

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

13 February 2019

PURPOSE

This notice is issued by the Communications Authority (“CA”) under section 2 of Schedule 2 to the Competition Ordinance (Cap. 619) (“CO”) to seek representations from the industry and interested parties on the CA’s proposed acceptance of the commitments offered by Hong Kong Broadband Network Limited and HKBN Enterprise Solutions Limited (both indirectly wholly-owned subsidiaries of HKBN Ltd. and collectively referred to as “HKBN” hereinafter), as well as WTT HK Limited (“WTT”) (an indirectly wholly-owned subsidiary of WTT Holding Corp.) as set out in the **Annex** (“Commitments”) under section 60 of the CO in relation to the proposed acquisition of the entire issued share capital of WTT Holding Corp. by HKBN Ltd. (“Proposed Transaction”).

2. For the avoidance of doubt, nothing in this notice represents or constitutes a decision made by the CA. The invitation of representations by this notice is without prejudice to the exercise of powers by the CA under the CO.

BACKGROUND

3. On 7 August 2018, HKBN Ltd. announced the Proposed Transaction¹. As HKBN and WTT hold carrier licences issued under the Telecommunications Ordinance (Cap. 106) (“TO”), the Proposed Transaction falls within the definition of a “merger” to which the Merger

¹ HKBN Ltd’s announcement in relation to the Proposed Transaction is available at: https://reg.hkbn.net/WwwCMS/upload/pdf/en/e_20180807_HKBN_VSA_Announcement.pdf

Rule applies pursuant to sections 3(2)(b) and 4(b) of Schedule 7 to the CO². Under section 3(1) of Schedule 7 to the CO, the Merger Rule stipulates that an undertaking must not, directly or indirectly, carry out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong.

4. The CA has conducted a preliminary assessment of the Proposed Transaction in accordance with the CO and the Guideline on the Merger Rule, taking into account the views and information provided by the merging parties and relevant third parties. The CA notes that HKBN's and WTT's businesses overlap mainly in the commercial segment of the provision of fixed telecommunications services. The merged entity will become the second largest player in the commercial segment of the provision of fixed broadband services and fixed voice services post-merger. Based on the competition analysis conducted, which has taken into account the data and information received, the CA has identified two competition issues which would likely arise from the Proposed Transaction –

(a) Difficulties in Accessing those Buildings which are not Exclusively for Residential Use and where Both HKBN and WTT have Coverage (“Issue One”)

For those buildings which are not exclusively for residential use and where both HKBN and WTT have installed and own blockwiring circuits therein, there will be one less competitor for the provision of fixed telecommunications services in such buildings post-merger. Competition risks would likely arise in respect of these buildings if other fixed network operators (“FNOs”) encounter difficulties in accessing the buildings for installation of their own blockwiring circuits therein for service provision. For these buildings, the competitive conditions would be significantly altered as there is no likelihood of any new competitors entering these buildings to offer services to end-customers occupying premises which are not for residential use and compete with the existing players

² Sections 3(2)(b) and 4(b) of Schedule 7 to the CO provide that the Merger Rule applies where one or more undertakings acquire direct or indirect control of the whole or part of one or more other undertakings, and either the undertaking acquiring control or the undertaking in which control is acquired holds a carrier licence under the TO, or directly or indirectly controls an undertaking that holds such a licence.

due to the difficulties of access³. On the other hand, for buildings where other FNOs do not encounter difficulties of access and are hence able to install their own blockwiring circuits therein if they commercially decide to compete in this way, the CA does not consider that the competitive conditions would be significantly altered post-merger.

(b) Supply of Wholesale Services to Downstream Rivals in Commercial Segment of the Provision of Local Fixed Telecommunications Services (“Issue Two”)

Both HKBN and WTT are currently providing wholesale services to service providers, who in turn make use of those wholesale inputs to provide local fixed telecommunications services for the commercial segment as competitors of the merging parties (“Downstream Rivals”). There may be a risk of the merged entity being in a position to refuse to supply wholesale services, raise wholesale prices substantially or lower service quality, etc. post-merger. As these Downstream Rivals may not be able to source alternative supply from another FNO or arrange migration within a short period of time, there is a risk that they would become captive customers of the merged entity. This could increase their costs of providing retail services downstream, which in turn would weaken their ability to compete with the merged entity post-merger until and unless they are able to source alternative supply and complete migration.

