PCCW Limited and HKT Limited make this submission regarding the treatment of the telecommunications industry under the proposed bill.

The purpose of a general competition law is to have one competition regime for the entire market. Yet the telecommunications market, perhaps the most competitive of any local market, is subject to different treatment in four important ways. By this submission PCCW and HKT request the Bills Committee to seriously look at the discriminatory treatment against the telecommunications industry and to ask the Administration the fully explain this departure from a general competition law. The four areas of discrimination are described below.

First, Section 21 of the bill contains the Second Conduct Role (CR2) on Abuse of Market Power. While there has been an important debate over the exact language of CR2[1], it is generally accepted that Section 21 represents global best practices in that it looks at conduct related to the foreclose of competition.

Yet, Section 7Q of Schedule 8 introduces an additional and broader CR2 just for the telecommunications market. This "two CR2's for telecoms" approach is discriminatory, is not global best practices, is inconsistent with Section 21 of the bill and Section 7G of the Telecommunications Ordinance, and is only found in the bill in order to try to bolster the TA's position in a matter now pending before the Telecommunications (Competition Provisions) Appeal Board. The Administration should not try to influence Appeal Board or limit its independence. This section should be removed.

Second, competition cases are almost always complex, with multiple allegations of mis-conduct. In short, a complainant will plead every real and imagined possible breach. This is what lawyers do, as the barristers among the committee will attest.

[1] Inclusion of the object clause, substantial market power v dominance, substantiality test and per se breaches have all been raised.

This is true for both CR1 (anti-competitive agreements, concerted practices) and CR2 (abuse of market power) cases.

It is contemplated under the bill that the Tribunal will play a central role in the enforcement of the Competition Ordinance by reviewing the decisions of the Commission and/or making its own de novo decisions.

However, this will not be the case for abuse of market position (ie, dominance) proceedings related to the telecommunications licensees. Proceedings which contain a CR2 (Section 21) allegation may only go to the Tribunal. Proceedings which contain a Section 7Q (Section 14 of Schedule 8) allegation may only go the Telecommunications (Competition Provisions) Appeal Board. The Tribunal cannot hear Section 7Q cases. The Telecommunications Appeal Board cannot hear CR2 (Section 21) cases.

The result of such a jurisdictional split is obvious. A case with sections 21 and 7Q allegations will have: substantially higher costs as the case is essentially conducted before two different tribunals; a real potential for inconsistent procedures, timelines and decisions; and a real potential for inconsistent penalties and orders. This is frankly an unnecessary disaster just waiting to happen. Section 7Q can only be described as discriminatory and dangerous and should be removed.

Third, the bill at Section 158 proposes that the Commission share its jurisdiction with the Telecommunications Authority (soon to be the Communications Authority). This "concurrent jurisdiction" approach means that cases involving licensees under the Telecommunications Ordinance may see OFTA taking up the full investigative and administrative role of the Competition Commission.

It has been stated by the Administration that OFTA staff has expertise in competition matters and concurrent jurisdiction will ease the burden placed on the Competition Commission in its early years. With respect, we find this reasoning to be flawed. First, we do not except the claim that there is a wealth of expertise at OFTA. To the best of PCCW's knowledge, OFTA has handled a total of two significant competition law cases in the last several years. In one case no action was taken for three years and then the case was dismissed as 'historic'. In the other case OFTA got the right

result but its analysis was problematic.[2] Thus, we question the assertion of great competition law expertise.[3]

PCCW would alternatively suggest that it makes little sense to warehouse within OFTA "substantial expertise" which just waits for a competition case to be filed once every two or three years. If there is real expertise, it would be better to consolidate it within one regulator (ie, the Competition Commission) where the workload is greatest so it can do its difficult work better, faster, sooner.

Second, concurrent jurisdiction is costly as two groups of experts are separately supported. Simply stated, two competition regulators are more expensive than one. Third, concurrent jurisdiction creates a real risk of inconsistent approaches, processes and decisions. Fourth, concurrent jurisdiction is not global best practices. It is found in the UK, but to mixed reviews. Section 158 should be deleted.

Fourth, it has been proposed by the Administration to defer the application of a merger review regime. PCCW supports that approach. However, once again, the telecommunications market is singled out for discriminatory treatment as the merger regime found in the bill as drafted will apply (solely) to the telecommunications industry. It is the case that Section 7P of the Telecommunications Ordinance creates a merger review regime for telecommunications licensees. It has thus been argued that having the merger review provisions of the bill applying only to telecommunications licensees is merely an extension of the status quo.

However, PCCW would suggest that this 'status quo' response as to why a discriminatory approach is appropriate is not satisfactory. The correct question is not whether, looking backwards, telecommunications licensees are now subject to a

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[2] This case is currently before the Telecommunications Appeal Board, and is linked to the Section 7Q issue noted above. At least one carrier would dispute our view that OFTA reached the correct conclusion in that case.

[3] The Committee may want to solicit information as to this alleged expertise, including resumes and professional papers. We would note that the Competition Affairs Branch at OFTA has also lost its head (ie, the most experienced competition person there) and that the branch has now been down-graded to a unit under the supervision of an engineer. To the best of PCCW's knowledge, the BA has no real in-house expertise on competition matters and employs consultants as competition matters arise.

merger review. Rather, the correct question is whether, looking forward, there is a real and valid basis to impose a merger review regime solely on the telecommunications industry? This industry has invested billions of dollars in local networks, has consistently provided innovative services and has continually lowered prices to consumers. So why the discriminatory approach in regards to such a competitive industry? A looking backwards status quo answer is not responsive. Looking forward, what is so unique about the telecoms market that requires a merger regime for telecoms but for no other market? Without a clear and convincing going forward rationale, the merger regime should not be imposed on the telecommunications industry.

PCCW and HKT thank the Bills Committee for considering these comments and would welcome the opportunity to participate in any discussion regarding the above provisions.