SmarTone Mobile Communications Limited's Response to the Consultation Paper Relating to the Application for Prior Consent under Section 7P (6) of the Ordinance in respect of the Proposed Acquisition of CSL New World Mobility Limited by HKT Limited

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INTRODUCTION

1. SmarTone welcomes the opportunity to provide its views and comments on the consultation paper issued by OFCA on 23 December 2013.

2. This merger, if it proceeds, would reduce the number of MNOs from 6 to 5. This consolidation would be in line with the global trend. However, this has to be balanced against the need of every player to have sufficient spectrum to deliver high performance of service. The regulator's task is to ensure the spectrum holding created by any merger is not disproportionately large. Thus scarce spectrum must be equitably shared among players in the market. In this way, high quality performance can be delivered at a lower cost without any anti-competitive effects. This pro-active management of spectrum will enable Hong Kong to remain at the leading edge of technology and innovation in the telecom sector, and bring the biggest economic benefits to Hong Kong.

3. HKT will have disproportionately more spectrum than its nearest competitor post-merger, the largest mobile subscriber base and the ability to offer cross-platform bundling drawing on the PCCW group's leading market shares in fixed line, fixed broadband, pay-TV and now mobile markets. This could give rise to a substantial lessening of competition ("SLC") in the mobile market unless the CA takes robust measures to intervene to prevent SLC from occurring.

EXECUTIVE SUMMARY

4. SmarTone does not object to the proposed acquisition of CSL New World Mobility Limited ("CSL") by HKT Limited ("HKT"), subject however to appropriate safeguards such as divestment of spectrum and customer segments, as well as the imposition of robust regulatory measures to address the potentially anti-competitive consequences of the merger.

5. More and more consolidation in the mobile market in Europe and the United States is taking place in recent years. There have been 8 mobile in-market consolidation deals in Europe in the period 2005 – 2013 mainly between 3rd and 4th market players. These deals have usually resulted in the merged entity gaining a greater mobile

subscriber market share and improving their margins. In the United States, AT&T, Sprint and T-Mobile have bought up smaller players whilst Softbank took a majority shareholding in Sprint.

6. Telecoms regulators particularly in advanced jurisdictions have insisted on applying regulatory measures to mergers. There is materially relevant overseas precedent for the imposition of specific conditions and remedies to this proposed HKT/CSL transaction.

7. This transaction would reduce the number of MNOs from 6 to 5 since 21Vianet must be included as a MNO, and not from 5 to 4 as OFCA have suggested. After the merger, HKT's aggregate spectrum holding will only reduce from 38.8% to 33.9%[1] of the available FDD/TDD spectrum even after agreeing to give up and not to re-acquire certain spectrum in the 1.9-2.1GHz band.

8. The FDD spectrum will continue to dominate the roll out of 4G/LTE in Hong Kong and the global markets for many years to come. HKT's holding in this will be 39.4% even after the agreed divestment of 2 x 14.8MHz of spectrum. For a 5 player market, this is too high a concentration for one player for FDD spectrum.

9. HKT's holding of 33.9% of the FDD/TDD spectrum would mean that each of the other operators would have to share 66.1% of the remaining spectrum which is an average of less than 16.6% spectrum clearly resulting in SLC. In this case, the over concentration has not been acquired through auction in a free market but acquired by merger.

10. A greater amount of spectrum enables the holder to deliver service at a lower overall cost as compared to those with less spectrum. This makes it imperative to impose a limit which SmarTone suggests should be a 30% limit in the absolute and regardless of market share in terms of customer numbers.

11. All spectrum divested to keep within the 30% limit should be auctioned to promote competition. HKT should not be allowed to meet this limit by relinquishing to Hutchison (3HK) any part of the spectrum jointly held by the HKT/3HK joint venture Genius Brand in the 2.5-2.6GHz band. This would be anti-competitive and would be spectrum trading, which is not allowed in Hong Kong, by the back door. Further it would not address the excessive spectrum concentration in the 1800MHz band by the merged entity or HKT's under-utilisation of the 850MHz spectrum which are also present.

12. This suggested divestment of spectrum is not intended to deprive HKT of all its competitive advantages from having such an accumulation of spectrum in certain bands but is targeted to ensure the advantage should not be overwhelming or lead to

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[1] HKT has wrongly included in its assessment of spectrum market share 8MHz in the 700MHz band which is for mobile TV and not for general mobile services (i.e. voice and data services). (See paragraph 30 below)

SLC. Divestment of spectrum by HKT should take place within a reasonable time frame, say 12 months, after the CA's consent to the transaction so that SLC is eliminated at the earliest opportunity and the public interest is protected. HKT should not be allowed to delay the return of its spectrum until expiry of the existing assignment of the relevant spectrum.

13. HKT and its parent, PCCW, following the proposed transaction, enjoy very significant market power in all the markets that they serve – mobile, fixed, broadband and pay-TV. After the merger, the PCCW group will be the largest player in all of these markets (mobile included). Their ability to effect bundling, cross market subsidies and cross platform integration to create extreme competitive barriers will further extend and deepen SLC.

14. SmarTone is not against the availability of cross-platform services but these must be offered by HKT and the wider PCCW group to all other mobile operators on terms no less favourable than are made to their subsidiary or other members of the PCCW group.

15. HKT recognises the anti-competitive effect of the merger but the commitments offered including giving up 2 x 14.8MHz of paired spectrum do not go far enough to eliminate SLC. To eliminate the SLC effect caused by this significant proposed merger, SmarTone suggests that OFCA should set all the following conditions:

(a) To return, within 12 months after consent to the merger by the CA ("CA's Consent"), the 2 x 14.8MHz paired spectrum in the 1.9-2.1GHz band it has agreed to relinquish to the Government for public auction in which HKT cannot participate;

(b) To relinquish within 12 months after CA's Consent an additional 2 x 15MHz in total of paired spectrum comprising 2 x 10MHz from the 1800MHz band and 2 x 5MHz from the 850MHz band for public auction in which HKT cannot participate;

(c) In respect of the remaining 2 x 14.8MHz paired spectrum in the 1.9-2.1GHz band, 2 x 9.9MHz should be subject to the right of first refusal and 2 x 4.9MHz should be re-auctioned together with the other operators' relinquished spectrum in this band in which HKT may participate (but only to bid for the 2 x 4.9MHz slot given up for re-auction) if it wishes. HKT should have a cap on acquiring maximum 2 x 4.9MHz in this band;

(d) To permit the existing MVNOs and resellers of HKT and CSL to have the right to terminate their contractual arrangements without any penalty and on demand, within a reasonable period of time, say within 18 months after CA's Consent;

(e) To divest within 12 months after CA's Consent, New World Mobility Limited, a 60% owned subsidiary of CSL[2], which business is defined in HKT's submission as a MVNO and whose customers have not been counted as part of the 2.8 million subscribers attributed to CSL. Such divestment will support HKT's contention that CSL's customer base is only 2.8 million.