5. For the avoidance of doubt, notwithstanding that Issue One and Issue Two have been identified, the CA has not yet conducted a formal investigation into the Proposed Transaction under section 39 of the CO⁴.

³ As HKBN’s and WTT’s businesses do not overlap in the residential segment of the provision of fixed telecommunications services, the Proposed Transaction should not have impact on the competitive conditions of the provision of services to end-customers occupying premises which are for residential use.

⁴ Under section 39 of the CO, if the CA has reasonable cause to suspect that a contravention of, *inter alia*, the Merger Rule, has taken place, is taking place or is about to take place, it may conduct an investigation. Section 97 of the CO also provides that the CA, after conducting an investigation, may bring proceedings in the Competition Tribunal if it has reasonable cause to believe that arrangements are in progress or in contemplation which, if carried into effect, will result in a merger that is likely to contravene the Merger Rule.

THE COMMITMENTS OFFERED BY THE MERGING PARTIES

6. The Office of the Communications Authority (“OFCA”) has communicated Issue One and Issue Two to the merging parties. On 30 January 2019, HKBN and WTT, without admission of likely contravention of any competition rules under the CO, offered the Commitments at **Annex** to the CA under section 60 of the CO in return for the CA not commencing an investigation or bringing proceedings in the Competition Tribunal in relation to the Proposed Transaction.

7. Specifically, HKBN and WTT offered the In-building Interconnection Commitment (see section 3 of the Commitments) to address Issue One and the Wholesale Access Commitment (see section 4 of the Commitments) to address Issue Two.

THE CA’S ASSESSMENT OF THE COMMITMENTS

In-building Interconnection Commitment

8. The CA notes that, in the circumstances where a competing FNO is not providing fixed telecommunications services to any end-customer (residential or non-residential) at the building concerned and encounters difficulties in accessing that building for installation of blockwiring circuits for the provision of fixed telecommunications services to end-customers occupying premises which are not for residential use, the In-building Interconnection Commitment would enable such FNO to provide such fixed telecommunications services and thus compete with the merged entity. The CA’s preliminary view is that the In-building Interconnection Commitment would be sufficient to effectively address Issue One.

9. The CA notes that although some FNOs have not installed their own blockwiring circuits at the buildings concerned, they are providing services there by making use of the blockwiring circuits of other FNOs or through other commercial arrangements with other FNOs. The CA’s preliminary view is that it is sufficient for the access remedy to be available to any operator who, at the time of making a request for access to the merged entity, is not providing fixed telecommunications services to

any end-customers (residential or non-residential) within the building concerned. The reason is that, for a building which is not exclusively for residential use, if an operator is currently leasing blockwiring circuit from a third party FNO for provision of residential services, there should not be any significant obstacle for such operator to commercially arrange to lease blockwiring circuit from that third party FNO for provision of non-residential services, and therefore such operator should not be eligible to request access from the merged entity under the In-building Interconnection Commitment.

10. The CA notes that under the In-building Interconnection Commitment, the merged entity, after receiving a request, may require the 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 for the provision of fixed telecommunications services to end-customers occupying premises which are not for residential use within that building. For the purpose of the In-building Interconnection Commitment, “no other feasible means of access” should include but not limited to the scenarios where there is no physical space within that building for installing any blockwiring circuits, or the property management office or owner(s) of that building is/are not willing to accommodate the installation of new blockwiring circuits. With a view to facilitating the commercial negotiation among the parties, the CA proposes that the requesting operator, in making a request, should provide to the merged entity a written confirmation made by its senior management that –

- (a) for a building that has common parts, there are no other feasible means of access to that building despite holding a certificate issued by the CA under section 14(9) of the TO; and
- (b) for a building that has no common parts, there are no other feasible means of access to that building.

