Notice to Seek Representations regarding the Communications Authority's ("CA's") Proposed Acceptance of Commitments Offered by Hong Kong Broadband Network Limited, HKBN Enterprise Solutions Limited (collectively "HKBN") and WTT HK Limited ("WTT") under Section 60 of the Competition Ordinance ("CO") in relation to the Proposed Acquisition of WTT Holding Corp. by HKBN Ltd. (the "Notice")

1. Introduction

1.1 Hong Kong Telecommunications (HKT) Limited ("**HKT**") welcomes the opportunity to provide its representations on the Notice issued by OFCA on 13 February 2019.

1.2 The Notice concerns two commitments offered by HKBN and WTT[1] in return for the CA not commencing an investigation or bringing proceedings in the Competition Tribunal in relation to the proposed acquisition of the entire issued share capital of WTT Holding Corp. by HKBN Ltd ("**Proposed Transaction**").

1.3 Unless otherwise stated, defined terms herein bear the same meaning given to them in the Notice and its Annex.

2. Inadequate behavioural commitments and need for an investigation under section 39 of the CO

2.1 It is recognised in Hong Kong[2] and in the majority of mature antitrust regimes[3] that "structural commitments" (requiring parties to a proposed transaction to divest some of their businesses) are preferable to so-called "behavioural commitments", in particular when the businesses of the merging parties overlap. This is precisely the case in the Proposed Transaction.

2.2 It has been widely recognised, including by the CA in the Guideline on the Merger Rule, that behavioural commitments are "less likely to address competition concerns" and would in any event "require ongoing monitoring and compliance activity".[4]

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[1] Namely, the In-building Interconnection Commitment and the Wholesale Access Commitment.

[2] Competition Commission and Communications Authority's Merger Control Guidelines, para. 5.12.

[3] E.g., in the European Union, see para 69 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (*EU Official Journal*, C 267 of 22.10.2008, p. 1–27) (the **EU Remedy Notice**): "[…] non-structural types of remedies, […] will generally not eliminate the competition concerns resulting from horizontal overlaps. In any case, it may be difficult to achieve the required degree of effectiveness of such a remedy due to the absence of effective monitoring of its implementation […]. the Commission may examine other types of non-divestiture remedies, such as behavioural promises, only exceptionally in specific circumstances, such as in respect of competition concerns arising in conglomerate structures"

[4] Competition Commission and Communications Authority's Merger Control Guidelines, para. 5.12.

2.3 HKT notes that despite this very clear position, HKBN and WTT have only offered behavioural commitments in the context of the Proposed Transaction and have not offered that their commitments be monitored. HKT is of the view that for the precise reasons given in the Guideline on the Merger Rule, these commitments will not be "able to eliminate or avoid the effect of substantially lessening competition in a relevant market that is, or is likely to be, brought about by the merger or proposed merger" [5]. These commitments have been badly-designed, will have limited effect in the market, and the complete absence of monitoring will, in effect, prevent the CA from adequately supervising their implementation.

2.4 It also appears from the reading of the Notice that the likely anti-competitive effects of the Proposed Transaction may not have been fully disclosed during the CA's preliminary assessment. These likely effects – as described below – should have led the CA to have reasonable cause to suspect that the Proposed Transaction does contravene the Merger Rule and will continue to do so despite the imposition of any of the behavioural commitments that have been offered. HKT is therefore of the view that a proper investigation of the Proposed Transaction should be conducted pursuant to section 39 of the CO, during which HKT, and other affected parties, would have the opportunity to offer more specific and detailed facts, information and arguments.

3. In-building Interconnection Commitment

3.1 HKT considers that the draft In-building Interconnection Commitment is insufficient to alleviate the concerns raised by the Proposed Transaction in the market.

3.2 Firstly, its scope is too narrow. The draft In-building Interconnection Commitment excludes buildings that should be included in its scope. It ignores the risk of partial access, and only appears to cover in-situ blockwiring circuits.

3.3 Secondly, the implementation of the draft In-building Interconnection Commitment will be rendered ineffective for a number of reasons, including the vagueness of the commitments offered by the merging parties to the Proposed Transaction and the total absence of day-to-day supervision of its implementation. Its implementation will also lead representatives of the Requesting Operators and the merged entity to directly communicate with one another more than is strictly necessary, which could lead to (the appearance of) unwarranted collusion that could contravene section 6 of the CO; a properly defined commitment would enable the Requesting Operators and the merged entity to avoid this issue.

3.4 HKT has the impression that during the CA's preliminary assessment, the merging parties have gone too far in trying to limit the scope of their commitment. In the

[5] Competition Commission and Communications Authority's Merger Control Guidelines, para. 5.11.

absence of any investigation, and by reference to the EU practice concerning commitments offered in Phase I, the commitments offered by the merging parties in a preliminary stage should be "straightforward" and "the remedies so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out [the concerns of the authority]"[6]. In light of the facts available to it, HKT is of the opinion that the commitments offered by the merging parties far from satisfy this requirement.

(a) Scope too narrowly defined

3.5 HKT is strongly of the view that, as a matter of principle, the scope of the In-building Interconnection Commitment should be defined based on the demand of customers, not on the basis of the type of building. It should be expanded to all buildings where either HKBN or WTT or, in the future, the merged entity is the only blockwiring provider. For the reasons outlined below, the scope should also be extended to cover access to parts of buildings (not just whole buildings), to include rights to share use of existing facilities as well as in-building wiring and to cover fibre blockwiring circuits and facilities in specified circumstances. It should also be made clear that "in situ" circuits include situations where an existing customer of HKBN/WTT/the merged entity using HKBN's/WTT's/the merged entity's existing fibre/copper wiring wishes to churn to another Fixed Network Operator ("**FNO**").

The type of building concerned is not relevant for defining the scope of the In-building Interconnection Commitment

3.6 HKT notes that the CA is of the view that HKBN's and WTT's businesses overlap mainly in the commercial segment of the provision of fixed telecommunications services and, as a result, the In-building Interconnection Commitment should only cover "Relevant Buildings", which are defined as "not exclusively for residential use".

3.7 HKT respectfully submits that the merged entity is very likely to take advantage of its enhanced market power to adopt anti-competitive behaviour not only in commercial or mixed use buildings, but also in buildings which could be classified as "exclusively for residential use". It is clear, for example, that potential customers use their homes as Small Office/Home Office, that shops are based on lower levels of buildings, or that club houses exist in buildings, and that some of these buildings are nonetheless qualified as "exclusively for residential use". The classification of buildings is not the appropriate criterion for defining the scope of the In-building Interconnection Commitment. Only the activities of customers should be relevant for the purpose of defining the scope of the In-building Interconnection Commitment.

3.8 It is, in fact, highly expected that the merged entity will impose a high charge for interconnecting to its blockwiring, thereby making it unprofitable for the Requesting

[6] The EU Remedy Notice, para 81.

Operators to provide service in all buildings, *whether they are labelled as "residential" or "commercial"*. HKT is therefore of the view that the scope of the In-building Interconnection Commitment should be extended to all buildings. It is inappropriate to limit the scope of the commitment on the basis of the type of building.

The need for an overlap between the merging parties unfairly reduces the scope of the In-building Interconnection Commitment

3.9 The CA considers that the In-building Interconnection Commitment would only apply to buildings where the merging parties have both installed and own blockwiring circuits, whereas the Proposed Transaction should not constitute a significant obstacle if an operator is currently leasing blockwiring circuits from a third party FNO for provision of residential services.

3.10 With respect, HKT submits that once the merger has taken place the problem will be the same throughout Hong Kong: one "close competitor" will disappear from the *entire* Hong Kong market, and the market power of the merged entity will increase in the *entire* territory. It would not be reasonable for the CA to conclude that the Proposed Transaction cannot also impact buildings where only one of the merging Parties is active; such an approach would amount to claiming that buildings where the merging parties are both active are the only "relevant markets" and that all other buildings are not part of that relevant market affected by the Proposed Transaction. This would contradict the CA's apparent position in the Notice that Hong Kong as a whole is affected by the Proposed Transaction. Therefore, HKT considers that the In-building Interconnection Commitment should apply to any building where either HKBN or WTT or the merged entity is the only blockwiring circuit provider.

3.11 Furthermore, based on HKT's practical experience, even though an FNO may already be making use of another FNO's blockwiring to serve *residential* customers in a building, this does not automatically mean that it can easily extend its services to *non-residential* clients in the same building via that other FNO's blockwiring. The reason is that there may be different access paths or blockwiring systems for accessing residential and commercial customers even in one and the same building. This would for instance regularly happen if residential apartments are located in the upper floors of a building, while shops are located in the lower floors of the same building.

3.12 HKT is, therefore, of the view that the scope of the In-building Interconnection Commitment should also be extended to *any* building where an operator is currently leasing blockwiring circuits from a third party FNO for provision of residential services.

3.13 This is particularly the case for certain districts, where currently both the merging parties are very active and have strong combined or individual presence building by

building. This is the case for Central and Western, Wanchai, Yau Tsim Mong, and Kwun Tong.

The In-building Interconnection Commitment should apply to any part of a building

3.14 The CA considers that the In-building Interconnection Commitment concerns the access to each Relevant Building.

3.15 However, HKT submits that the access to whole buildings is not the only issue at stake. The In-building Interconnection Commitment should be extended to "any part of a building". By way of example, HKT's experience shows that FNOs are sometimes able to access the upper floors of a building but not the lower levels because of closed ceilings or interior decoration or, as mentioned above, because of different access paths or blockwiring systems. The same is true for the access to other sections of the building. These are only a few examples. HKT therefore considers that, where HKBN/WTT or the merged entity is the only blockwiring circuit provider, the In-building Interconnection Commitment should also apply.

The In-building Interconnection Commitment should apply to elements other than in-situ blockwiring circuits

3.16 The scope of the In-building Interconnection Commitment should not be limited to "in-building wiring", but should also cover all elements which may be needed in order for other FNOs to have access to serve their customers in a particular building.

3.17 By way of example, the elements to which FNOs need to have access would include:

(a) Rights to share use of HKBN's/WTT's/the merged entity's existing facilities including but not limited to underground lead-in ducts, TBE room cabinet space, vertical cabling riser/trunking space and horizontal conduits.

(b) Fibre or copper in-building wiring. The CA knows that some FNOs sometimes install their own copper blockwiring or sometimes lease copper blockwiring from another FNO in a building in order to serve existing customers. However, FNOs are also sometimes unable to build or overlay another set of fibre blockwiring to serve new customers or to upgrade their blockwiring in order to satisfy high speed broadband or data service demands from customers due to access difficulties, e.g. limited vertical riser or horizontal conduit issues. In such circumstances, HKBN/WTT/the merged entity should be required to open up and share their existing fibre blockwiring circuits and facilities to ensure effective competition in the building concerned.

3.18 Similarly, the CA has defined "in-building wiring" as any in-situ blockwiring circuits used or capable of being used at the point in time at which a request is made for provision of fixed telecommunications services.

3.19 HKT respectfully suggests that the term "in-situ" should include a situation in which an existing customer is using HKBN's/WTT's/the merged entity's existing fibre or copper wiring or circuits but that customer wishes to switch to another FNO service provider. In these circumstances, HKBN/WTT/the merged entity should be required to share its existing fibre/copper circuits when the customer ports out their services. HKBN/WTT/the merged entity should not be able to refuse interconnection on the basis that no "in situ" wiring is available for interconnection due to all circuits being used up by its customers.

(b) The burden of proof is placed on the Requesting Operator which is unreasonable and unnecessary

3.20 According to the draft In-building Interconnection Commitment, the merged entity will have the right to require any Requesting Operator to provide evidence to demonstrate that there are no other feasible means of access to the building concerned for the purpose of installing any blockwiring circuits before agreeing to facilitate access to the In-building wiring in a building. The merging parties' proposed commitment also provides that only a written confirmation by the Requesting Operator's senior management would be valid.

3.21 The draft In-building Interconnection Commitment seems to ignore the fact that demand for an alternative source of services by customers is likely to be the original source for any request by a Requesting Operator. Any obstacle to this new source of service is, therefore, an unnecessary obstacle to competition. The request for evidence from any Requesting Operator and the requirement to involve its senior management are likely to constitute such an obstacle and, in fact, becomes a serious barrier.

3.22 HKT is strongly concerned by the requirement that evidence may need to be adduced in the process for various reasons:

(a) Firstly, as a general remark, it must be expected that the merged entity is very likely to be inclined to refuse to proceed with any access request that would create competition; insufficient evidence that there is no other feasible means of access would constitute a perfect excuse for such a refusal.

(b) Secondly, the requirement to adduce "evidence" substantially and unfairly switches the burden onto the Requesting Operator, thereby rendering the In-building Interconnection Commitment unworkable in practice. In a situation where substantial competition is already reduced, it should not be up to the Requesting Operator to provide evidence to demonstrate that there are no other feasible means of access to any particular building for the purpose of

installing blockwiring circuits. It should, on the contrary, be up to the merging entity to provide evidence that there *are* other feasible means of access to the building concerned for the purpose of installing any blockwiring circuits before objecting to a request from Requesting Operators.

(c) Thirdly, in order to provide such evidence, the Requesting Operator would first need to be granted access to the building to conduct a thorough physical inspection, which is often difficult. However, even if access to the building for inspection purpose is granted, it remains the case that this exercise is time-consuming and costly which does not foster fair competition. Asking for such evidence from a Requesting Operator who is not familiar with the building may unnecessarily reduce any incentive from potential customers to approach potential new service providers.