(f) To impose robust regulatory oversights (either by way of licence conditions or undertaking) to ensure HKT and its parent PCCW will not abuse their substantial market power in the mobile, fixed, broadband and pay-TV markets, require them to offer services to other mobile operators on terms no less favourable than offered to customers of subsidiaries or to members of the PCCW group and ensure there is:

(1) non-discrimination in offers related to wholesale services as well as any service constituents of its bundled offers (not limited to pricing);

(2) transparency of wholesale prices and internal transfer prices to prevent unfair cross-subsidisation;

(3) no predatory pricing that can disadvantage competition by leveraging on cross-bundling subsidies; and

(4) accounting separation or legal separation of its mobile business unit from other business units.

<u>COMPETITION ISSUES</u>

16. Under section 7P of the Telecommunications Ordinance, the CA must consider

(a) whether the proposed transaction would have or be likely to have the effect of substantially lessening competition in the market; and

(b) if it would have such an effect, whether the proposed change would have or be likely to have benefit to the public that outweighs any detriment to the public that would be or would likely to be constituted as substantially lessening competition.

17. In that respect, OFCA has indicated in the Consultation Paper that it wishes to have specific representations on a number of issues, namely:

(a) Possible competition scenarios in relevant markets and the likely adverse and/or positive aspects caused to the competitive process;

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[2] According to the Annual Return of New World Mobility Limited filed on 18 November 2013

(b) Possible unilateral effects in particular whether the merger would create or enhance the market power of HKT with the exit of CSL;

(c) Possible coordinated effects with the reduction of the number of MNOs from 5 to 4[3];

(d) HKT's status as an incumbent fixed network operator ("FNO") and an integrated fixed and mobile network operator;

(e) The proposed commitments offered by HKT of CSL/HKT as a merged business; and

(f) Potential public benefits from the proposed transaction.

18. SmarTone considers that the proposed acquisition of CSL by HKT would have the effect of SLC in the Hong Kong telecommunications market. SmarTone will address the above issues and highlight the competition issues in the following sections for the CA's consideration, as well as proposing conditions and remedies that will enable the transaction to proceed.

19. HKT's submission contains a number of inaccuracies and potentially misleading information which are set out in a separate Annex 1 to this response and which if uncorrected could lead to a mistaken or incomplete impression about the anti-competitive effect of the proposed transaction.

<u>SPECTRUM CONCENTRATION</u>

20. It is self-evident that post-merger, HKT will have the largest spectrum holding of all MNOs. SmarTone strongly contends that a key issue is the impact on the mobile market in Hong Kong. A thorough review by the CA of the amount of spectrum held by the merged entity of HKT/CSL is recommended. Such a review should be wholly focused on the absolute holding of spectrum regardless of market share in terms of customer numbers.

21. There are currently 6 MNOs in the mobile market (including 21Vianet) sharing the overall spectrum allocated by the OFCA. It is important to recognise that 21Vianet is also a MNO and could deploy its spectrum in the 2.3GHz band to provide mobile services.

22. Spectrum is a scarce resource with no certain further spectrum supply in Hong Kong in the next 3 years or even longer. What is more, it is FDD spectrum that is utilised

[3] 21Vianet should also be included as a MNO so it is a reduction from 6 to 5.

the most to deliver mobile services in Hong Kong and this is expected to remain the case for the foreseeable future. Therefore the concentration of FDD spectrum should attract particular scrutiny.

23. SmarTone urges the CA to set safeguards to deal with this concentration of spectrum before approving the proposed acquisition. This would also be consistent with the approach of regulators in Europe and in the United States.

24. Where a market is reduced from 6 to 5 MNOs as a result of a merger, SmarTone proposes that the merged entity should be subject to a 30% limit on the overall amount of spectrum held to prevent SLC, since the other operators would have access only to the remaining 70% of the total spectrum giving an average of 17.5% spectrum, for each operator. This 30% limit should be in the absolute regardless of market share in terms of customer numbers.

25. If any new entrant(s) enters the market as a result of the spectrum auction of the 1.9-2.1GHz band in 2014, the over-concentration of spectrum will become even more marked. Such an uneven distribution of spectrum will not provide a level playing field for all operators, and will severely affect market competition.

26. The amount of spectrum an operator can deploy directly affects the cost of delivery since an operator holding relatively less spectrum has to incur higher investment in radio networks enhancement and other measures. This drives up the cost of delivery while the operator with disproportionately larger spectrum enjoys significant technological and marketing advantages over competitors. This has an anti-competitive effect on the mobile market and directly on cost to the consumer.

27. The only means of correcting over-concentration of spectrum resulting from a merger is the proposed compulsory divestment of certain spectrum for re-auction. A private sale or disposition of spectrum through transfer of shareholding in the holder of spectrum, for example Genius Brand, would not eliminate the anti-competitive effect of holding excessive spectrum in certain bands. Further, this would amount to spectrum trading which is not currently allowed in Hong Kong.

28. Virtually all of the mobile traffic in Hong Kong is currently being served by the FDD spectrum. The MNOs' share of that FDD spectrum is a critical factor in determining if there is over-concentration of spectrum in the market. FDD spectrum will continue to be the most important means for MNOs to serve their customers in the coming few years in terms of infrastructure and terminal devices.

29. The 3G spectrum will only be renewed in 2016 and assignment in other bands will not expire until the period 2020 – 2028. Thus, any divestment of spectrum by HKT should take place within a reasonable time, say 12 months after CA's Consent, as a condition of consent in order to eliminate as soon as possible the effect on SLC of the large amount of spectrum in the hands of the merged entity. HKT should not be allowed to delay its return of spectrum until expiry of the relevant licence term.

30. Turning to the numbers, as a result of the merger HKT will acquire an additional 137.6MHz of FDD/TDD spectrum from CSL. Its combined holding will be 233.6MHz or 38.8% of the total FDD/TDD spectrum. HKT offers to give up and not to re-acquire for 2 x 14.8MHz of the 2 x 29.6MHz paired spectrum in the 1.9-2.1GHz band. This would give the merged entity 204MHz or 33.9% of FDD/TDD spectrum. As a result, HKT will enjoy significant market power that could distort the mobile market. SmarTone has excluded from these figures the 8MHz of spectrum in the 700MHz band used for mobile TV and not for general mobile services (i.e. voice and data services) which HKT has wrongly included.

31. After the merger HKT will have an even larger share of the FDD spectrum and also will enjoy the inherent benefits of a lower cost base than its competitors for building and operating its radio network. This holding will not have been acquired by organic growth through auction but by way of acquisition by merger. This will enable HKT to build up an excessive concentration of spectrum which needs to be addressed by the CA through divestment.

32. Set out below is a table showing the spectrum in each band after the HKT/CSL merger excluding 8MHz for mobile TV wrongly included by HKT[4].

Table 1 – HKT / CSL's Spectrum Holding in each band

	Frequency Band	Combined HKT/CSL Before Merger (MHz)	After Merger & Relinquishing 14.8MHz x2 of 1.9–2.1GHz (MHz)	Industry Total (MHz)
FDD	850MHz and 900MHz	31.6 (37.3%)	31.6 (37.3%)	84.8
	1800MHz	72.8 (48.9%)	72.8 (48.9%)	148.8
	1.9-2.1GHz - Paired	59.2 (50%)	29.6 (25%)	118.4
	2.5-2.6GHz	60* (42.9%)	60* (42.9%)	140
	FDD Sub-total	223.6 (45.4%)	194 (39.4%)	492
TDD	1.9-2.1GHz - Unpaired	10 (50%)	10 (50%)	20
	2.3GHz	-	-	90
	Total FDD/TDD	233.6 (38.8%)	204 (33.9%)	602

Note (*): The 40MHz of spectrum in the 2.5-2.6GHz band was assigned to Genius Brand Limited through the auctions conducted in January 2009 and March 2013 respectively. Genius Brand Limited is indirectly owned by HKT and Hutchison and hence the concerned spectrum is assumed to be equally shared between the two parties.

33. As appears in Table 1 above, HKT/CSL's FDD spectrum share post-merger will be 45.4% and will reduce only to 39.4% after relinquishing the 2 x 14.8MHz paired spectrum in 1.9-2.1GHz. The over-concentration of FDD spectrum is even more marked than for the combined FDD/TDD spectrum.

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[4] See Annex 1 paragraph 1

34. Taking account only of the FDD spectrum being used for 4G (the 1800MHz and 2.5-2.6GHz bands), HKT/CSL's spectrum share is 46.0% (i.e. (72.8 + 60) / (148.8 + 140)). HKT will hold close to half the total spectrum in the 1800MHz and 2.5-2.6GHz bands after the proposed acquisition. This is a high concentration of spectrum in these two major FDD bands delivering 4G services in Hong Kong and the global markets today and over the next few years. Therefore, the over concentration of spectrum in those bands by the merged entity will give HKT significant technological and marketing advantages over its competitors and hence SLC.

35. In the light of the above spectrum analysis, SmarTone's specific proposals for the divestment of spectrum for certain bands are set out below.

1.9-2.1GHz band

36. HKT recognises that the merged entity would hold an excessive concentration of spectrum in this band – currently 50% of the 59.6MHz paired spectrum. It has therefore indicated that it would commit if so requested by the CA to give up and not to re-acquire for the 2 x 14.8MHz in the 1.9 – 2.1 GHz band which it will relinquish. However, HKT wishes to keep slots S2, S5 and S6 of the remaining 2 x 14.8 MHz slot of paired spectrum.

37. This proposal, if accepted by the CA, would place SmarTone and Hutchison at a competitive disadvantage as each can only exercise a right of first refusal over 2 x 9.9MHz each - SmarTone over slots S7 and S8 and Hutchison over S11 and S12.

38. HKT would have 2 x 14.8MHz if its proposal was accepted without the need to participate in any re-auction. It would also have all the certainty that this entails in the period up to expiry of the current 3G licence in October 2016. It is manifestly unfair for the incumbent 3G operators to be differentiated in terms of the spectrum over which they have the right of first refusal.

39. On top of the 2 x 14.8MHz HKT proposed to return and not to re-acquire, SmarTone proposes that <u>either</u> (i) HKT commits to placing 2 x 4.9MHz for re-auction thereby placing HKT on a level playing field with SmarTone and Hutchison <u>or</u> (ii) the CA permits SmarTone and Hutchison similarly to re-acquire 2 x 14.8MHz by right of first refusal. HKT should only be able to bid for the 2 x 4.9MHz slot it relinquishes and no further spectrum in that band.

40. In terms of timing, the 2 x 14.8MHz which HKT already proposes to divest should be relinquished before expiry of the assignment in 2016. SmarTone proposes it should take place within 12 months after CA's Consent. This would allow the successful bidder, who may be a new entrant, to plan its investment and would more rapidly eliminate the effect of SLC on this aspect of the proposed transaction. The relinquished spectrum in the band should be made available for public auction in which HKT cannot participate.

850MHz and 1800MHz bands

41. SmarTone proposes that an additional 2 x 15MHz paired spectrum in the above bands should be released by HKT/CSL. This will comprise 2 x 10MHz from the 1800Mz band and 2 x 5MHz from the 850MHz band. Without divestment, after merger HKT would hold 49% of the 1800MHz band. This is an excessive concentration and the same high percentage as it has in the 1.9 – 2.1GHz band which it has agreed to reduce by half. Of the 72.8MHz of spectrum which it has in the 1800MHz band, HKT can easily divest 2 x 10MHz for re-auction and reduce its concentration. The band is prime for refarming for 4G use which is the focus of MNOs in upcoming years.

42. As for the 850MHz band, SmarTone points out that the 2 x 7.5MHz paired spectrum held by HKT is only serving inbound CDMA roamers. SmarTone believes 2 x 2.5MHz of the spectrum would be sufficient for that purpose. This band is therefore highly under-utilised and 2 x 5MHz of HKT's holding should be relinquished. The relinquished spectrum in the band should be made available for public auction in which HKT cannot participate.

2.5-2.6GHz band

43. SmarTone does not advocate any redistribution between HKT and Hutchison of the spectrum in the 2.5-2.6GHz band currently held by the joint venture between HKT and 3HK, Genius Brand. This would not address the under-utilisation and concentration respectively in the 850MHz and 1800MHz bands. If HKT was to do so, this would avoid a re-auction and would amount to spectrum trading which is not permitted.

Post-relinquishment position

44. After relinquishing an additional 2 x 15MHz paired spectrum from the 1800MHz and 850MHz bands, HKT/CSL's FDD spectrum share would be reduced from 39.4% to 33.3% (164/492), which is still a significant concentration. There should be no impact on HKT/CSL of this further spectrum relinquishment whilst ensuring at the same time healthy competition in the market.

45. The additional 2 x 15MHz paired spectrum should be relinquished within a reasonable time, say 12 months, after the CA's Consent and HKT should not participate in the auctions related to these relinquished spectrum bands. At that point, HKT's overall spectrum share (with TDD spectrum included) would then be reduced to a more reasonable level of 28.9% (174/602).

46. The following table summarizes HKT/CSL's spectrum share after relinquishing an additional 2 x 15MHz paired spectrum in the 850MHz or 1800MHz band.

Table 2 - Relinquishment of Spectrum

	Before HKT/CSL Merger			**After HKT/CSL Merger**	
	HKT	**CSL**	**Combined HKT / CSL**	**After relinquishing 2x14.8MHz of 2.1GHz**	**After relinquishing additional 2x10MHz of 1800MHz and 2x5MHz of 850MHz**
All FDD and TDD spectrum, excluding the Mobile TV spectrum (Total: 602MHz)	96MHz (15.9%)	137.6MHz (22.9%)	233.6MHz (38.8%)	204MHz (33.9%)	174MHz (28.9%)
FDD spectrum only (Total: 492MHz)	91MHz (18.5%)	132.6MHz (27.0%)	223.6MHz (45.4%)	194MHz (39.4%)	164MHz (33.3%)
FDD spectrum for 4G in 1800MHz and 2.5-2.6GHz (Total: 288.8MHz)	46.4MHz (16.1%)	86.4MHz (29.9%)	132.8MHz (46.0%)	132.8MHz (46.0%)	112.8MHz (39.1%)

CROSS-PLATFORM BUNDLING

47. HKT has described itself as both a fixed network operator ("FNO") and a mobile network operator ("MNO"). No significance, however, is attached to the fact that HKT is part of the PCCW group.

48. In PCCW's company profile on its website, PCCW is described as owning "*a fully integrated multi-media and entertainment group in Hong Kong which includes a highly successful IPTV operation, NOW TV. As the provider of Hong Kong's first quadruple-play experience, PCCW offers a range of innovative media content and services across four delivery platforms – fixed line, broadband internet access, tv and mobile*".

49. HKT has the largest market share in fixed line and fixed broadband and PCCW has the largest market share in pay-TV markets in Hong Kong (See paragraph [71]). Following the merger, the PCCW group will also have the largest market share in Hong Kong's mobile market. This would allow HKT, by means of a M&A transaction as opposed to by its own product/service development, to engage in practices that

would substantially lessen market competition by way of cross-subsidies, bundling, transfer pricing and predatory pricing.

50. There has been a clear tendency of cross-market bundling offers by HKT or PCCW in the past. A summary of past published bundling offers of services provided by HKT or PCCW group companies is set out in Annex 2. The summary is not exhaustive as most bundling offers provided by HKT or PCCW group companies (which are usually more aggressive offers) are made directly to retain or acquire customers, for example, by way of telephone calls, or are not available in published sources. One could reasonably foresee that the cross-market bundling behaviour will only intensify after the merger which will inevitably lessen the competitive equilibrium.

51. In line with best regulatory practices worldwide and in the EU in particular, it has long been established that "*where an undertaking has SMP (Significant Market Power) on a specific market, it may also be deemed to have SMP on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking*".[5]

52. In the present situation, HKT as an operator with significant market power in both fixed line and broadband and PCCW in the pay-TV market in Hong Kong will be deemed to have significant market power on a closely related market, i.e. the MNO market.

53. In other words, due to its substantial market power in the fixed and now in the mobile markets, HKT will be in a position to further strengthen and leverage the market power it has as a FNO and on the second / neighbouring MNO market.

54. The above market issues have long existed and been addressed at international level. Hong Kong regulators have considered precedent and practices of telecoms regulation in other jurisdictions, particularly the EU. Regulators worldwide have universally recognised that they are particularly applicable in the telecommunications sector where an operator often has a dominant position in the infrastructure market and a significant presence in the downstream service market.

55. For example, the European Commission has published Guidelines[6] which reiterate that where an undertaking has significant market power in a specific market, it is likely to have significant market power in a closely related market. This scenario is particularly applicable in the electronic communications market where an operator often has a dominant position on the infrastructure market and a significant presence on the downstream service market.

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[5] Article 14 (3) of the Framework Directive.

[6] Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services (2002/C 165/03).

56. These Guidelines go further and suggest that in such circumstances, a regulator is well placed to determine that such an operator has SMP in both markets taken together.

57. Therefore, according to global best regulatory practice, if a company in the same position as HKT was assessed as having SMP on an upstream wholesale or access market, the relevant regulators would likely prevent any likely spill-over of leverage effects downstream into the retail or services markets by imposing specific obligations on such a significant player aimed at avoiding such effects on an *ex ante* basis.

58. Accounting separation is one example of the type of an *ex ante* obligation that a regulator could impose on HKT in relation to specified activities associated with interconnection and/or access.

59. HKT, being a vertically integrated company, could also be required to make transparent its wholesale prices and its internal transfer prices to prevent unfair cross-subsidisation.

60. SmarTone submits that the CA needs to take account of whether the proposed transaction would create or enhance the market power of HKT with particular regard to the ability of the merged entity to (a) increase its share of the mobile market; (b) consolidate its enhanced concentration of spectrum; and (c) engage in cross-market bundling activities which may have an anti-competitive effect.

MARKET SHARE AND SAFE HARBOURS

61. HKT has assessed the approximate market share by subscribers as at June 2013 (page 4 of HKT's Submission) and suggest that CSL is the 3rd largest MNO after Hutchison and China Mobile with HKT in 5th place behind SmarTone.

62. In the M&A Guidelines, the CA utilises two tests, CR4 and HHI, to provide a benchmark as to whether the proposed transaction has the effect of SLC.

    (a) The first safe-harbour measure – the CR4 test

    Applying the CR4 test, the post-merger combined market share (using the under-stated subscriber numbers in HKT's submission) of the 4 largest operators is about 90% and the HKT/CSL merged entity has a 31% market share. Paragraph 2.8 of the M&A Guidelines provides, "*Where the CR4 is 75% or more, the TA is unlikely to investigate the transaction* ***if the combined market share of the merged entity is less than 15% of the relevant market.***" Therefore, the transaction is deemed to fall outside the safe harbour of the CR4 test as the CR4 is more than 75% and the market share of the merged entity is more than 15% of the relevant market.

(b) The second safe-harbour measure – the HHI test

Using the HHI test, the pre-merger HHI is about 1854 which is above the upper bound of the 1000 to 1800 range which indicates a highly concentrated market. Post-merger, the HHI will increase to about 2310. An increase of 456 in the HHI index is considerably higher than the benchmark increase of 50 which is expressed to raise competitive concerns and where further investigation is required (Section 2.9 of the M&A Guidelines).

63. Based on the outcome of the two tests above, and contrary to HKT's claim at page 17 of their submissions, the proposed acquisition clearly falls outside both of the safe harbour measures. HKT in its submission at page 17 has avoided applying the two safe harbour mechanisms as clearly set out in paragraphs 2.6 to 2.12 of the M&A Guidelines. Instead, HKT has solely and selectively relied on the post-merger market share figure of less than 40% in paragraph 2.13 of the M&A Guidelines as a benchmark to claim that the safe harbour measures have been met.

64. As set out above, none of the two tests use the post-merger market share as the only benchmark to determine the result. The approach taken by HKT is simply wrong and misleading.

65. These outcomes are based on HKT's figures, although there is an issue about the subscriber figures for CSL particularly which are said to be net of MVNO and re-seller numbers. It is noted that on previous occasions, CSL had reported a significantly higher customer number in the order of 3.9 million. If CSL's figures of 2.8 million are under-stated in the HKT's submission, then the CR4 and HHI tests will show even higher figures.

66. In addition to the above, the exact wording of paragraph 2.13 of the M&A Guidelines is that "*In any event, where the post-merger market share of the parties to the transaction is 40% or more, it is likely that the TA will wish to make a detailed investigation of the transaction*". HKT has interpreted (to its advantage) that the quote logically means that a merger below 40% would not likely raise competition issues and would not likely be subject to a detailed investigation. It is clear from the M&A Guidelines that the quote does not carry the meaning as contended for by HKT. A post-merger market share of less than 40% does not attract automatic clearance.

67. The Hong Kong Telecommunications Authority Guidelines do not contain any legally-binding rule that concentrations leading to a combined market share of under 40% should be cleared as a matter of principle.[7] The consistent practice followed by the relevant competition authorities worldwide suggest that the likelihood of a

[7] See indicatively the cases M. 5224-*EDF/Segebel*, M. 3916-*T-Mobile/tele.ring*, M. 5224-*EDF/British Energy*, M. 5355-*BASF/CIBA*, in which the European Commission identified serious concerns despite the small market shares of the merging parties.

significant impediment of effective competition should be assessed on an individual basis, taking into account the characteristics and specificities of each individual case.

68. Furthermore, it should be noted that post-merger, HKT will have 31% of the Hong Kong mobile telecommunications market by subscriber numbers. HKT should be generally considered to be an operator holding a significant market power in that market.