11. If the merged entity and the requesting operator fail to reach agreement on access or the terms of access despite the written confirmation made by the requesting operator, they may refer the matter to the CA for determination, provided that the requesting operator agrees in writing to be bound by the CA’s determination. The merged entity and the requesting

operator should, at the request of the CA, provide all relevant supporting information and documents for the purpose of its determination.

Wholesale Access Commitment

12. The CA notes that the Wholesale Access Commitment would enable the Downstream Rivals who have existing agreements with HKBN and/or WTT on wholesale services to continue to obtain supply of wholesale inputs from HKBN and/or WTT on existing or no less favourable terms and conditions for two years from the effective date of the Commitments. The CA's preliminary view is that a two-year timeframe should provide such operators sufficient time to source similar inputs from alternative FNOs if they intend to do so and the Wholesale Access Commitment would be sufficient to effectively address Issue Two.

Conclusion

13. Based on the considerations, the CA considers that the Commitments are sufficient to effectively address Issue One and Issue Two. **The CA therefore proposes to accept the Commitments under section 60 of the CO and not to commence an investigation into the Proposed Transaction under section 39 of the CO.**

INVITATION FOR REPRESENTATIONS

14. Pursuant to section 2 of Schedule 2 to the CO, the CA would like to invite representations from the industry and interested parties on the CA's proposed acceptance of the Commitments in relation to the Proposed Transaction. The CA will consider all representations received before finalising its decision of whether to accept the Commitments from the merging parties.

15. Representations in response to this notice should be made in writing and reach OFCA **on or before 28 February 2019**. **Late submissions will not be considered.**

16. The CA may publish all or part of the representations received and disclose the identity of the respondent in such manner as the CA sees fit. If any party would like to claim confidentiality in respect of any part(s)

of the representations, please identify the relevant part(s) as confidential information and clearly set out the reasons why the identified information is, in its opinion, confidential pursuant to section 123(2) of the CO.

17. Representations should be addressed to –

Office of the Communications Authority
29/F Wu Chung House
213 Queen's Road East
Wan Chai, Hong Kong

Attention: Principal Regulatory Affairs Manager
(Market & Competition Section 12)

Fax: +852 2123 2187

Email: co-info@ofca.gov.hk

18. An electronic copy of the representations should be provided to the email address indicated above.

Office of the Communications Authority
13 February 2019

**Commitments given by Hong Kong Broadband Network Limited,
HKBN Enterprise Solutions Limited and WTT HK Limited to the
Communications Authority pursuant to section 60
of the Competition Ordinance (Cap. 619)**

Pursuant to section 60 of the Competition Ordinance (Cap. 619), regarding the proposed acquisition of the entire issued share capital of WTT Holding Corp. by HKBN Ltd. (the "**Transaction**"), Hong Kong Broadband Network Limited ("**HKBN**"), HKBN Enterprise Solutions Limited ("**HKBNES**") and WTT HK Limited ("**WTT**") hereby enter into the following commitments with a view to addressing concerns about a possible contravention of the merger rule under section 3 of Schedule 7 of the Competition Ordinance. HKBN and HKBNES are indirectly wholly-owned subsidiaries of HKBN Ltd. whereas WTT is an indirectly wholly-owned subsidiary of WTT Holding Corp.

1. Effective date of the commitments

These commitments, signed by the Parties, shall take effect from the date on which the Authority accepts them or the date on which the Transaction completes, whichever is the later ("**Effective Date**").