(d) Fourthly, in practice, there has never been such requirement for the Requesting Operator to provide proof or documentary evidence of no access before it seeks access to the blockwiring of another operator. There is no common practice against which to benchmark this requirement, and it is therefore left to the complete discretion of the merged entity, which will obviously be biased and will have no incentive to accept any request and evidence from Requesting Operators.

3.23 Given the above, HKT is of the view that that Requesting Operators should automatically be given the benefit of the In-building Interconnection Commitment upon submitting a request, unless the merging parties can provide strong evidence that there are other feasible means of accessing the building.

3.24 Finally, HKT is also seriously concerned by the need for a written confirmation from the Requesting Operator's senior management. This requirement:

(a) will inevitably discourage potential Requesting Operators from seeking access to the merged entity's blockwiring;

(b) is intrusive, as not all Requesting Operators involve their senior management in such business requests;

(c) is not proportionate with, or necessary for achieving, any possible objective; and

(d) is not otherwise justified.

3.25 Any representation made by any Requesting Operator should be considered as valid by the merging parties without any need to force the Requesting Operator to change its own internal decision-making process.

(c) Vagueness of "fair and reasonable terms and conditions" and "normal commercial practice"

3.26 The draft In-building Interconnection Commitment currently provides that upon the written request of a Requesting Operator, the merging parties will facilitate access by the Requesting Operator on *fair and reasonable terms and conditions and in line with normal commercial practice*.

3.27 HKT is seriously concerned by the vagueness of the reference to "fair", "reasonable" and "in line with normal commercial practice", which may be manipulated by the merged entity to levy a higher charge on FNOs for interconnection to the merged entity's blockwiring.

3.28 It is submitted that a pre-defined objective benchmark ought to be in place, and that the decision as to what constitutes "fair", "reasonable" and "normal" cannot be left to the merged entity given its clear averse position to any Requesting Operators.

3.29 In terms of benchmark, an interconnection charge to be proposed by the merged entity could be seen as "fair" and "reasonable" only when compared, for instance, to the retail prices which the merged entity charges its own customers located in that same building and presenting a similar demand pattern or features. This benchmark would provide assurance that the Requesting Operator is not being over-charged.

3.30 However, due to confidentiality, neither the merged entity nor the Requesting Operator should be forced to disclose or discuss their actual retail price. To avoid this additional antitrust risk, HKT is of the view that only an independent third-party, bound by strong confidentiality obligations, should be retained to assess whether the terms offered by the merged entity are "fair", "reasonable" and "in line with normal commercial practice" on a day-to-day basis (see below), and that its assessment should be made based on benchmarks pre-established by the CA in the context of the present assessment of the Proposed Transaction.

(d) Need for strong monitoring and supervisory roles and process

3.31 The draft In-building Interconnection Commitment is silent on the way its implementation and the merged entity's compliance will be monitored. It is also silent on the timeline according to which the merged entity should respond to an access request and when the case should be referred to the CA for determination.

Need for a monitoring trustee

3.32 HKT does not dispute that the CA has all the necessary expertise to hear a dispute between the merging parties and Requesting Operators, but is concerned that it may not have the resources to immediately rule upon any of these disputes. Besides, as indicated above, the procedure contained in the draft In-building Interconnection Commitment may lead to other serious competition concerns.

3.33 Only day-to-day supervision by a monitoring trustee will ensure that the commitments are respected and fully implemented by the merged entity. HKT would therefore recommend that an independent and trustworthy third-party "monitoring trustee" be retained. As is the case in all other jurisdictions, this trustee would be retained by the merging parties and would oversee the merged entity's compliance with both commitments, although it would carry out its tasks under the sole supervision of the CA. The trustee could propose to the parties any measures it considers necessary for carrying out its tasks. It could also report to the CA and confirm the content of the report to be prepared by the merged entity. The trustee's duties and obligations would need to be specified in detail in a trustee mandate, as is the case in other jurisdictions, and its tasks would need to be further detailed in a work-plan. This request for an independent monitoring trustee is fully aligned with remedy decisions adopted abroad concerning behavioural commitments. In order to fulfil its tasks, the trustee shall also have access to the merged entity's information, books and records[7]. Professional and independent companies offer monitoring trustee services; the appointment of a monitoring trustee will therefore not cause any practical difficulty for the merging parties. Such an appointment is also likely to reduce the supervisory burden on the CA (see below).

Need for a prescribed time period

3.34 HKT submits that a prescribed time period should be stipulated within which the merging parties must respond to the Requesting Operator's access requests and refer the case to the CA should they fail to come to an agreement. This is because any unnecessary delay would endanger any attempt to boost competition in buildings where new FNO services are required. The draft In-building Interconnection Commitment cannot remain silent on such a crucial issue.