69. It is also noted that even before the merger HKT possesses the largest market share in both the fixed line and fixed broadband market (75% and 60% market share by lines respectively)[8] and PCCW has the largest market share in pay-TV markets in Hong Kong. In addition, both entities have also substantial or significant market power in the respective markets. As such, there are undisputed links between the fixed line, fixed broadband, mobile markets and pay-TV markets allowing the market power held in one market to be leveraged into another market, thereby strengthening the market power of the merged entity.[9]

70. Therefore, the merged entity will have substantial market power status in fixed line and broadband and PCCW in the pay-TV market in Hong Kong.

71. Whilst the M&A Guidelines indicate that the CA will not apply Sections 7K and 7L of the Ordinance or equivalent provisions in relevant licences to the same transaction, the likely effect in SLC terms is of legitimate enquiry and concern.

OVERLAPPING OF BUSINESS OF HKT AND CSL

72. HKT submits that there is minimal overlap of business of HKT and CSL in its submissions because their business focuses are different (page 36). This is contrary to the actual statistics available. Based on the porting statistics available to the incumbent MNOs, it is SmarTone's contention that the two companies are respectively the largest donor and receiver of each other and therefore the proposed transaction would result in a substantial reduction of competition.

73. In this regard, SmarTone refers to OFCA's letter dated 7 January 2014 requesting porting statistics and assumes that other incumbent MNOs would have received the same request. Upon review of the information received from individual MNOs, SmarTone is confident that the CA will draw the same conclusion that there is a

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[8] http://www.thestandard.com.hk/news_detail.asp?pp_cat=1&art_id=135458&sid=39943124&con_type=1; http://point-topic.com/free-analysis/hong-kong-broadband-subscribers-and-tariff-overview-q4-2012/

[9] Directive 2002/21/EC of the European Parliament and of the Council of 07/03/2002 on a common regulatory framework for electronic communications networks and services ("**Framework Directive**"), L 108/33, 24/04/2002, Article 14 (3).

significant and substantial degree of overlap in the business of HKT and CSL based on the porting statistics.

CO-ORDINATED EFFECTS

74. Paragraph 18 of the Consultation Paper invites representations on whether the post transaction market structure would facilitate co-ordinated conduct as the number of MNOs will be reduced from 5 to 4 (effectively 6 to 5 including 21 Vianet). SmarTone does not understand why this question is relevant in the current context because the existing competition provisions currently in the Telecommunications Ordinance (e.g, section 7K) and in future the upcoming Competition Ordinance (once in force) should be able to prevent and deal with any such co-ordinated conduct, if established.

PUBLIC BENEFIT

75. In order for the pro-competitive effects to be taken into account, efficiencies must be verifiable, likely to be passed on to consumers and merger specific to the extent that no other practicable and less anti-competitive alternatives exist to achieve the same benefits.

76. SmarTone considers that HKT has failed to substantiate and verify that the network related efficiencies could be attained only through a merger in its submissions (page 55 to 56). HKT did not underpin its assumptions with sufficient evidence from internal documents.

77. Instead of substantiating the claims on the basis of specific evidence and actual facts, HKT has put forward its personal ambitions and general declarations with regard to increased innovation, faster introduction of new services, improved service quality, network up-grades, better customer care, etc.

78. By way of example, a domestic roaming agreement with other MNOs and/or a joint venture to develop LTE and large-scale network sharing could achieve the same results claimed by HKT which can be alternative options. In addition, the alleged effects of increased network quality as a result of the merger are without foundation.

79. As far as the faster LTE, the increased network coverage, the prospective further investments, and the potential reduction of alleged scale disadvantages are concerned, SmarTone particularly notes that this is not merger-specific. Investments and innovation could in any case take place organically in the absence of a merger. Further, by HKT's own admission at page 41 of its submissions, SmarTone has already achieved this and so it is reasonable to assume that HKT could and should do so without this merger.

80. HKT has not sufficiently explained how these efficiencies, if they arise, would fully benefit consumers and the public interest as a whole. The efficiencies claimed, even if

proven, will only benefit HKT and/or CSL customers, which cannot equate to benefits available to all consumers.

81. In addition to the above, over-concentration of spectrum holding by one operator would have negative impacts on the competition landscape and without the imposition of robust regulatory measures, the resulting adverse effect of the proposed merger would ultimately be experienced by consumers.

PRECEDENTS IN MERGER CASES IN OTHER JURISDICTIONS

82. In the M&A Guidelines and in decisions relating to previous mergers, the CA refers to legislation, guidelines and to case precedent in other jurisdictions. Such legislation, guidelines and precedents are not binding on the CA but will help to inform the approach which regulators globally apply when considering whether or not to consent to a proposed merger and what conditions to apply to address any SLC.

83. In view of the likely effect of substantially lessening competition of the proposed transaction and the lack of any verifiable public benefit, SmarTone submits that the CA should impose conditions on the transaction to prevent the merged HKT/CSL entity from engaging in any anti-competitive behaviour after the merger. As such, SmarTone respectfully refers to certain precedents in relation to telecom mergers in various jurisdictions in the EU and in the US.

84. In the EU, the Commission has power to, and does where appropriate, accept commitments from parties.[10]

M. 5650/T-Mobile/Orange

85. In this landmark Commission Decision the Commission identified that, post-merger, Orange and T-Mobile would hold a combined amount of contiguous spectrum at the 1800 MHz frequency level, significantly larger than their competitors, as is also the case in the HKT/CSL merger. The concern raised particularly by the other MNOs was that the joint venture, as a result of the combination of the 1800 MHz spectrum bands held by T-Mobile and Orange, could be the only MNO with a clear path to full

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[10] According to the Commission's Notice on remedies under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008/C 267/01, paragraph 9 "*the Commission only has power to accept commitments that are deemed capable of rendering the concentration compatible with the common market so that they will prevent a significant impediment of effective competition. The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.*"

coverage maximum-speed long term evolution ("LTE") technology or 4G in the UK.[11]

86. This might be the case since the joint venture was in a position to offer good coverage; use its significant amount of spectrum at the 1800 MHz to clear within a short time frame 2 x 20MHz while migrating customers from one of the merging parties' networks to the other one, without incurring disruptions or lower quality of service in the meantime; and significantly lower the operational cost of the network. According to the Commission, this could result in a bifurcation of the market in the years to come, with the joint venture enjoying significant technological and marketing advantage over its competitors.

87. In order for the parties to resolve the Commission's competition concerns regarding the merger's compatibility with the common market in relation to the wholesale and retail telecommunications market, they proposed a commitment regarding the concentration of spectrum in the 1800MHz band, to divest either by way of a private sale or via an OFCOM auction, 2 x 10MHz ("Divestment Spectrum I") plus 2 x 5MHz ("Divestment Spectrum II") of the joint venture's 1800MHz spectrum band. In addition, the purchaser of the 2 x 10MHz should be the same as the purchaser of the 2 x 5MHz. This would ensure that the purchaser would hold a sufficient amount of spectrum to allow an independent deployment of a competitive LTE network.

M. 6497-Hutchison 3G Austria/Orange Austria

88. In order for the parties to resolve the Commission's concerns regarding the merger's compatibility with the common market in relation to the market for mobile telecommunication services to end customers and in the market for wholesale access and call origination, they proposed certain commitments.[12] The merger would reduce the number of MNOs in Austria from 4 to 3 and create the 3rd largest MNO with an overall market share of 20-30%.

89. A commitment by H3G to make available spectrum to a new entrant and other related commitments, such as the sale or collocation of sites and national roaming for a period of up to 6 years on the H3G Network, on the basis of the same charges and substantially the same terms as contained in the Reference Offer for the MVNO wholesale access were added into the second set of commitments to the Commission.

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[11] In order to deploy the most efficient and fastest download speed LTE technology, contiguous spectrum of 2 x 20 MHz is preferable and necessary to achieve the maximum bandwidth possible. While LTE can be launched also on 2 x 10 MHz or even smaller bands, the full speed will not be reached if this smaller amount of spectrum is used.

[12] In case M. 6497- Hutchison 3G Austria/Orange Austria, the merged firm post-merger would still be the third largest MNO. However, post-merger the proposed transaction would more than double H3G's customer base and would bring H3G to the forefront of MNOs in terms of subscribers. The merged firm would have, post- merger, an appreciably larger market share than the next competitor post-merger.

90. In particular, H3G agreed in a decision of the Commission published in December 2012 to make available 2 x 10 MHz of spectrum in the 2600MHz frequency band to a new entrant on the Austrian market. This spectrum was to be offered for sale alongside further spectrum in the 800MHz frequency band which would be within 3 months of the outcome of the 800MHz auction to be held in 2013.

M. 3916-T-Mobile Austria/tele.ring

91. The merging parties offered commitments to address the Commission's concerns: the **divesture o**f UMTS frequencies and mobile telephony sites of tele.ring to operators with lower market shares than T-Mobile Austria. In particular, T-Mobile agreed to **sell two 5 MHz** 3G/UMTS frequency blocks, which were at the time licensed to tele.ring, to competitors with smaller market shares.

92. One frequency block was to be sold to H3G with whom T-Mobile had already entered into Heads of Terms. H3G also agreed to acquire some of tele.ring's mobile communications sites, including the mast, relays, cable infrastructure, microwave frequencies and associated equipment.

93. The other UMTS frequency block was to be sold to either H3G, ONE, or a new entrant. The other sites to be divested were to be sold either to ONE or to other operators. T-Mobile would also offer H3G and ONE preferential co-location rights at sites it was retaining, in addition to its regulatory obligations.[13]

M. 2803-Telia/Sonera

94. Telia agreed to divest certain assets including its mobile communications services business in Finland and its cable TV network and related distribution business in Sweden with the view to removing the serious doubts identified in relation to the horizontal overlap between the parties' activities in the provision of mobile communication services, WLAN services and international roaming services in Finland.

95. With regard to the likelihood of vertical foreclosure in the downstream markets for the provision of corporate communications services and mobile communications services, Telia offered the following commitments:

(a) to ensure that its fixed and mobile network businesses in Sweden and Finland are held in separate legal entities which are distinct from related retail activities. Until the legal separation has been achieved, as an interim solution, Telia committed to cause separate accounts to be kept and to be available to the arbitration panel, for the fixed and mobile network businesses;

[13] These commitments should enable Hutchison 3G (competitor) which recently entered the market as a UMTS operator to expand its network all over Austria and thereby to compete without being dependent on its current national roaming agreement with Mobilkom.

(b) to apply a non-discrimination obligation in relation to the provision of regulated wholesale fixed and mobile network services as between the Telia group and specified third party operators in Sweden and Finland. Also a non-discrimination obligation in relation to making available access to international wholesale roaming in its GSM networks in Sweden and Finland, between the Telia group and third party mobile network operators in Sweden and Finland; and

(c) to offer a fast-track dispute resolution procedure in the event of disputes regarding the application of the non-discrimination obligations described above.

M. 1795-Vodafone Airtouch/Mannesmann

96. In order to remove the concerns raised by the operation, Vodafone Airtouch submitted the following undertakings:

(a) The de-merger of Orange that aims at removing identified competitive overlaps in the UK and the Belgian market;

(b) A set of undertakings that aim at enabling third-party non-discriminatory access to the merged entity's integrated network so as to provide advanced mobile services to their customers. These undertakings particularly covered:

(1) Third parties' access to roaming arrangements;

(2) Third parties' access to wholesale arrangements;

(3) Standards and SIM cards to enable subscribers to override preferred roaming arrangements; and

(4) A fast track dispute resolution procedure in order to solve disagreements between the merged entity's group and third parties on third parties' access to roaming arrangements, third parties' access to wholesale arrangements, standards and SIM cards.

Verizon Wireless/Alltel Corporation

97. Verizon Wireless purchased Alltel Corporation in 2008. As a condition of obtaining US regulatory approval to complete the purchase which took place in early 2009, Verizon agreed to divest spectrum and assets in overlapping operations in 108 markets across 24 states. Many of the assets were sold to AT&T and comprised assets originally held by Verizon as well as those acquired from Alltel in the merger. The remaining divested markets were sold to Atlantic Tele-Network Inc. The divestment of assets took place and was completed in 2009 and 2010.

PROPOSED CONDITIONS AND REMEDIES

98. There is precedent in other jurisdictions in the telecoms field for the imposition of conditions and remedies whether by way of commitments or otherwise to the proposed merger.

99. To eliminate the SLC effect, SmarTone suggests that OFCA should set the following conditions on HKT whether by way of commitment or otherwise to the proposed merger.

Divestment of Spectrum

100. HKT should relinquish and not seek to re-acquire an additional 2 x 15MHz in total of paired spectrum from the 850MHz and 1800MHz bands. This should take place within a similar 12 months time frame after CA's Consent is granted.

101. HKT must return the 2 x 14.8MHz paired spectrum which it has indicated that it would be prepared to give up and not to re-acquire the spectrum in the upcoming auction in the 1.9 - 2.1GHz band to the Government for public auction. This divestment should take place within 12 months of CA's Consent being granted.

102. HKT must not be placed in a more advantageous position than Hutchison and SmarTone in respect of the remaining spectrum in the 1.9 – 2.1GHz band. Accordingly, if the CA maintains its decision set out in the Statement in respect of the 3G spectrum on 15 November 2013, then HKT will only have a right of first refusal over 2 x 9.9MHz of paired spectrum and must relinquish the remaining 2 x 4.9MHz paired spectrum for re-auction. HKT is only allowed to bid for a maximum of 2 x 4.9MHz at the re-auction.

103. The alternative would be for the CA to permit HKT, SmarTone and Hutchison to exercise rights of first refusal over their block of 2 x 14.8MHz paired spectrum to ensure that no incumbent 3G operator was differentiated from any other.

MVNO Agreements

104. The existing MVNOs of HKT and CSL should be permitted to terminate the contractual arrangements without penalty and on demand within a reasonable period of time, say 18 months, after CA's Consent is granted to the proposed transaction.[14] This would allow the MVNOs to negotiate terms with other MNOs if each wished to do so.

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[14] A similar commitment concerning Telefonica's commitment to withdraw completely from the FreeMove Agreements was accepted in Case M. 4035-*Telefonica/O2*.

Divest New World Mobility Limited

105. HKT must divest CSL's 60% interest in New World Mobility Limited, within 12 months after CA's Consent is granted to the proposed transaction.[15] CSL claims it only has 2.8 million subscribers after stripping out numbers from MNOs and re-sellers. However, New World Mobility Limited is a MVNO which is majority owned by CSL. The New World Mobility Limited's subscriber number should therefore be included in HKT's total numbers. However this will increase HKT's numbers and therefore the results of the safe harbour tests using CR4 and HHI will be higher and will fall further outside the safe harbour of the tests. If HKT divested New World this would keep the subscriber numbers down to its stated 2.8 million.

Cross-bundling

106. The CA should impose robust regulatory oversight (either by way of licence conditions or undertaking) to ensure that the merged HKT/CSL entity would not abuse its substantial market power. By this, SmarTone means that any cross-bundling offers made between HKT and PCCW (and/or their affiliated companies within the PCCW Group) for their respective customers should not be on terms more favourable than would be on offer to other MVNOs or MNOs.

107. To ensure compliance, HKT should be required:

(a) to ensure non-discrimination in its offers related to wholesales services as well as any service constituents of its bundled offers (not limited to pricing);[16]

(b) to make transparent its wholesale prices and its internal transfer prices to prevent unfair cross-subsidisation;[17]

(c) to guard against predatory pricing that can disadvantage competition by leverage on cross-bundling subsidies ;[18] and

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[15] Regarding the demerging of shareholdings see Case *M. 1795-Vodafone Airtouch/Mannesmann*. Regarding the divestiture of interest see Case M. 2300-*YLE/TDF/DIGITA/JV*; Case M. 1760-*Mannesmann/Orange;* Case M. 2016-*France Telecom/Orange*.

[16] See Case M. 6497-*Hutchison 3G Austria/Orange Austria;* Case M. 1795-*Vodafone Airtouch/Mannesmann;* Case M. 2803-*Telia/Sonera.*

[17] Reference to the compliance with the principle of transparency is made in Case M. 2803-*Telia/Sonera,* paras 135 *et seq.* In this case, the Commission has accepted several commitments including, among others, Telia's legal separation, account separation, and so on with the view of remedying the existing lack of transparency.

[18] In Case M. 2803-*Telia/Sonera,* para 135 the Commission pointed out that "*the lack of clear interfaces between the different activities of the merged entity makes it difficult to fully control that their termination charges are cost oriented and that there are no price squeezes.*" In addition, according to the section F of the commitments, Telia or the Affiliated Undertakings were obliged to offer wholesale prices to third parties on a cost-oriented basis ("Regulated Products"). See, also, in this regard, Case M. 1795-*Vodafone Airtouch/Mannesmann.*

(d) to put in place accounting separation[19] or legal separation of its mobile business unit from other business units.[20]

CONCLUSION

108. Consolidation in the telecoms market is a global trend which takes place through high value transactions and is a means of enhancing efficiencies, optimising radio performance and creating economies of scale in order to deliver a high quality service at a lower cost and at great value to the customer. This brings increased economic benefits to an economy.

109. In consequence, in mobile markets throughout the world the number of players is reducing as consolidation takes effect. The more mature the market, the fewer the number of players. SmarTone acknowledges that this trend is desirable as fewer players enables the limited spectrum to be shared sufficiently amongst the remaining players to ensure investment is targeted at enhancing performance rather than compensating for insufficient spectrum.

110. Accordingly, SmarTone remains broadly supportive of the proposed merger subject however to the CA ensuring that HKT divests spectrum to reduce its excessive spectrum concentration to a more equitable 28.9% total of the FDD/TDD spectrum. Further, that in addition HKT addresses the concerns that the significant presence of the PCCW group, of which it is part, in fixed line, fixed broadband, pay-TV and now mobile does not result in further cross-platform bundling of services on terms which amount to anti-competitive behaviour.

111. Consolidation whilst driven by market forces cannot be allowed to lessen competition and must therefore be subject to the CA's active scrutiny. This is not intended to discourage consolidation but to ensure that it is managed by imposing conditions to consent to merger to eliminate any effects of SLC which the proposed transaction would otherwise create.

112. Consolidation in-market properly managed is a win-win for all concerned. Operators can create economies of scale and efficiencies the financial benefits of which feed through to consumers in the form of innovation, good value and enhanced service performance.

SmarTone Mobile Communications Limited

4 February 2014

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[19] Case M. 6497-*Hutchison 3G Austria/Orange Austria;* Case M. 2803-*Telia/Sonera;* Case M. 1795-*Vodafone Airtouch/Mannesmann.*

[20] See, in this regard, Case M. 2803-*Telia/Sonera.*

Annex 1 - Erroneous information in HKT's Application

	Erroneous information	Impact
1	The table listing the market share of each MNO by subscribers, revenue and spectrum holdings (at page 4, pages 22 - 23 and pages 42 - 43 of HKT's Application) • The table suggests that currently the MNOs have a total of 610 MHz of spectrum, of which China Mobile Hong Kong ("CMHK") has 104.4 MHz of the total allocated spectrum. • However, out of the 104.4 MHz spectrum held by CMHK, 8 MHz of spectrum in the UHF band was specifically allocated for mobile TV service and not for mobile service. (the relevant spectrum was transferred to Hong Kong Television Network Limited in December 2013). It has been recognized by the CA in its statement on 15 Nov 2013 (Table 1 of Appendix 1 at page 10) that mobile TV spectrum is not considered as spectrum for the provision of public mobile services. (http://www.comsauth.hk/filemanager/statement/en/upload/237/ca_statements20131115_en.pdf • As such, the inclusion of mobile TV spectrum in the calculation of market share by mobile service spectrum is incorrect.)	The wrong inclusion of the 8MHz UHF spectrum has produced a lower figure of 38.3% which has the effect of understating the post-transaction market share (by spectrum) .The post –transaction market share should be a higher figure of 38.8%.
2	The same table in item 1 above states that the market share of CSL by subscriber number is 19 – 20%, which is equal to about 2.7 to 2.8 million subscribers. In footnote 18 (page 46) of HKT Application, it is stated that the subscriber numbers of MVNO and reseller as well as the non-activated pre-paid SIM card numbers have been subtracted out from the MNOs. • The parent company of CSL New World Mobility Limited, Telstra, has disclosed in its annual reports (year 2012 and 2013) and its presentation to investors that CSL ranked no. 1 in the Hong Kong mobile market with 3.9 million customers. There is a substantial difference between the CSL's subscribers figures reported in Telstra's annual reports and	The exclusion of the subscriber numbers of the MVNO subsidiary from the calculation of CSL's subscriber numbers has the effect of understating the market share of CSL. Using Telstra's published figure, the pre-merger market share of

