in very exceptional circumstances" constitute abusive conduct.

Given Hong Kong's location and its market, the Commission may want to address the situation of entities based in China leveraging their market power into Hong Kong.

III. Merger Rule

22. CR4 Ratio Test

AmCham suggests that the Commission should not limit itself to consider only the CR4 ratio test. In some circumstances, the CR3 ratio test (used in Singapore) will be a more helpful measure of concentration in the market and therefore the Commission should retain the flexibility to retain the most useful tool.

23. When should the Commission "ought to have become aware" that a merger has taken place

The Guidelines state that the Commission may commence an investigation of a merger within 30 days after the day on which the Commission first became, or ought to have become aware, that the merger has taken place. Aside from an undertaking directly contacting the Commission for informal advice, it is unclear when the Commission "ought to have become aware" of a merger having taken place. AmCham considers that the Guidelines should provide guidance on when this will be deemed to have occurred, for example, when the completion of a merger is reported in the local or national press or when an undertaking issues a press release (which includes press announcements, stock exchange filings, non-rebutted press/news reports, etc.).

24. Indicative timeframes

AmCham notes that the Guidelines do not give any indicative timeframes for the informal advice process or the process for accepting commitments or awarding a merger decision. Although AmCham welcomes the Commission's willingness to try to deal with requests for informal advice within the requested timeframe where possible, it would be helpful for undertakings if the Commission could indicate the amount of time it is likely to require to consider and respond to an approach for informal advice. Furthermore, the lack of timeframes for the commitments and decision processes creates a significant degree of uncertainty for undertakings who wish to take

one of these two routes. AmCham believes it would be helpful if the Guidelines included an indicative timeframe for each of these processes to allow companies to adequately plan their engagement with the Commission in line with their proposed merger timetable. Nevertheless, AmCham understands that any timeline given will be purely indicative and requests that the Commission outline in the Guidelines that they will engage in dialogue with the relevant undertakings to ensure that the requisite amount of time is given on a case by case basis.

25. Information received by the Commission

In respect of confidentiality and use of information, the Guidelines state that the Commission will be able to use any information received by it, with or without notice, for other purposes under the Ordinance. AmCham considers this power to be too broad and would find it useful to know if and what information may be disclosed to the public. Information provided by an undertaking for a specific informal consultation with the Commission should be provided in confidence as a preliminary step for the undertaking to make an informed self-assessment. This should be distinguished from the use of the Commission's investigatory powers where information may be obtained and used for a global assessment of the undertaking's activities. AmCham believes that information provided voluntarily by an undertaking in the informal advice process in the context of a merger should not be used by the Commission for any other purpose under the Ordinance, as this may deter undertakings from seeking guidance from the Commission. If the Commission subsequently wishes to investigate an undertaking following a merger, it should use the information gathering powers provided under the Ordinance for the relevant purpose.

IV. Complaints

26. Informing the subject of a complaint

AmCham raises the question of whether the subject of a complaint should be informed by the Commission of the complaint made against it. On balance, AmCham considers that this should be the case even where the Commission decides not to proceed to the Investigation Phase. Indeed, this would make undertakings aware of any potential issues or grievances, and allow them to deal with these in a timely manner through effective compliance. An exception could be made where the disclosure of the complaint could hinder the Commission's investigation, or could harm the complainant, or generally disincentivize complainants.

In any event, AmCham supports the Commission's view that complainants should keep their complaint confidential, as publication of such information may jeopardize an investigation and cause unjust and premature reputational damage to the subject of the complaint.

27. No indicative timeframes

The Guidelines do not give any indicative timeframes for the processing of complaints. AmCham understands that it may be difficult for the Commission to provide "hard" deadlines given that it has no enforcement experience in Hong Kong at this stage. Nevertheless, it would be helpful if the Commission sets out indicative timeframes. Indicative timeframes would help to ensure that the Commission deals with complaints in a timely and consistent manner. In addition, the subject of the complaint will be incentivised to act quickly to internally investigate and address the complaint in question.

AmCham notes that the existing guidance on Competition Investigation Procedures provided by the Communications Authority gives a target of 12 months for the completion of an investigation

from the time of receiving a complaint.[11] This does not set out a binding commitment, however, the Communications Authority would be prepared to explain any delays.

AmCham requests that the Commission clarify in the Guidelines that at a minimum, it will work with the undertaking to ensure a timeline is provided based on the case at hand, and the party is kept informed of any anticipated changes.

V. Investigations

28. No indicative timeframes

As for investigations, the Guidelines do not give any indicative timeframes for the Initial Assessment Phase or the Investigation Phase. AmCham suggests that this omission creates a significant degree of uncertainty. AmCham believes that the Guidelines should include indicative timeframes for each of the two key stages in the investigation process (the Initial Assessment Phase and Investigation Phase). First, this is so that undertakings have a better understanding of how investigations will be conducted and secondly, so that the Commission has a clear target to aim for in terms of duration, thereby enhancing efficiency and consistency.

