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By Fax (fax no. 2978 7569)

Your Ref: CB1/BC/12/09

19 November 2010

Ms. Diana WONG
for Clerk to Bills Committee
Legislative Council

Dear Ms. WONG,

Bills Committee on Competition Bill
Meeting on 29 November 2010
Invitation for submissions

Hutchison Port Holdings Limited ("HPH") has operations in 25 countries throughout the world, and therefore has substantial experience of dealing with competition laws in various jurisdictions. Based on this experience, we welcome this opportunity to provide comments on the Bill, which we hope the Bills Committee will find useful.

It is essential, in our view, that the draft legislation is amended to make it very clear as to the types of conduct which are prohibited. This is because, in our experience, vague laws which prohibit conduct according to their future economic effects:

- by definition do not give businesses the degree of legal certainty to plan their future operations with confidence that their commercial arrangements will not subsequently be challenged. This is a particular concern, given the serious consequences which can flow from breaching the law, even inadvertently (in some jurisdictions such as the EU, strict liability attaches to competition law, so that no intention or negligence is required for a breach to be established. We note the position appears to be the same under the Hong Kong Bill).
- increase the need to engage specialist legal (and sometimes economic) advisers to conduct risk assessment exercises, thereby increasing the costs of doing business. Any advice is invariably qualified, because vague laws do not enable the specialists themselves to give advice which is definitive. A degree of uncertainty therefore always remains.
- give more discretion to the authorities to interpret the laws in ways which may vary according to the personalities and preferences of the individuals making up the enforcement authorities from time to time. This makes the application of the law even more difficult to predict.

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- give more scope and incentive for competitors or potential competitors to challenge deals which rivals have fairly won at their expense, by arguing that deal in some way affects competition. This can be extremely disruptive to commercial operations, and potentially cause adverse reputational effects, without any redress for the business affected. This problem is exacerbated in competition regimes which are relatively new, where the authorities are relatively inexperienced, and wish to 'make their mark', sometimes by taking up complaints which have no merit and which would be rejected by more experienced authorities. These complaints cannot necessarily be dismissed as frivolous or vexatious (even although they are clearly commercially-motivated): the vagueness of the law allows room for arguments which may seem attractive to a new authority at first sight, albeit without merit.

For all of these reasons we are concerned that the Hong Kong Bill contains a number of key concepts which are undefined, for example "competition", "prevent, restrict or distort competition", "eliminate competition", "substantially lessen competition", "substantial degree of market power" and "abuse". Moreover, the "illustrative examples" of prohibited conduct are too vague to provide guidance, seem capable of extending to conduct which would normally be considered unobjectionable, and are in any event still subject to the test of "prevent, restrict or distort competition". Providing definitions of these terms, though it would be of some help, is not an optimal solution. This is because any law whose applicability depends on future economic effects is by definition uncertain and unpredictable. This is why we believe that prohibiting in clear terms specific types of conduct which are considered unacceptable (irrespective of economic effects) is a better solution. If the Government does wish to have an instrument to regulate conduct on the grounds of its economic effects, it should not be through a prohibition of such conduct. At most, it should be through a mechanism for intervening, engaging in dialogue with the businesses concerned, and ultimately, if no negotiated settlement can be achieved, regulating such conduct for the future. We understand that the competition law in Canada was amended in March this year, to follow this approach.

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It is also essential that the new authorities are staffed by people with substantial experience of competition law, to guard against the risk of Hong Kong business being disrupted, and the authorities overburdened, with speculative complaints and litigation. For the same reason, we strongly recommend that third party claims be restricted to follow-on actions, at least in the early years of the new law being in effect.

In conclusion, Hong Kong has the opportunity to learn from the experiences in other jurisdictions, and to create a competition law which achieves the Government's objectives, while allowing Hong Kong business and the Hong Kong economy to continue to flourish. We would urge the Government and Legco to take advantage of this opportunity.

Yours sincerely,



John Meredith
Group Managing Director

CC. Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman of the Bills Committee)

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