WHARF T&T LIMITED

SUBMISSION IN RESPONSE TO THE APPLICATION FOR PRIOR CONSENT UNDER SECTION 7P OF THE TELECOMMUNICATIONS ORDINANCE IN RESPECT OF THE PROPOSED ACQUISITION OF CSL NEW WORLD MOBILITY LIMITED BY HKT LIMITED – PUBLIC CONSULTATION PAPER DATED 23 DECEMBER 2013

1. INTRODUCTION

1.1 Wharf T&T Limited ("WTT") submits its views in response to the public consultation on the application by HKT Limited ("HKT") for prior consent in respect of its proposed acquisition of CSL New World Mobility Limited ("CSL") ("HKT's Application").

1.2 WTT raises a number of competition concerns regarding HKT's Application and urges the Communications Authority ("CA") to carefully scrutinise HKT's Application and address those concerns.

2. RELEVANT MARKETS

2.1 WTT submits that the CA should not just assess HKT's Application based on the mobile services market as submitted by HKT. In its assessment WTT submits that the CA should also consider the market being an integrated fixed and mobile network services and the resulting market position of HKT following its acquisition of CSL. Further the competition is no longer focusing on voice, rather on mobile data; the CA should thus specifically consider the market position of HKT in the mobile data market following the acquisition. Therefore the CA should assess HKT's Application in each of the following relevant markets for a thorough assessment:

- mobile services market;
- mobile data services market;
- integrated fixed and mobile services market; and
- fixed services market.

2.2 OFCA should conduct its own enquiries and make its own calculations to independently verify the market share data as we have doubts on the purported market data based on public sources submitted in HKT's Application. The references for the so-called public sources have not been cited by HKT, so it is not readily possible to verify the validity of HKT's data. Further HKT's figures seem to downplay CSL's relative market share compared to other publicly available data. It appears that HKT's data regarding CSL's market share adopts data found in a HKT circular that states that CSL's total subscriber base was 2,792,000 in June 2013.[1] However, in contrast we note that New World Development Company Limited, which holds ultimate partial ownership of CSL, has published in its Annual Report 2013 that the subscriber base of CSL to 30 June 2013 was 3.9 million.[2]

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[1] PCCW Limited, "Major transaction in relation to the acquisition of the entire issued share capital of CSL New World Mobility Limited by HKT Limited", 31 December 2013. p 29, <http://www.hkexnews.hk/listedco/listconews/SEHK/2013/1230/LTN20131230434.pdf> as accessed on 24 January 2014.

[2] New World Development Company Limited, Annual Report 2013, p 34, <http://www.nwd.com.hk/html/download/Report/ar2013e.pdf> as accessed on 24 January 2014.

2.3 We dispute the claim in HKT's Application that 21 ViaNet is a credible potential competitor in the mobile services market. The Unified Carrier Licence (UCL 038) issued to 21 ViaNet on 30 March 2012, authorises it to solely provide public internal fixed telecommunications services. It appears that 21 ViaNet is neither authorised, nor intends, to establish and operate a mobile network.

2.4 We reject the claim made in HKT's Application that the degree of competition between HKT and CSL is minimal in the mobile market. HKT claims that CSL has broad market focus while HKT is more focused on mid-tier and some presence in high-end. We consider that the HKT claims of the existence of various distinct market segments (high-end, mid-tier and low-end) are dubious. In our view, for the purposes of competition law analysis, there is unlikely to be any distinction between such segments, due to the chains of substitution which militate against describing the market in such narrow terms. Each of CSL and HKT's mobile business (i) offer voice and data mobile telecommunications services to retail consumers throughout Hong Kong by means of extensive retail store networks which largely overlap in popular shopping districts and (ii) have extensive mobile radiocommunications access networks covering the whole territory of Hong Kong. From both a product and geographic perspective, both CSL and HKT participate in the same competitive space. HKT's Application does not point to any authority/precedent for its methodology for defining the market in narrow market segment terms.[3] In any event, even if the actual degree of competition between HKT and CSL were minimal, the two companies would undeniably be potential competitors for the same services for the same geographic market as the modes of supply of each can readily be adapted to meet the so-called market segment being addressed by the other. Therefore their merger would still warrant competition scrutiny.

2.5 We submit that the CA should, before it reaches its decision on HKT's Application, engage experts and deploy economic tools to predict the likely future market share and market power of HKT following the acquisition of CSL.

3. POSSIBLE COMPETITION SCENARIO IN THE MOBILE SERVICES MARKET

3.1 In assessing HKT's Application pursuant to section 7P of the Telecommunications Ordinance, the CA must consider the effects of the proposed acquisition by comparing the likely future state of competition if the acquisition proceeds (the "with" or "factual" position) to the likely future state of competition if the acquisition does not proceed (the "without" or "counterfactual" position).[4]

3.2 We submit that the state of competition in the mobile services market will be substantially lessened if the acquisition proceeds. The proposed acquisition will result in the mobile services market becoming more concentrated, with the reduction in MNOs from 5 to 4. The mobile services market is already highly concentrated where 90% of subscriber market shares and over 97% of market revenues are enjoyed by 5 MNOs currently. This unequivocably demonstrates that competition occurs substantially between facilities-based MNOs. MVNOs are not a significant competitive threat.

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[3] Notably, in the precedents cited in HKT's Application, the regulator has generally identified a retail market for mobile telecommunications services (comprising mobile voice/telephony and mobile data/broadband): e.g. ACCC, Public Competition Assessment - Vodafone Group plc and Hutchison 3G Australia Pty Limited - proposed merger of Australian mobile operations, 24 June 2009, <http://registers.accc.gov.au/content/trimFile.phtml?trimFileTitle=D09+68099.pdf&trimFileFromVersionId=884499&trimFileName=D09+68099.pdf> as accessed on 24 January 2014.