2. Definitions

For the purpose of these commitments, the following terms shall have the following meanings:

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|-----------------------|--|
| Authority | means the Communications Authority established under the Communications Authority Ordinance (Cap. 616) or its successor; |
| Effective Date | has the meaning given in section 1; |
| Group | means, in relation to an entity, that entity, together with any other entity which controls, is controlled by or is under common control with that entity; |
| HKBN | means Hong Kong Broadband Network Limited, holder of UCL 045 (as of the Effective Date); |

HKBNES	means HKBN Enterprise Solutions Limited, holder of UCL 022 (as of the Effective Date);
Hong Kong	means Hong Kong Special Administrative Region of the People’s Republic of China;
In-building wiring	means any in-situ blockwiring circuits used or capable of being used at the point in time at which a request pursuant to section 3.1 is made for the provision of fixed telecommunications services and which is owned by any of the Parties, or any entities within the Group to which the Parties belong, within a Relevant Building and which is available having regard to the reasonable needs of any of the Parties (or any other person who has obtained rights to use it from a Party);
Interconnection	means any connection between systems or services of a Party and a Requesting Operator or elements of such systems or services for the delivery of any communication, message or signal over the connection and, without limiting the generality of the foregoing, includes interconnection to a system, to a service, between systems, between services and between a system and a service;
Network	of a Party means the fixed telecommunications network operated, established and maintained by that Party in accordance with its UCL;
OFCA	means the Office of the Communications Authority of Hong Kong;
Parties	means HKBN, HKBNES and WTT, each a “Party”;
Requesting Operator	has the meaning given in section 3.2;
Relevant Building	means any building located in Hong Kong which is not exclusively for residential use and which satisfies both of the following conditions: <ul style="list-style-type: none"> • immediately prior to the Effective Date, either HKBN or HKBNES and WTT have installed and own In-building wiring within that building; and

- after the Effective Date, the In-building wiring so installed and owned by either HKBN or HKBNES and WTT within that building is connected to the Network of any of the Parties.

Relevant Wholesale Customer means a person, other than a Party, who is party to a Wholesale Agreement (as defined below) and who holds a valid UCL with authorization to provide public internal fixed telecommunications services and/or SBO Licence;

SBO Licence means Services-Based Operator Licence issued under the Telecommunications Ordinance (Cap. 106) with authorization to provide Class 1 service, Class 2 service and/or Class 3 for Internet Access Services;

UCL means Unified Carrier Licence issued under the Telecommunications Ordinance (Cap. 106);

Wholesale Agreement means an agreement entered into by HKBN, HKBNES or WTT with a Relevant Wholesale Customer which is still in force as at the Effective Date for the provision of telecommunications services to a Relevant Wholesale Customer for the purposes of enabling the Relevant Wholesale Customer to provide retail fixed telecommunications services to non-residential end-customers in Hong Kong; and

WTT means WTT HK Limited, holder of UCL 028 (as of the Effective Date).

3. **In-building Interconnection Commitment**

3.1 Upon the written request of a Requesting Operator with reasonably sufficient details of its requirements, the Parties (or any one Party that the Parties may between themselves agree) will facilitate access by the Requesting Operator to the In-building wiring of a Relevant Building on fair and reasonable terms and conditions and in line with normal commercial practice for the purposes of enabling such Requesting Operator to provide fixed telecommunications services to end-customers occupying premises which are not for residential use within the Relevant Building (the “**In-building Interconnection**

Commitment”).

- 3.2 For the purposes of the In-building Interconnection Commitment, a **Requesting Operator** is a person (a) who holds a UCL with authorization to provide public internal fixed telecommunications services; and (b) who, at the time at which a request pursuant to section 3.1 is made, is not providing fixed telecommunications services to any end-customers within the Relevant Building to which access has been requested from any of the Parties. For these purposes, the Party who receives the request may require the Requesting Operator to provide evidence to demonstrate that there are no other feasible means of access to that Relevant Building for the purposes of installing any blockwiring circuits for the provision of fixed telecommunications services to non-residential end-customers within that building.
- 3.3 Any disputes regarding the application of the In-building Interconnection Commitment or the terms and conditions of access to In-building wiring may be referred by any of the Parties or the purported Requesting Operator to the Authority for determination, provided that such purported Requesting Operator agrees in writing to be bound by the Authority’s determination. If the Authority accepts such request for determination, such dispute will be determined by the Authority and shall be binding on the relevant Party, without prejudice to the rights of a Party or the purported Requesting Operator from exercising any other legal right or remedy that may be available to it. The relevant Party shall provide all relevant financial and/or technical information to facilitate the Authority to make the determination.
- 3.4 The terms and conditions in a determination made pursuant to section 3.3 of these commitments may include any technical, commercial and financial terms and conditions that the Authority considers fair and reasonable, including (without limitation):
- (i) the level of, and the method of calculating, the charges that any party will pay to another;
 - (ii) the points at which Interconnection is to be made;
 - (iii) the technical standards for such Interconnection; and