	the CSL's subscribers figures provided in HKT's Application. • Secondly, New World Mobility Limited, an MVNO licensee, is 60% owned by CSL (as shown in the joint announcement of HKT/PCCW on the proposed transaction) which has therefore a majority and its subscriber numbers should not be subtracted out from the MNOs.	CSL will increase from 19-20% to 27%, and the post-merger market share (by subscriber number) of HKT/CSL merger entity will increase from 31% to 38% or above.
3	In the first table on page 5 of the HKT's Application, it is stated that SmarTone merger with P-Plus in 1998 reduced the number of operators from 4 to 3. On page 46, it is stated that the SmarTone/P-Plus merger reduced the number of major competitors from 4 to 3. • This is not correct because after the SmarTone/P-Plus merger in 1988, there were 6 mobile operators in Hong Kong (3 dual-band operators and 3 PCS band operators). (See OFTA's press statement for the SmarTone/P-Plus merger, http://tel_archives.ofca.gov.hk/en/press_rel/98/mar_98.html) •	The information may present a wrong impression that previous merger had even resulted in a more concentrated mobile market than the proposed transaction.
4	In paragraph 1 on page 22 of the Executive Summary, it is factually incorrect to state that China Telecom participated in the last spectrum auction. • In fact, it was China Unicom (Hong Kong) Operations Limited which participated in the spectrum auction conducted in March 2013. (see OFCA's notice of Qualified Bidders for the auction of radio spectrum in the 2.5/2.6 GHz band, http://www.ofca.gov.hk/filemanager/ofca/en/content_810/20130308.pdf)	N/A
5	Erroneous information in relation to safe-harbour measures and CA's Merger Guidelines See paragraphs 48 – 55 of SmarTone's Response.	The non-compliance of the safe-harbour measures and inaccurate paraphrasing of the M&A Guidelines would provide

		an impression that the proposed transaction does not warrant a detailed investigation by the CA. There is no presumption that a post-merger market share less than 40% will not be investigated.
6	In section 3.2 of HKT's Application (pages 29 – 30), HKT should have indicated that its affiliated company, PCCW Media Limited, has been offering pay- TV services and that HK Television Entertainment Company Limited, a PCCW group company, has recently awarded the domestic free TV licence. (See paragraph [*] of the Response).	The extent and effect of HKT's capability as a quadruple-play operator which have significant market power in the fixed, mobile and pay-TV markets is downplayed
7	In identifying the competition from China Mobile and SmarTone respectively, HKT has made the following statements: (a) "*Price leadership: China Mobile is a very strong and aggressive competitor that has historically competed largely on the basis of price and is often a price leader*" (paragraph 8.3, page 38 of the Executive Summary). (b) "*Highly aggressive competitor and price leader: SmarTone is an example of an aggressive and innovative competitor. It has invested heavily in its network, is a vigorous competitor, is often a price leader and was Apple's first iPhone 5 partner in Hong Kong*." (paragraph 8.5, page 40) (c) "*HKT and CSL are generally not price leaders and have brands that are generally targeted at different customer demographics resulting in minimal competitive overlap between them*." (page 52)	The description of other operators as price leader while HKT/CSL are not is an unsubstantiated description of the mobile market situation. The effect of which is to project an impression that the merger would not result in a reduction of competition in the market.

	• The claim made by HKT that China Mobile and SmarTone are price leaders whereas HKT and CSL are not is without foundation. No information or examples have been given to support HKT's claim that when China Mobile and SmarTone respectively and independently determine the price of their services in the market, the prices that they set are then adopted by other operators. • Ironically, HKT also recognized SmarTone "*has built a strong brand as a premium service provider and is the industry leader in terms of profitability*", "*SmarTone has excelled at focusing on ARPU and profitability, often being a leader in both market metrics*" (page 41 of HKT's application).	
8	In paragraph 4 on page 21 of the Executive Summary, HKT claims that "*Hutchison and SmarTone derive substantial preferential access to key buildings and locations in Hong Kong via their parents and/or property related affiliates...*" Further, at paragraph 1 on page 36, it is stated that "*CSL sees SmarTone and Hutchison as its major competitive threats rather than HKT because of their stronger brands, extensive networks (particularly in exclusive inbuilding residential and commercial coverage), established presence in the business/commercial sector and relationships with their property-company affiliates and their roaming partners*." • HKT claim in relation to Hutchison and SmarTone that they both have a competitive advantage over it in terms of accessibility to buildings and infrastructures are without substantiation. • HKT has in fact historic access to buildings and infrastructure (e.g., exchange buildings) which it inherited after it acquired HK Telecom (as it then was) from Cable and Wireless in 2000.	This is quite irrelevant to the issue of SLC created by the proposed merger. Neither Hutchison nor SmarTone has exclusive access to buildings or locations as suggested because of access granted under Section 14 authorizations.
9	With regard to paragraph 12.3 on page 53 of HKT's Application, SmarTone is not aware of any proven collusive case in which HKT claimed to be a whistleblower as to alleged collusive behaviour. In any event, HKT's submission is totally irrelevant as to the likelihood of occurrence of collusive behaviours by the merged entity as a result of the proposed transaction.	If HKT is referring to case T36/08, this file was closed without investigation being opened and no finding made on the merits of the subject of the

		complaints. It is not clear how HKT seems to claim credit for the request to investigate in support of its contention that consent should be given to a merger of two MNOs under Section 7P.

Annex 2 – Examples of Past Service Bundles offered by PCCW/HKT

<table>
<tr><th>Date</th><th>Services Bundled</th></tr>
<tr><td>March 2012</td><td>Now TV (Pay TV) / Netvigator (Fixed Broadband) + PCCW Mobile

Exclusive for existing subscribers of Now TV or Netvigator:

• to subscribe mobile services at $199/mth (vs mass $208/mth)
• 6-month mobile monthly fee waiver (pay 24 months for 30 months service)

(Source: ePrice / PhoneDaily - 12 March 2012)</td></tr>
<tr><td>March 2011</td><td>Netvigator (Fixed Broadband) + PCCW Mobile + Now TV (Pay TV)

For existing subscriber of Netvigator to subscribe PCCW mobile $256/1GB data plan with the following:

• Waive the handset prepayment of Samsung Galaxy Tab
• Mobile High Definition Now TV content for 1,500 mins
• MOOV music on mobile for 300 mins
• international mobile roaming data discount for up to 90% off
• free Wi-Fi hotspots
• free Netvigator Home Wireless service

(Source: Oriental Daily, A3 & A5 - 24 February 2011)</td></tr>
<tr><td>March 2011</td><td>Netvigator (Fixed Broadband) + Netvigator Everywhere (Pocket Wi-Fi) + PCCW Mobile

For existing subscriber of Netvigator to subscribe Netvigator Everywhere (Pocket Wi-Fi) at $428 with the following (vs non-existing Netvigator subscriber at $458)

• $0 for a Pocket Wi-Fi device
• Waive the handset prepayment of Samsung Galaxy Tab
• free Wi-Fi hotspots
• free Netvigator Home Wireless service

(Source: Oriental Daily, A3 & A5 - 24 February 2011)</td></tr>
</table>

February 2011	**Netvigator (Fixed Broadband) + PCCW Mobile** Exclusive for existing Netvigator subscriber to subscribe PCCW mobile services: • with extra data & voice mins at a very special price (e.g.: $20 for extra 4GB mobile data / $50 for unlimited mobile data / $50 for extra 1,800 voice mins / $100 for both unlimited mobile data & 1,800 voice mins) • waive handset prepayment of Samsung Galaxy Tab (vs mass - $3980 prepayment is required; to be rebate in 24 months' contract period *(Source: Apple Daily, C1 - 7 February 2011)*
March 2006	**Business Netvigator (Fixed Broadband) + PCCW Mobile** Subscribing business broadband plan ($498) + $50 value-added services offered the following promotion: • free 6 months monthly fee for mobile service (worth $160/mth x 6) *(Source: Apple Daily, A3 - 7 March 2006)*