[4] Consultation Paper, paragraphs 12 and 13. This methodology is consistent with other overseas precedent, e.g. Australia: ACCC, Merger Guidelines, November 2008, p 13 <http://www.accc.gov.au/system/files/Merger%20guidelines.pdf> as accessed on 24 January 2014.

3.3 The reduced level of competition will lead to tariff increase for mobile services, as widely reflected in the common opinion of market analysts. Market analysts have forecast improved profitability for the remaining mobile carriers driven by higher tariffs due to reduction of discount promotional offers.[5] Higher tariffs will be detrimental to consumers who have hitherto been enjoying competitive offerings. Surely the CA would not want to be seen to be supporting the tariff increase.

3.4 We question HKT's claim that the mobile market is hypercompetitive. By general standards, the existence of five market players holding a combined 90% market share and 97% of market revenues indicates high market concentration and that economic barriers to entry exist.

3.5 The market data demonstrates that it is vertically integrated mobile network operators who hold and maintain market share. Contrary to the claim in HKT's Application, 21 ViaNet is not a credible potential competitor due to the fact, as noted earlier, its Unified Carrier Licence authorises it to provide public internal fixed telecommunications services only. MVNOs can hardly be counted as a competitive restraint, due to the very low levels of market share which suggest they exist on the fringes, common with the MVNO experience elsewhere in the world. In such circumstances, the proposed merger will only serve to increase market concentration and weaken competitive forces, contrary to the interests of consumers.

3.6 The scope for competitive new mobile network operator entry is constrained. There are substantial regulatory and technical barriers for a new entrant MNO to acquire the necessary spectrum, with no mobile spectrum availability in the near term as shown in the latest OFCA spectrum release plan.[6] There are also substantial economic barriers to timely and efficient entry to deploy a rollout of mobile access networks and retail locations as well as develop strong market branding to match the scale of incumbent MNOs.

3.7 There is no verifiable public benefit to be attained from the proposed acquisition. While HKTs Application suggests that the acquisition is likely to result in material public benefits, these are not convincingly substantiated. We refer to the TA's 2004 Merger Guidelines, which state:

> "*4.79 To the extent that an efficiency-enhancing merger increases competition by creating a more vigorous competitor, the TA may consider the efficiency gains to be a relevant matter to take into account in forming an opinion whether the merger substantially lessens competition. However, the TA would need to be satisfied on the following points:*
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> - *the efficiency gains must occur as a direct result of the merger ("merger-specific efficiencies");*
> - *the efficiencies must be clearly identified and verified ("recognizable efficiencies"); and*

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5 South China Morning Post, "SmarTone, Hutchison Telecom to see gains after CSL acquisition", 9 January 2014, <http://www.scmp.com/business/companies/article/1401081/smartone-hutchison-telecom-see-gains-after-csl-acquisition> (paywalled article) as accessed on 24 January 2014 (quoting Barclays); Bloomberg, "HKT to Buy CSL for $2.43 Billion to Bolster HK Mobiles", 20 December 2013, <http://www.bloomberg.com/news/2013-12-19/telstra-sells-hong-kong-mobile-unit-csl-for-2-43-billion-to-hkt.html> as accessed on 24 January 2014 (quoting BNP Paribas SA); Morgan Stanley, "Hong Kong Telecoms – HKT Acquires CSL; Big Positive for Mobile Operators", 22 December 2013, <http://pg.jrj.com.cn/acc/Res/CN_RES/INDUS/2013/12/22/3eb01481-4e90-453d-9e14-0f54512be5d9.pdf> as accessed on 24 January 2014; Credit Suisse, Asian Daily – SmarTone Telecom, 20 December 2013, <https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1026991441&extdocid=1026991441_1_eng_pdf&serialid=03QD%2bRx4936pTGNMfsyenbCyVGZKpy1mD%2fwHp4t0z%2fw%3d> as accessed on 24 January 2014.

6 OFCA, Spectrum Release Plan for 2013-2015.

> - *the efficiency gains must translate into more a effective level of competition from the merged entity than the level that was offered by the merging parties separately ("translated efficiencies").*
>
> *"4.80 It must be demonstrated that the efficiencies will be achieved by the merger and would be unlikely to have been achieved without the merger (for example, internal re-organisation) or by another means having comparable or less significant anti-competitive effects (for example, a joint venture arrangement)."*[7]

3.8 HKT fails to prove that any of the so-called public benefits are merger-specific, i.e. unattainable, for example, by building new mobile cell sites or entering into network sharing / roaming agreements with other MNOs. HKT points to vague cost saving implications of merging the mobile networks, but does not show how network roaming arrangements could not lead to the same outcome and anyway presents no evidence that any such cost efficiency gains are likely to be passed to consumers or invested in new infrastructure. HKT points to abstract quality improvements, but without presenting evidence of its planned network size, configuration, network capacity and quality post-merger as compared to pre-merger and without showing that similar quality improvement cannot be attained by building new mobile cell sites. In the absence of substantiating evidence in HKT's Application, we submit that the CA should dismiss HKT's public benefit claims.

4. HKT'S STATUS AS AN INCUMBENT AND DOMINANT FNO

4.1 HKT is an incumbent FNO with extensive network throughout the territory and is the sole fixed carrier entrusted with the universal service obligation. It still holds a very substantial market share, as evidenced by its over 70% market share in the fixed voice line and fixed broadband markets.[8] HKT is vertically and horizontally integrated and has a fully integrated fixed and mobile network. It is not subject to any regulatory control on its tariffs. It has the ability to implement discriminatory pricing and charging at a higher price where there is no competitive service provider. It is deep-pocketed and is arguably the only operator who can afford to pay a full price for CSL. As an incumbent fixed network operator and an integrated fixed and mobile network operator, HKT also enjoys the following market leading advantages:

- Extensive customer access network coverage;
- Extensive retail outlets;
- Extensive customer base and information;
- Comprehensive facilities-based retail service offerings (quadruple-play of fixed telephony / fixed broadband / mobile / pay TV) and one-stop shop;

[7] OFTA, Telecommunications Authority Guidelines - Mergers and Acquisitions in Hong Kong Telecommunications Markets, 3 May 2004, paragraphs 4.79 and 4.80, and generally paragraphs 4.70 to 4.85.