3.35 It is proposed that:

(a) The merged entity must respond to the Requesting Operator's request for access to any building within TWO WEEKS after the request is delivered to the merged entity. The merged entity must provide its proposed terms, conditions and charges to the Requesting Operator and to the monitoring trustee;

(b) The Requesting Operator should accept or counter-propose a set of terms, conditions and charges within THREE WEEKS after receiving the written response from the merged entity; the monitoring trustee should be able to comment on whether the proposed terms, conditions and charges are "fair",

[7] See by analogy the description of the "role of the monitoring trustee" – albeit in the divestment context – provided by the EU Commission in the EU Remedy Notice, par 117 *et seq*. Similar rules exist in other jurisdictions, including Mainland China (see the 2014 Provisions on Imposing Additional Restrictive Conditions on the Concentration of Business Operators, art 18).

"reasonable" and "in line with normal commercial practice" within TWO WEEKS after receiving the written response from the merged entity;

(c) The merging parties should then be allowed to negotiate the terms for a further TWO WEEKS;

(d) If no agreement is reached, the case should be duly referred to the CA for determination. The CA should be ready to make a final decision as soon as possible and, in any case, not taking longer than ONE MONTH.

3.36 The imposition of such a prescribed time period will ensure that the merged entity does not unduly delay the negotiations with the Requesting Operator, and avoids the Requesting Operator losing potential customers due to the time required to connect the customer, thereby rendering the In-building Interconnection Commitment impotent. The involvement of the monitoring trustee would also ensure a rapid "check and balance" mechanism that could substantially reduce the risk of dispute between any Requesting Operator and the merged entity, and the need for the CA's involvement.

4. Wholesale Access Commitment

(a) Duration of the Wholesale Access Commitment

4.1 The merging parties have undertaken to continue to provide fixed telecommunications services under the Wholesale Agreements to Relevant Wholesale Customers for two years. The CA is of the preliminary view that a two-year timeframe is sufficient for Downstream Rivals to source similar inputs from alternative FNOs if they intend to do so.

4.2 Switching wholesale supplier is a lengthy process, especially for data services. The service provider must first test the service platform of the new supplier. The normal amount of time required to complete user acceptance testing is three to six months. Coupled with the commercial negotiation process with the new supplier to agree on terms, conditions and charges, it will normally take a total of around one year to set up on the new supplier's platform. Migration of end customers to the new platform will likely take a further one to two years upon expiry of their existing service contracts and to allow for service upgrades requested by the end customers. On this basis, three years would be a more realistic timeframe for changing wholesale supplier.

4.3 A three-year period is also consistent with the Mobile Virtual Network Operators ("**MVNO**") Direction as described in Annex A of the *Final Decision of the Communications Authority - Application for Prior Consent under Section 7P of the Telecommunications Ordinance* in respect of the proposed acquisition of CSL New

World Mobility Limited ("**CSL**") by HKT Limited issued in April 2014, whereby HKT was required to continue providing wholesale network access to MVNOs based on terms and conditions which were to remain unchanged (or on no less favourable terms) for a period of 3 years as a condition of being permitted to acquire CSL.

(b) Continue to supply Downstream Rivals according to the existing terms and conditions

4.4 The Wholesale Access Commitment provides that the merging parties shall continue to supply Downstream Rivals according to the *existing* terms and conditions.

4.5 HKT is concerned that if the merged entity introduces an upgrade to its existing system, it is less likely that they will offer such an upgrade to the Downstream Rivals (without forcing them to pay a higher price) as compared to when HKBN and WTT are competing against each other. For instance, the merged entity as a wholesale service provider may discriminate against Downstream Rivals by upgrading their own services without offering their wholesale customers the same upgrades, e.g. upgrading from Metro-Ethernet (traditional Ethernet) to Carrier Ethernet 2.0 (a new standard of Ethernet service). The merged entity could thus exploit such *status quo* to the detriment of all users of the Downstream Rivals, a potential loophole under the proposed Wholesale Access Commitment.

(c) Need to involve a monitoring trustee

4.6 As explained above, HKT is of the strong view that a monitoring trustee should be appointed by the merging parties. Without the support of a monitoring trustee, the CA will rely almost exclusively on claims made by the merging parties to ensure that they comply with their own commitments. Only this monitoring mechanism will allow a proper implementation of, and compliance with, the Wholesale Access Commitment by the merging parties.

Hong Kong Telecommunications (HKT) Limited
7 March 2019