As discussed in point 27 above, AmCham understands that it may be difficult to provide hard deadlines and thus requests the Commission to clarify in the Guidelines that it will work with the undertaking to ensure a timeline is given based on the case at hand. In the alternative, it would be helpful if the Guidelines would include an explicit commitment by the Commission to keep the relevant parties apprised of the estimated timeframe and next steps in any investigation.

29. Investigation Phase

As per the authority awarded under section 40 of the Ordinance, the Guidelines set out the test for when the Commission may proceed to the Investigation Phase. While the Guidelines state that the Commission will only proceed to the Investigation Phase when it is satisfied that "it has *reasonable cause* to suspect a contravention of a Competition Rule," at the same time it also states that this test only requires "*suspicion*" based on relevant facts and other information and that the Commission is satisfied "*at least beyond mere speculation*" that there may have been a contravention of a conduct rule (see Section 5.1). AmCham believes that due to the nature and extent of the investigation powers at the Commission's disposal during the Investigation Phase, this interpretation of the standard does not set a high enough bar. The exercise of the investigation powers may lead to reputational damage for the undertaking in question and is likely to disrupt the normal functioning of its business. Therefore, it is fair and proportionate that the Commission should be required to have at least a *reasonable belief* based on sufficient evidence that a contravention may have occurred.

30. Interaction with regulators in other jurisdictions

If an undertaking receives immunity under Section 44 of the Ordinance, it is unclear to what extent evidence provided subject to such immunity could be shared and used as evidence by other antitrust regulators in different jurisdictions. AmCham considers that information disclosed to the Commission by an undertaking who has obtained the benefit of immunity should be protected by the Commission so that it cannot be used in investigations by other regulators or as a basis for private actions. Beyond immunity, AmCham is concerned about the sharing of information more generally between regulators. The Commission should provide guidance in the Guidelines on how they intend to interact with competition regulators, if at all, in other jurisdictions and the legal framework within which they will or will not provide foreign regulators with information gathered

[11] Competition Investigation Procedures, paragraph 46.

in the process of an investigation. We understand that the Commission does not have express powers to share information with regulators in other jurisdictions and/or Government bodies in Hong Kong. AmCham requests that this be clearly reiterated within the Guidelines.

31. Publication of warning notices

The Guidelines state that warning notices entered into will be made public. AmCham does not believe that the publication of a warning notice is fair and proportionate, given that the notice relates to non-serious anti-competitive conduct where there has been no finding of an infringement. Furthermore, publication may cause reputational damage to the undertaking and attract negative publicity even when the undertaking has acted in compliance with the Commission's investigation and requests, and where there has been no finding of infringement.

The rationale behind warning notices has always been to provide undertakings a chance to redress a conduct without fear of negative consequences or inferences. With their publication, a new objective is put forward (transparency of the Commission's work and education) and this is not in line with the intent of the legislator. Also, this leads to the odd result that non-SAC conduct may attract more publicity that SAC conduct which may be the subject of a non-published infringement notice and ensuing proceedings before the Tribunal. This is not logical and certainly not proportionate.

AmCham urges the Commission to reconsider this position and have regard to the Hong Kong (and Asian) markets more generally. Simply, one of the most important cultural aspects of Asian business is the idea of saving face. A public warning would indeed be seen as a serious reprimand. Arguably, the Commission is acting beyond their scope. AmCham draws the Commission's attention to the language of the Ordinance; express mention of publication is made in respect of infringement notices containing commitments – there is no such express mention in respect to warning notices.

If the Commission ignores the effect on business, they should at least provide in the Guidelines that the undertaking in question will have sufficient and reasonable opportunity to represent and rebut the issuing of the warning notice. Moreover, if publication is to occur it should be anonymised to protect business reputation and contain explicit language that the warning notice does not amount to a finding of contravention.

VI. Exclusions and Exemptions

32. No indicative timeframes

As for the other sections, the Guidelines do not provide any indicative timeframes for the application process for individual or block exemptions. AmCham believes that this omission creates a significant degree of uncertainty. It would be helpful if the Guidelines included indicative timeframes for the application process for both a Decision and Block Exemption Order. In addition and as discussed above, AmCham suggests that it would be useful for the Commission to keep the applicant informed of the progress and estimated time scale within which a decision will be reached. This is so that undertakings may have a better understanding of the practical process of obtaining an exemption and to better assist them in their commercial planning. Moreover, it provides that the Commission has a clear target to aim for in terms of duration, thereby enhancing efficiency and consistency.

33. Block exemptions

The Guidelines confirm the Commission's view that sector specific block exemptions will only be granted as an "exceptional measure". AmCham believes that it would be beneficial for the

Commission to consider granting block exemptions in relation to specific sectors at an early stage (before or as soon as the conduct rules came into force). This would provide much-needed legal certainty in a new regulatory environment and prevent numerous applications for a Block Exemption Order by various undertakings in respect of the same industry-specific scenario.

The American Chamber of Commerce in Hong Kong is the largest international chamber in Hong Kong and represents a broad and diverse membership.