[8] HKT has reported that it provisioned 2,651,000 local telephony service fixed lines and 1,567,000 broadband fixed lines in June 2013: HKT, 2013 Interim Report, <http://www.hkt.com/staticfiles/HKTCorpsite/About%20HKT/Investor%20Relations/Announcements%20&%20Notices/2013/Sep/e1-2013%2009%2005%20%282013%20Interim%20Report%29.pdf> as accessed on 24 January 2014; HKT, 2013 Interim Results Presentation, <http://www.hkt.com/staticfiles/HKTCorpsite/About%20HKT/Investor%20Relations/Financial%20Results/2013IR/2013InterimResultsPresentation.pdf> as accessed on 24 January 2014. This compares to the industry wide numbers in June 2013 of 3,427,794 exchange lines and 2,247,080 registered broadband Internet access customer accounts: OFCA, Key statistics for telecommunications in Hong Kong - Wireline Services, 7 January 2014, <http://www.ofca.gov.hk/filemanager/ofca/en/content_108/wireline_en.pdf> as accessed on 24 January 2014; OFCA, Statistics on Customers of Internet Service Providers ("ISPs") in Hong Kong, <http://www.ofca.gov.hk/filemanager/ofca/en/content_293/cus_isp_en.pdf> as accessed on 24 January 2014.

- Extensive wi-fi hotspot network supplementing its fixed and mobile services;
- Inherent advantages of incumbency; and
- Economy of scale.

4.2 As noted by OFCA in the Consultation Paper:

> "*Given that HKT is also an incumbent FNO in Hong Kong, the Proposed Transaction may have potential impact in terms of conferring on HKT, as an integrated fixed and mobile network operator, market power or enhanced market power in other relevant telecommunications markets. This may include the market power to offer interconnection services or backhaul facility services for MNOs without significant competitive constraints*." [9]

4.3 We submit that the proposed acquisition will significantly strengthen HKT's market power and will adversely impact competition in the fixed line market, where HKT already holds substantial market share. As incumbent FNO and still holding a very substantial market share, HKT enjoys economies of scale. For instance, the sheer scale of its network is able to absorb internally any sudden increase of its customers' new traffic without the need to increase interconnection capacity between itself and other carriers. Sudden increase of interconnection traffic may happen from customers switching from one network to another network. Contrast that with any other FNOs where interconnection capacity has to be carefully managed and planned due to the size of their customers' base, sometimes customers may be turned away due to insufficient interconnection capacity. The acquisition would further enhance HKT's position in the fixed line market and in the provision of interconnection capacity for the delivery of traffic between fixed networks and mobile networks.

4.4 We identify the following potential competitive concerns which may arise:

(a) HKT may have additional incentive to withhold or constrain supply of interconnection services or backhaul facility services for competing MNOs.

- HKT is the leading FNO, as evidenced by its over 70% market share in the fixed voice line and fixed broadband markets.[10] It is known to be an important supplier of interconnection services or backhaul facility services for competing MNOs. In some cases, owing to the ubiquity of its incumbent access network, HKT may well be the sole supplier to rival MNOs of certain inputs to sparsely populated or remote locations.
- As a result of the proposed acquisition, HKT's market share will increase markedly, based on HKT's figures, from 11% to 31%. It follows that HKT will have increased interest in raising the costs, or limiting the supply, of fixed line inputs to rival MNOs competing in the mobile market.

(b) The proposed acquisition may adversely affect the market for the supply of backhaul transmission to MNOs by FNOs.

- CSL has a territory-wide mobile radiocommunications access network which has significant and critical backhaul transmission requirements for connecting those mobile radiocommunications access network sites to mobile switching centres. Such requirements currently are being met by backhaul transmission services provided by FNOs on a competitive basis.

[9] Consultation Paper, paragraph 19.
[10] Footnote 8.

- HKT has indicated its plans on CSL's backhaul transmission procurement, stating:

  "*Backhaul transmission rationalisation: savings are also expected in the provision of optical fibre backhaul connectivity to the combined radio base station network by leveraging HKT's existing proprietary infrastructure as CSLNW Group's current contracts with third-party backhaul transmission providers would gradually be replaced*."[11]

  This suggests that CSL will no longer procure backhaul transmission services on a competitive merit basis. This will remove a major purchaser of backhaul transmission from the market, with knock-on effects to legitimately competing backhaul transmission providers. With reduced demand for backhaul transmission services in the market and the lack of critical mass, it is more than likely that competing backhaul transmission providers would reduce their investments in this market segment.

(c) The acquisition will significantly enhance HKT's position as an integrated telecommunications service provider in Hong Kong which will further enhance its significant market power in the fixed line services market.

- HKT's position in the fixed line services market will be further strengthened with the acquisition of CSL as it will be better able to provide higher quality and higher speed mobile services in its full facilities-based service offerings, backed by the substantial mobile network access coverage and spectrum bandwidth assets held by CSL. This will allow HKT to further differentiate itself from its fixed line competitors in the market, who do not have the financial or infrastructure resources to compete with or match HKT on the same level via any similar acquisition of MNO infrastructure. HKT's fixed business will also gain invaluable customer information and cross-selling opportunities through obtaining the customer base of CSL. The resulting market structure change will be to the serious detriment of competitive forces in the fixed line services market.

5. HUTCHISON TELECOMS GROUP AND GENIUS BRAND

5.1 We note that there is a family relationship between the owners / management of HKT and that of Hutchison Telephone Company Limited (UCL 004) and Hutchison Global Communications Limited (UCL 023), which may raise concerns of potential collusion. Following the acquisition, HKT's share of the mobile spectrum will be significantly increased. When this is considered together with the spectrum holding of Hutchison Telephone Company Limited, their joint venture partner in Genius Brand Limited, the resulting spectrum holding being owned by members of one family should be alarming to any regulator.