(iv) the lead time for effecting the Interconnection.

3.5 The charges referred to in section 3.4(i) above shall be based on the relevant reasonable costs attributable to Interconnection. In determining the level, or method of calculation, of the relevant reasonable costs attributable to Interconnection, the Authority may select from among alternative costing methods what it considers to be a fair and reasonable costing method.

3.6 The In-building Interconnection Commitment shall continue in force until it is varied or released pursuant to section 62 of the Competition Ordinance.

4. Wholesale Access Commitment

4.1 The Parties will continue to provide fixed telecommunications services under the Wholesale Agreements to Relevant Wholesale Customers for two years from the Effective Date, as follows:

(i) the Parties shall continue to comply with the terms and conditions of the Wholesale Agreements and keep the material terms and conditions unchanged, or no less favourable than those in the existing Wholesale Agreements, until the expiry date of each relevant Wholesale Agreement (subject to the proper exercise by any party to a Wholesale Agreement of any enforcement, variation or termination right under that Wholesale Agreement); and

(ii) if any Wholesale Agreement expires within two years from the Effective Date, the relevant Party shall, if requested in writing by the Relevant Wholesale Customer concerned, enter into a new agreement on terms and conditions no less favourable than those in the existing Wholesale Agreement for a term expiring no earlier than the date falling two years from the Effective Date (the “**Wholesale Access Commitment**”).

4.2 For the avoidance of doubt, section 4.1 does not prohibit the Parties from offering terms and conditions that are more favourable (to the Relevant Wholesale Customer) than those in the existing Wholesale Agreements.

4.3 The Wholesale Access Commitment shall expire two years from the Effective Date.

5. Procurement Commitment

5.1 The Parties will use their best endeavours to procure that all entities within their Group:

- (i) act in accordance with the commitments in sections 3 and 4;
- (ii) provide all such assistance to the Parties to enable the Parties to comply with their commitments in sections 3 and 4; and
- (iii) not take any action that would be inconsistent with the Parties' commitments in sections 3 and 4.

5.2 The Procurement Commitment with respect to each of the commitments will expire upon the expiry of the relevant commitment as the case may be.

6. Reporting Commitment

6.1 The Parties (or another entity on the Parties' behalf) will submit to OFCA written reports on their compliance with each of the above commitments every six months, with the first such report to be submitted six months from the Effective Date and the last such report to be submitted upon the expiration of the last of the above commitments.

6.2 The Reporting Commitment with respect to each of the above commitments will expire upon the expiry of the relevant commitment as the case may be.

7. General provisions

7.1 Any notice delivered pursuant to these commitments shall be delivered by hand, or sent by email, facsimile, registered post or pre-paid post. Any notice shall be deemed to have been received: (i) if delivered by hand, when delivered; (ii) if sent by email or facsimile, on receipt of confirmation of transmission or delivery; or (iii) if sent by pre-paid post, (in the absence of evidence of earlier receipt) three business days after posting from within Hong Kong. Any notice received on a day which is not a business day shall be deemed to be received on the next following business day.

7.2 These commitments are governed by the laws of Hong Kong and

subject to the jurisdiction of the Hong Kong courts.

For and on behalf of
Hong Kong Broadband Network Limited.

Name:

Title:

Date:

For and on behalf of
HKBN Enterprise Solutions Limited.

Name:

Title:

Date:

For and on behalf of
WTT HK Limited

Name:

Title:

Date: