**Response by the American Chamber of Commerce in Hong Kong to the Hong Kong Competition Commission and Communications Authority's jointly issued Revised Draft Guidelines under the Competition Ordinance published on March 30, 2015**

**April 24, 2015**

The American Chamber of Commerce in Hong Kong ("**AmCham**") appreciates the opportunity to comment further on the Hong Kong Competition Commission ("**Commission**") and the Communications Authority's jointly issued draft guidelines under the Competition Ordinance ("**Ordinance**") on the First Conduct Rule, the Second Conduct Rule, the Merger Rule, Complaints, Investigations and Exclusions and Exemptions (together, "**Revised Draft Guidelines**").

AmCham wishes to reiterate its support of the Ordinance. We believe more competition in a free, open economy is good for Hong Kong. At the same time, as we support all the ways in which Hong Kong can maintain and strengthen its status as a major international business and financial centre, we are keen to keep the burden of regulation at bay.

In the Chamber's understanding, the clear intention of the legislator was to adopt a light-handed approach to enforcement with a strong focus on particularly harmful conduct, such as cartels, and a more lenient approach to vertical restraints. Therefore, we have consistently supported the view that the Ordinance should be primarily effects-based (rather than object-based), and that legal certainty should be strengthened.

We also have consistently raised the concern that the Ordinance should not be a burden for SMEs, which were told they would only benefit from, and not be hindered by, the introduction of a cross-sector competition law regime in Hong Kong. The concern is particularly rooted in the fact that the Revised Draft Guidelines have not incorporated the need for the impact on competition of an 'object-restriction' to be significant ('appreciable', to use an EU jargon). This could have a significant impact on SMEs.

Overall, we welcome the Revised Draft Guidelines in so far as they have provided additional examples and illustrations, which help businesses understand the Commission's position on a number of points, such as joint ventures, joint tenders, joint-selling agreements or franchise agreements and selective distribution systems. Nevertheless, we remain concerned about some core aspects of the Commission's approach.

## FIRST CONDUCT RULE

### 1. Resale Price Maintenance

AmCham reiterates its view that resale price maintenance ("**RPM**") arrangements should only be considered as an 'effect-restriction' (analysed per the rule of reason) and not an 'object-restriction'. We therefore regret the fact that the Commission maintains its view that RPM may have the "object" of harming competition.

We welcome the fact that the Revised Draft Guidelines have expanded the circumstances under which the arrangement may be assessed as an 'effect-restriction' (depending on the content of the agreement, its implementation and the "relevant context"). The Revised Draft Guidelines,

however, do not state clearly whether the default position will be that RPM arrangements are an 'object-' or an 'effect-' restriction. This has important implications from a burden of proof standpoint and is all the more relevant because meeting the efficiencies defense test is expected to be extremely challenging. If the Commission maintains its view that some forms of RPM may be 'by object' restrictions, then it would increase legal certainty to state clearly the situations in which RPM will be deemed so, rather than leaving it to the Commission's discretion based on criteria which are difficult to ascertain.

For the sake of legal certainty, we also maintain that it would be preferable for RPM not to be considered a "serious anti-competitive conduct". This approach again is at odds with the legislator's intent, which created a special procedural category ("serious anti-competitive conduct") for hard core cartels (understood to be horizontal arrangements only).

### 2. Vertical agreements

AmCham continues to advocate that for the Commission to focus its enforcement against cartels, and to increase legal certainty, it would be preferable and in line with the legislator's original intent to exempt vertical restraints. This could be based on safe harbors below certain market shares.

### 3. Bid rigging

The Revised Draft Guidelines have in our view expanded the types of conduct that may amount to bid-rigging by including in that conduct situations where a customer is aware of the collusion. In such case, it would not be a serious anti-competitive conduct, but the practice may nevertheless be an infringement by object. We believe this expansion was not intended by the legislator in the first place and is at odds with international standards.

### 4. Information exchange

The Commission has helpfully clarified when the exchange of competitively sensitive information could raise issues under the Ordinance by distinguishing between legitimate commercial negotiations and anti-competitive exchanges of information. In particular, the Commission has emphasised that the exchange of future individual intentions or plans with respect to price or quantity information will likely have the object of restricting competition. AmCham considers that some form of coordination, in addition to the mere flow of information, should have to exist in order for the concerted practice to be established. This means also that unilateral conduct could not be characterised as a concerted practice, a point which would be worth clarifying.

Furthermore, it is not entirely clear however whether the reference to "planned prices or planned pricing strategy" (Section 2.28) would include both price and quantities (as indicated in Section 6.40 and footnote 26). This may be a worthwhile clarification to make.

In addition, the distinction between parallel behaviour and improper information exchange is not very clearly set out. In particular, it would be helpful to understand whether the key dividing factor will be the absence of any contact (in parallel behaviour) and/or the nature of the information (current pricing vs. future pricing). This is one of the most complex areas of competition law and one that is particularly relevant in Hong Kong, which is a small market characterized by a high degree of transparency.

## SECOND CONDUCT RULE

### 5. Abuse of substantial market power 'by object'

Although multiple submissions pointed that abuse of market power 'by object' is not in line with international standards, the Commission has maintained its view that it is consistent with the Ordinance. We regret the Commission's stance, and furthermore, it is disappointing that more

examples have actually been added to the list of practices the Commission considers may have the object of restricting competition.

With regards to 'predatory pricing', AmCham reiterates that there might be a number of instances where below cost pricing might be justified (e.g. to eliminate stock) so a 'by object' approach is too rigid. We also regret that the circumstances in which the Commission is likely to require the recoupment test to be met are very limited, and entirely subject to the Commission's discretion. This is at odds with the U.S. approach.

In addition to predatory pricing, the Revised Draft Guidelines now also indicate that certain exclusive dealing agreements by companies with substantial market power, and payment of a distributor/customer by a supplier having substantial market power with a view to delay the introduction of a competitor's product in the market, may have the object of harming competition.

AmCham particularly takes issue with the example in relation to exclusive dealing in particular, which does not provide clarity as to when these practices will be regarded as having the "object" of restricting competition in practice. This is likely to raise a number of practical issues in Hong Kong, where such agreements are widespread.

### 6. Exploitative Conduct

AmCham considers that the Ordinance does not envision that exploitative conduct may amount to abuse under the Second Conduct Rule. A specific provision prohibiting exploitative conduct in the telecommunications sector is being introduced by way of a new Section 7Q of the Telecommunications Ordinance (see 'Consequential and Related Amendments' in Competition Ordinance, Schedule 8, Part 4). The fact that this change was introduced at the same time and in conjunction with the passage of the Competition Ordinance indicates that the Legislature did not intend the Second Conduct Rule to cover exploitative conduct. The legislative intent was plainly to restrict the Second Conduct Rule to exclusionary conduct, consistent with the approach in jurisdictions such as the United States and New Zealand. The Revised Draft Guidelines fail to clarify this point.

## INVESTIGATIONS

### 7. Publication of commitments and warning notices

AmCham is disappointed that the Commission has retained its decision to publish warning notices. Businesses are concerned about the fact that the Commission's views, before having been tested by the Tribunal, will be made public. This raises very real reputational risks for companies, some of which are publicly listed. AmCham reiterates its plea that the Commission change its position on this point.

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