5.2 Mr Li Tzar Kai, Richard, Executive Chairman and holder of a substantial interest in the shares of HKT, is the son of Mr Li Ka Shing, Chairman and holder of a substantial interest in the shares of Hutchison Whampoa Limited which controls Hutchison Telecom Hong Kong Holdings which in turn controls Hutchison Telephone Company Limited and Hutchison Global Communications Limited ("Hutchison Telecom companies") that operate significant mobile and fixed line businesses in Hong Kong. The controllers of these companies have a shared interest through family bonds.

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[11] PCCW Limited, Major transaction in relation to the acquisition of the entire issued share capital of CSL New World Mobility Limited by HKT Limited, p 20, *supra*.

5.3 Genius Brand is first-hand evidence of existing collaboration between HKT and the Hutchison Telecom companies. HKT and Hutchison Telephone Company Limited are parties to a 50/50 Genius Brand Limited ("Genius Brand") joint venture for the purposes of sharing a 4G radio network. In the 2009 auction for 4G LTE spectrum, Genius Brand acquired one lot of 30 MHz spectrum. It engaged Huawei to build a 4G network. In 2013, it acquired a further 10 MHz spectrum. The Genius Brand's 4G LTE mobile access network is an on-going operation whose use is shared by HKT and Hutchison Telephone Company Limited. With the mobile services market becoming more focused on mobile data services and therefore 4G, and specifically given the CA's recent decision on expiry of 3G spectrum is premised on the smooth migration of customers from 3G to 4G networks, there is the likelihood of further expansion and development of the Genius Brand business collaboration.

5.4 Genius Brand may be a mere stepping stone. It remains an open question whether further forms of collaboration, whether overt or covert, will develop in the future between HKT and the Hutchison Telecom companies.

5.5 Overall, the proposed acquisition will substantially consolidate market share held between HKT and the Hutchison Telecom companies. In the fixed line market, HKT alone holds majority market share. [12] In the mobile market, the combined market share of HKT and Hutchison Telephone Company Limited would easily be around 55%.[13] Significantly, the collective grouping of HKT and the Hutchison Telecom companies would enjoy the vast proportion of market revenue in the telecommunications sector (see *Table*).

Table – Combined Fixed and Mobile Business Annual Revenue (June 2013)

Combined Fixed & Mobile businesses	**Annual Revenue (Year to 30 Jun 2013)** (HK$ million)	**EBITDA** (HK$ million)
HKT		
Before merger:[14]	22,264	8,016
After merger:[15]	30,316	10,073
Hutchison Telecom companies[16]	15,436	3,182
Collective HKT / Hutchison Telecom companies		
Before merger:	*37,700*	*11,198*
After merger:	*45,752*	*13,255*
China Mobile	Not publicly disclosed	Not publicly disclosed

12 See paragraph 4.1 – based on key indicators.

13 Based on the market share figures in HKT's Application.

14 HKT, 2013 Interim Report, *supra*.

15 Combined with CSL: Telstra Corporation Limited, Annual Report 2013, <http://www.telstra.com.au/abouttelstra/download/document/Telstra-Annual-Report-2013.pdf> as accessed on 24 January 2014; New World Development Company Limited, Annual Report 2013, *supra*.

16 Hutchison Telecom Hong Kong Holdings Limited, 2012 Interim Report <http://www.irasia.com/listco/hk/hthkh/interim/ir96213-e215_2012interimreport.pdf>, 2012 Annual Report <http://www.hthkh.com/eng/ir/reports/ar2012/ar2012.pdf>, 2013 Interim Report <http://www.irasia.com/listco/hk/hthkh/interim/ir112047-e215_2013interimreport.pdf>, as accessed on 24 January 2014.

SmarTone[17]	12,067	2,989
NWT	Not publicly disclosed	Not publicly disclosed
HKBN[18]	1,922	711
WTT[19]	1,842	Not publicly disclosed
i-Cable[20]	340	117

5.6 We take note of OFCA's remarks that "*Higher industry concentration from the prevailing level may, under certain circumstances, facilitate market participants to engage in coordinated conduct resulting in price increases and/or reduction in service output.*"[21]

5.7 Moreover, this collective of HKT and the Hutchison Telecom companies, if they were to act in concert, whether formally or informally, would likely be in a strong position to influence competition in both fixed and mobile telecommunications markets. Given the current history of collaboration through Genius Brand, the strong shared interest and strong chances of successful co-ordination between them, the proposed acquisition would operate to increase the probability of co-ordination between them actually occurring.

5.8 The collective of HKT, the Hutchison Telecom companies and Genius Brand will hold the overwhelming quantity of mobile spectrum, as illustrated in the following charts.[22]

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17 SmarTone Telecommunications Holdings Limited, Annual Report 2012/13, <http://www.smartoneholdings.com/about/investor/financial_reports/english/2012_2013_annual.pdf> as accessed on 24 January 2014.

18 Hong Kong Broadband Network Limited, Financial Year 2013 presentation <http://reg.hkbn.net/WwwCMS/upload/pdf/en/20131204_Annual_Results_Presentation.pdf> (for 1 September 2012 to 31 August 2013), as accessed on 24 January 2014.

19 The Wharf (Holdings) Limited, 2012 Interim Report <http://www.wharfholdings.com/download_eng/ir2012/EW00004.pdf>, 2012 Annual Report <http://www.wharfholdings.com/download_eng/ar2012/EW00004.pdf>, Interim Report 2013 <http://www.wharfholdings.com/download_eng/ir2013/EW00004.pdf> as accessed on 24 January 2014.

20 i-Cable Communications Limited, 2012 Interim Report <http://www.i-cablecomm.com/ir/interim/2012/i-Cable_IR2012_Eng.pdf>, 2012 Annual Report <http://www.i-cablecomm.com/ir/annual/2012/e01097_Annual%20Report.pdf>, 2013 Interim Report < http://www.i-cablecomm.com/ir/interim/2013/e01097_IR2013.pdf>, as accessed on 24 January 2014, based on financial data for "Internet and Multimedia" business.

21 Consultation Paper, paragraph 18.

22 Based on spectrum assignments in respective licences. Figures for HKT do not take into account HKT's proposed commitment not to exercise right of renewal or compete for expiring 3G spectrum.

Chart 1 – Current mobile spectrum holdings

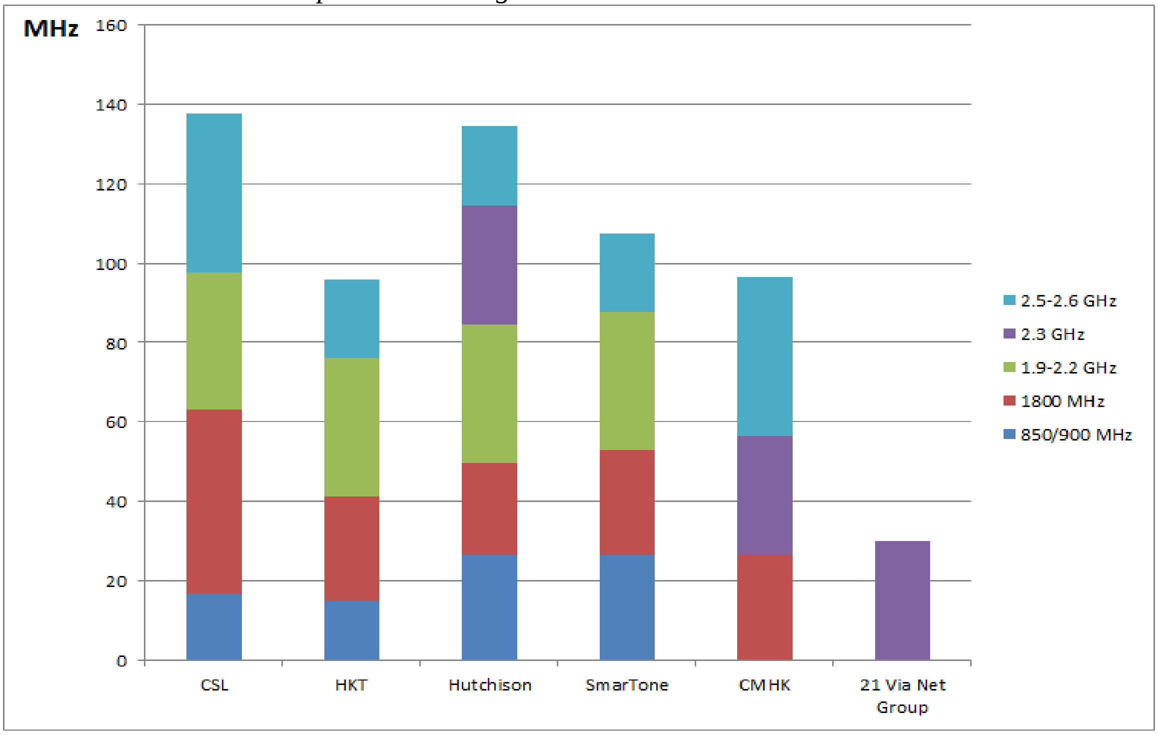


Chart 2 – Post-acquisition mobile spectrum holdings

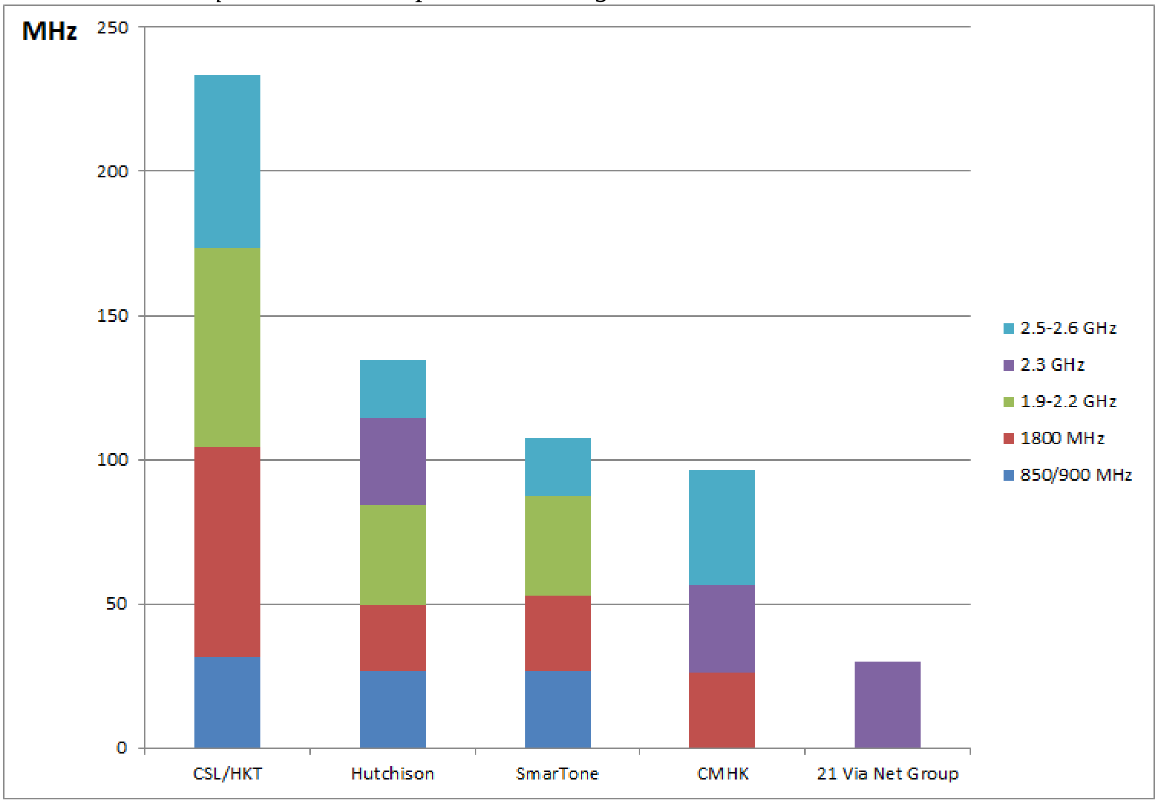
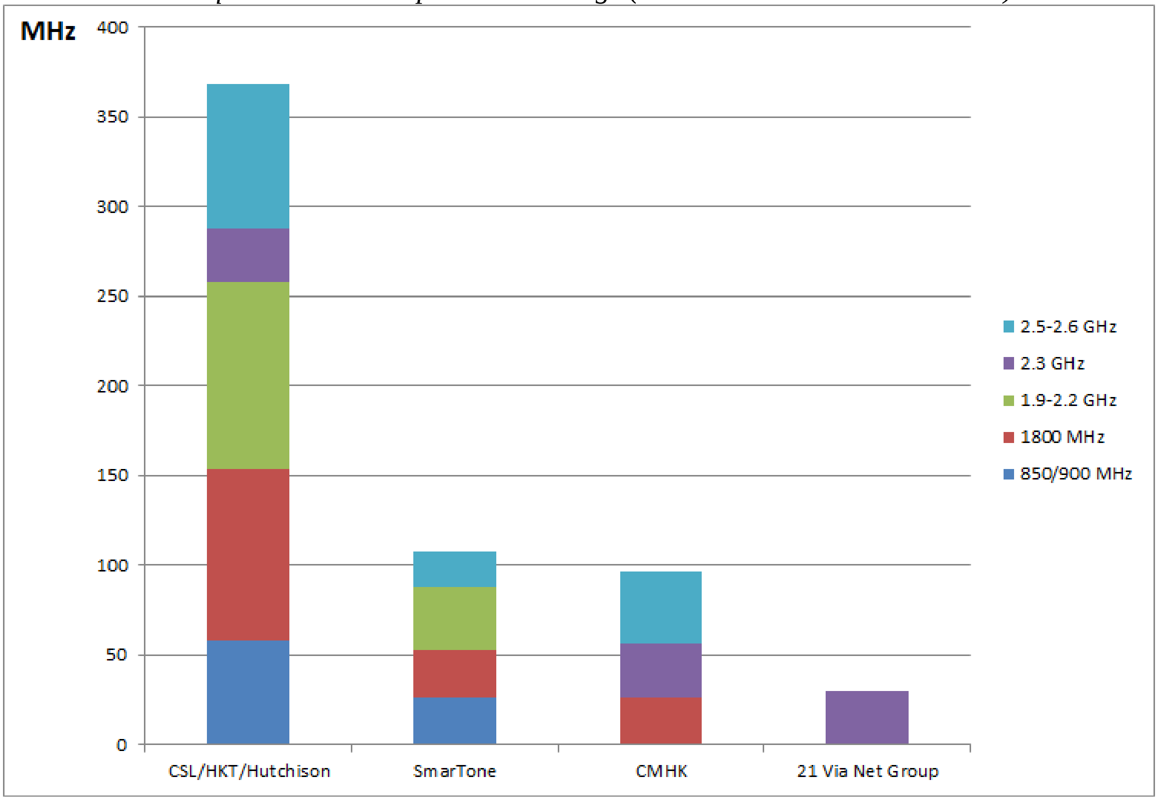


Chart 3 – Post-acquisition mobile spectrum holdings (with combined HKT/Hutchison)



5.9 The above charts show the holding of the overall mobile spectrum. With respect of the mobile spectrum capable of being utilised for 4G, our assessment concludes that following the acquisition of CSL, the respective share of 4G spectrum holding by MNOs is shown as follows:[23]

Operators	**MHz**	**% share**
HKT/CSL *(included share from Genius Brand)*	120	34.3
Hutchison Telecom *(included share from Genius Brand)*	70	20
Combined HKT/CSL/Hutchison Telecom	***190***	***54.3***
SmarTone	40	11.4
China Mobile Hong Kong	90	25.7
21 ViaNet	30	9
Total	**350**	**100%**

5.10 The substantial holding of mobile spectrum for 4G by the combined HKT/CSL/Hutchison Telecom should be a competition concern, where 3G will be progressed to 4G and 4G is expected to take over 3G and where mobile data services will be the growth and revenue drivers.

[23] Based on respective holdings of 1800 MHz, 2.3 GHz (unpaired) and 2.5-2.6 GHz spectrum blocks of at least 5 MHz size.

5.11 The joint venture of Genius Brand was accepted by the former Telecommunications Authority and the CA, clearly this was before the proposed acquisition of CSL. Whilst Genius Brand was a good strategy for HKT and Hutchison Telecom companies and accepted by the regulator at the time, this clearly should be re-evaluated by the CA as part of assessing HKT's Application. As a way to avoid the dominant holding of spectrum by the same family, an obvious solution would be to require the divestiture of Genius Brand to a third party not connected to either HKT or Hutchison Telecom companies, or take back and re-auction the spectrum held by Genius Brand and HKT and none of the Hutchison Telecom companies may take part in such auction.

6. 40% THRESHOLD

6.1 We disagree with the claim made in HKT's Application that the TA's Merger Guidelines (at paragraph 2.13) suggest that an acquisition / merger where the resulting market share is less than 40% would unlikely raise competition concerns.

6.2 We consider that HKT wrongly ignores how the safe harbour thresholds work under the TA's 2004 Merger Guidelines.[24] HKT's proposed acquisition of CSL would in fact fail to meet the safe-harbour thresholds. We submit that HKT makes the fundamental error of failing to understand that paragraph 2.13 of the Merger Guidelines is a residual catch-all test which is intended to be applied following the application of the safe-harbour tests in paragraphs 2.8 to 2.12 of the Merger Guidelines. In our interpretation, if the transaction passes the safe harbour tests of paragraphs 2.8 to 2.12, it needs to pass the further test under paragraph 2.13 (which is a 40% market share test). Our understanding is that paragraph 2.13 is not a standalone test, nor is it a summary of the safe-harbour tests as asserted by HKT.

6.3 We explore more fully the safe harbour measures in the TA's 2004 Merger Guidelines as follows:

(a) Paragraphs 2.6 and 2.7 state that there are two safe-harbour measures, namely CR4 and HHI.

(b) Paragraph 2.8 describes the CR4 test (concentration ratio – 4). If the post-merger combined market share in the relevant market of the four (or fewer) largest firms (CR4) is less than 75%, and the merged firm has a market share of less than 40% and the TA takes the view that it is unlikely that there will be a need to carry out a detailed investigation or to intervene.

(c) Paragraph 2.9 introduces the HHI test (Herfindahl-Hirschman Index – sum of the squares of the market shares of all firms), which is further described in the succeeding paragraphs:

- *Paragraph 2.10:* Any market with a post-merger HHI of less than 1,000 will be regarded as unconcentrated. Mergers resulting in unconcentrated markets are unlikely to result in a substantial lessening of competition and normally require no further investigation.

[24] OFTA, Telecommunications Authority Guidelines - Mergers and Acquisitions in Hong Kong Telecommunications Markets, paragraphs 2.6 to 2.13.

- *Paragraph 2.11:* Markets with a post-merger HHI of between 1,000 and 1,800 will be regarded as moderately concentrated. Mergers producing an increase in the HHI of less than 100 in these markets are unlikely to result in a substantial lessening of competition and normally require no further investigation. However, mergers producing an increase in the HHI of more than 100 potentially raise significant competitive concerns.

- *Paragraph 2.12:* Markets with a post-merger HHI of more than 1,800 will be regarded as highly concentrated. Mergers producing an increase in the HHI of less than 50 are unlikely to substantially lessen competition, even in a highly concentrated market. Mergers producing an increase of more than 50 in the HHI will potentially raise competitive concerns and will normally require further investigation.

(d) Paragraph 2.13 explains, while the TA is unlikely to further assess any mergers which fall below these thresholds, he does not categorically rule out intervention. 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.

6.4 Duly applying each of the CR4 and the HHI tests to HKT's proposed acquisition of CSL, the safe-harbour thresholds fail to be met (as acknowledged by HKT in paragraph 9.8 of the HKT's Application). Based on the data in HKT's Application, following the proposed acquisition CR4 would be 90% (an increase by 11.5%), while HHI would be at least 2198.5 (an increase of 448.5). On that basis, the residual catch-all test in paragraph 2.13 appears to be moot.

6.5 Furthermore the sizeable increases in both CR4 and HHI would tend to indicate a substantial lessening of competition in terms of market structure.

6.6 Given the context of the safe-harbour thresholds in the Merger Guidelines as explained above, HKT is mistaken in claiming that the Merger Guidelines support the proposition that an acquisition / merger where the resulting market share is less than 40% would unlikely raise competition concerns.

7. GLOBAL PRECEDENTS

7.1 We dispute the relevance of the global precedents cited by HKT in support of the merger.

7.2 In **T-Mobile / tele.ring (Austria, 2006)**, T-Mobile made an undertaking to divest a package of tele.ring's UMTS frequencies and an undisclosed number of its mobile communications sites, which were a major factor in the European Commission's granting of clearance.[25] In contrast, HKT's Application does not propose any such similar undertaking to divest mobile communications sites.

[25] European Commission, Case No COMP/M.3916 – T-MOBILE AUSTRIA/TELE.RING, 26 April 2006, pp 30-38 <http://ec.europa.eu/competition/mergers/cases/decisions/m3916_20060426_20600_en.pdf> as accessed on 24 January 2014.

7.3 In **T-Mobile / Orange (Netherlands, 2007)**, this involved the merger of the smallest two mobile carriers in a market with a large number of MVNOs whose market share was 17%. Even though the merger would result in T-Mobile becoming the second largest in terms of subscribers with 20-30% market share, this was significantly below the market leader KPN's 30-40% market share.[26] In contrast, under HKT's Application HKT will become the market leader in a market where MVNO competition is not substantial.

7.4 The **Vodafone / Hutchison (Australia, 2009)** merger transaction was cleared mainly on the basis of a "failing firm" defence. While it was found that Hutchison had been a vigorous and effective competitor to date, the Australia Competition and Consumer Commission found that in the foreseeable future Hutchison was unlikely to continue to be a vigorous and effective competitor in the mobile broadband segment of the market. It found that Hutchison had network capacity constraints, and would need to undertake substantial investments in network capacity in order to continue to compete aggressively for mobile broadband customers, but that the significant investments needed to fully overcome Hutchison's network capacity constraints were not likely to be made. It found that such a disadvantage was likely to increase over time as Hutchison's competitors were likely to continue to make the necessary investments in their networks. This might lead to a continued widening of the network capability 'quality gap'.[27] In contrast, HKT's Application does not present any evidence that CSL currently suffered network capacity restraints or lacked the capability or will to undertake substantial investments in network capacity.

7.5 In **T-Mobile / Orange (UK, 2009)**, T-Mobile agreed to divest 2 x 15 MHz of spectrum in the 1800 MHz band, with the European Commission noting that in the UK mobile retail market, MVNOs play a significant role, holding 10-20% market share and 10-20% of revenues.[28] In contrast, while HKT's Application proposes a relinquishing of spectrum, in Hong Kong MVNOs have low market share and extremely low share of revenues, only 1-3% according to HKT's Application.

7.6 According to our research, the **Sunrise/Orange (Switzerland, 2010)** merger transaction was actually rejected by the Swiss competition authority. We refer to the following news sources:

- Federal Authorities of the Swiss Confederation, "WEKO untersagt Zusammenschluss von Orange und Sunrise" <http://www.news.admin.ch/message/index.html?lang=de&msg-id=32758> (German version), "La COMCO interdit la fusion entre Orange et Sunrise" <http://www.news.admin.ch/message/index.html?lang=fr&msg-id=32758> (French version), "La COMCO proibisce la fusione tra Orange e Sunrise" <http://www.news.admin.ch/message/index.html?lang=it&msg-id=32758> (Italian version), as accessed on 24 January 2014
- Swissinfo, "Orange and Sunrise are banned from hooking up", 22 April 2010, <http://www.swissinfo.ch/eng/business/Orange_and_Sunrise_are_banned_from_hooking_up.html?cid=8726828> as accessed on 24 January 2014
- Reuters, "UPDATE 3-Swiss watchdog vetoes Orange, Sunrise merger", 22 April 2010, <http://www.reuters.com/article/2010/04/22/orange-sunrise-idUSLDE63L05K20100422> as accessed on 24 January 2014

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[26] European Commission, Case No COMP/M.4748 – T-MOBILE / ORANGE NETHERLANDS, 20 August 2007, <http://ec.europa.eu/competition/mergers/cases/decisions/m4748_20070820_20310_en.pdf> as accessed on 24 January 2014.

[27] ACCC, Vodafone Group plc and Hutchison 3G Australia Pty Limited, *supra*.

[28] European Commission, Case No COMP/M.5650 - T-MOBILE/ ORANGE, 1 March 2010, <http://ec.europa.eu/competition/mergers/cases/decisions/M5650_20100301_20212_247214_EN.pdf> as accessed on 24 January 2014.

7.7 In **Hutchison / Orange (Austria, 2012)**, clearance was granted conditionally, subject to Hutchison making a number of major commitments including:

- Hutchison committed to divest 2 x 10MHz radio spectrum in the 2.6 GHz band and additional rights to an interested new entrant in the Austrian mobile telephony market. The potential new MNO would have the right to acquire spectrum not only from Hutchison but also additional spectrum at an auction planned in 2013 by the Austrian telecom regulator. The latter would reserve spectrum for a new entrant, in order to enable such an operator to build up a physical network for mobile telecommunication services in Austria. The new entrant would also benefit from privileged conditions for collocation and the purchase of sites for building up its own network in Austria.
- Hutchison committed to provide, on agreed terms, wholesale access to its network for up to 30% of its capacity to up to 16 MVNOs in the coming 10 years.
- An up-front commitment to ensure that Hutchison would not complete the acquisition of Orange before it had entered into such a wholesale access agreement with one MVNO.[29]

In contrast, HKT's Application makes no offer of privileged conditions for collocation and the purchase of network sites to a new entrant nor any open access commitment to MVNOs. Also, to our understanding the CA is making no promise to reserve spectrum for a new entrant at any upcoming spectrum auction.

7.8 For **T-Mobile / Metro (USA, 2013)**, HKT's Application misleadingly claims that this is a case supporting the reduction of market players from 5 to 4. In fact, the national market structure in which T-Mobile was one of four national mobile carriers remained unchanged by the merger, so the transaction was cleared on the basis. The United States Department of Justice noted that many dimensions of competition in the mobile wireless industry took place at a national level, including plan pricing, device offerings and network technology. However, MetroPCS, like many local and regional providers, faced limitations, stemming from its lack of nationwide spectrum, networks and scale, and therefore exerted little influence on these aspects of mobile wireless competition.[30] In contrast, HKT's Application seeks consent for a real reduction in the number of mobile carriers in the territory.

7.9 In short, the precedents submitted by HKT are predicated on a highly superficial reading without due consideration of the special circumstances of each of those cases. In some instances, HKT's propositions are patently false. In that light, we submit that the precedents in HKT's Application should be regarded as unpersuasive.

8. CONCLUSION

8.1 On the basis of the competition based concerns outlined above in regard to the proposed acquisition, we submit that the CA should reject HKT's Application, or as a minimum to give due consideration to placing appropriate undertakings / conditions on the acquisition pursuant to its powers under section 7P to address those concerns including the divestiture of Genius Brand.

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[29] European Commission, Case No M.6497 – HUTCHISON 3G AUSTRIA / ORANGE AUSTRIA, 12 December 2012, <http://ec.europa.eu/competition/mergers/cases/decisions/m6497_20121212_20600_3210969_EN.pdf> as accessed on 24 January 2014.

[30] Department of Justice, Antitrust Division Statement on the Closing of Its Investigation of the T-Mobile / MetroPCS Merger, 12 March 2013, <http://www.justice.gov/opa/pr/2013/March/13-at-298.html> as accessed on 24 January 2014.

8.2 WTT is concerned that HKT's Application has purported to present material facts, without providing appropriate reference to the sources of those facts. In some instances, the material presented in HKT's Application amount to no more than bare assertions. WTT considers that a lower weight should be given to such 'facts' presented in HKT's Application.

8.3 We urge the CA to adopt a fact-based, empirical approach in examining HKT's Application. In particular we urge the CA to engage experts and deploy economic tools to project the likely market share of HKT following the acquisition, taking in account also the co-operation with Hutchison Telecom companies through Genius Brand.

8.4 We note the European Commission's practice in merger cases to issue requests for information to the merger parties, customers, suppliers, competitors and other relevant parties to collect necessary market information. The CA has the powers to require the provision of information from licensees, and thus the ability to similarly make enquiries and inform itself of economic and market information pertinent to HKT's Application on an objective basis. We also note the recent trend for the European Commission to use predictive economic tools, for instance upward pricing pressure analysis to estimate to what extent the merged firm would have the incentive to raise prices post-merger given in particular prices, margins and diversion ratios observed in the market.[31] In line with world best practice, the CA should employ similar economic rigour in analysing HKT's Application.

Submitted by
Wharf T&T Limited
4 February 2014

[31] European Commission, Case No M.6497 – HUTCHISON 3G AUSTRIA / ORANGE AUSTRIA, *supra*.