Comments of PCCW Limited to the Bills Committee on the Competition Bill, Institutional Arrangements (Component 4)

In November 2010 PCCW made a submission to the Bills Committee outlining the criteria that the proposed general competition law should reflect in its drafting. That is, as a starting point, a general competition law should:

(a) use global best practices as a starting point;

(b) adapt such global best practices to the unique circumstances of Hong Kong's small and open market;

(c) be light handed, clear and understandable, and easy to implement; and

(d) be non-discriminatory.

While PCCW supports the introduction of a general competition law that meets these criteria, the current bill fails to do so. The bill does not reflect global best practices, is not tailored to reflect the realities of a small and open market such as Hong Kong, is overly complex, is not light handed and is discriminatory. These deficiencies can and should be addressed.

In this submission PCCW addresses certain issues relating to Component 3 of the Proposed Work Plan (Document LC Paper No. CB(1) 320/10-11(01). These issues relate more specifically to Part 11 and Schedules 5 and 6 of the proposed bill dealing with concurrent jurisdiction as well as delegations of Commission authority to committees.

Concurrent Jurisdiction: Part 11, Concurrent Jurisdiction Relating to Telecommunications and Broadcasting (Clauses 157 - 161)

This section of the proposed bill suggests that the Commission share its jurisdiction (ie, concurrent jurisdiction) with the Telecommunications Authority ("TA") and the Broadcasting Authority ("BA") pursuant to a future Memorandum of Understanding

("MOU"). In short, when dealing with competition matters relating to licensees under the Telecommunications Ordinance (Cap 106) or licensees under the Broadcasting Ordinance (Cap 562), the Commission may agree to have its functions performed by the TA or BA, as they may agree. That is, the TA and BA would act as the Commission in investigating competition matters and making appropriate decisions as if they were the Commission.

PCCW would suggest that this approach contains substantial risks but no benefits. PCCW would therefore suggest that all competition work be undertaken by the Competition Commission and that the concurrent jurisdiction proposal be deleted. PCCW's position on this issue is based on the following reasons:

First, it has been stated that the proposed concurrent jurisdiction mechanism is intended to retain the specialist knowledge of the TA and BA in competition regulation. See CB(1) 320/10-11 (02) at paragraphs 13 and 14. With respect, PCCW would suggest that such specialist knowledge is at best limited.

As to the BA, there is no significant competition law expertise within TELA or the BA. To the best of PCCW's knowledge, the BA has reviewed very few competition matters (about 1 per year) and when such matters do come before it, outside consultants are ordinarily hired. The deficiencies of the BA's approach and analysis are well described in a recent law review article by Thomas K. Cheng an Assistant Professor at the University of Hong Kong titled "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" published in the World Competition Law and Economics Review. The article, which is attached, makes the following comments in relation to the BA's decisions since the Broadcasting Ordinance was adopted in 2000.

- At page 329, line 7: "While the BA made credible attempts at structured competition law analysis, the inadequacies in its decisions are plain to see. Three areas of notable problem are market definition, its analysis of predatory pricing claims, and causation."

- At page 330, line 1: “The BA reached it conclusion on market definition without any reference to empirical data or market surveys... These omissions are in fact not unique to this case. They are missing in all of the BA’s decisions.”

- At page 330, line 26: “The BA’s treatment of the market definition issue in the TVB-ATV Joint Acquisition of Sports Rights case left even more to be desired.”

- At page 332, line 4: “The BA’s double blunder in its analysis [in the TVB-ATV Joint Acquisition of Sports Rights case] allowed a blatant cartel agreement to go unpunished. This makes a mockery of the competition law regime under the Broadcasting Ordinance.”

- At page 332, line 8: “[the BA’s] analysis of the predatory pricing claims was even more deficient [than its treatment of market definition in earlier cases].”

- At page 333, line 2: “The BA’s analysis of these predatory pricing claims left much room for improvement”.

- At page 333, line 16: “The problem of this argument [the BA’s argument in several cases that continued subscriber growth would negate any anti-competitive effect] should be obvious. Continual subscriber growth does not demonstrate the absence of competitive harm; subscriber growth could have been higher without the alleged anti-competitive conduct.”

As to the TA, there is some level of competition law experience within OFTA. However, OFTA’s Competition Affairs Branch has been reduced in size, down-graded to a unit, lost its most experienced employee and Branch head, and (with respect) lacks in-depth competition law expertise. As with the BA, OFTA handles relatively few competition law cases. It is also possible that the OFTA staff with competition knowledge would be the first ones hired by the Commission.

Second, concurrent (i.e. shared) jurisdiction by definition would see the TA or BA conduct competition law investigations and make competition law decisions. As compared to the Competition Commission, a second and third actor on the stage invites inconsistent approaches, analysis, findings and decisions. PCCW can see no basis as a matter of public policy to create a regime which unnecessarily creates such clear risks of inconsistency.

Third, it will be absolutely critical to create a competent regulator as soon as possible. Concurrent jurisdiction arrangements will fragment what limited expertise exists in Hong Kong and will adversely affect both the establishment of a competent Competition Commission and its ability to address anti-competitive conduct. Dilution of a limited knowledge base among multiple regulators will not be in the public interest.

Fourth, concurrent jurisdiction will be costly. Multiple competition regulators must by definition be more expensive then one regulator as each regulator will need to employ the required expertise and bureaucracy. By having a single competition regulator these extra costs can be avoided.

Fifth, concurrent jurisdiction is not global best practice (even if it has been adopted in the UK although generally not we would note in the rest of the EU or the OECD). If it were, thousands of sector specific regulatory bodies would handle competition law complaints. This is simply not the case. It is particularly not global best practice in small markets where it is even more difficult to justify the burden of increased costs, fragmented regulation and limited expertise.

Sixth, competition cases are often complex and straddle multiple sectors and products/services. As such they may not be cleanly divided between subject matters and multiple regulators. Such cases if subject to concurrent jurisdiction could be conducted before multiple regulators, increasing all the risks noted above plus additional risks as to multiple proceedings, increased costs and inconsistencies.

Professor Cheng's article also highlights these issues in retaining the sectoral approach (i.e. concurrent jurisdiction) in the following passage:

- On page 340 at line 29 "One further drawback of the sectoral [broadcasting and telecommunications] approach is that it impedes the acquisition of expertise...The number of competition cases arising under the sectoral regimes is necessarily small. The BA itself has decided eight cases in the last nine years. It is thus not cost-effective for the two regulators to develop substantial in-house expertise on competition law. The BA, for example, usually hires an outside economic consulting firm to assist it in adjudicating cases: It is perhaps inevitable that this approach will continue to hinder the emergence of viable infrastructure for competition law enforcement in Hong Kong. Thankfully, as of the time of writing, the Hong Kong government is preparing the draft bill for a cross-sector competition law for the city. It is hoped that once the cross-sector law has been enacted, more investment will be made to create an enforcement agency with the requisite expertise so that the quality of competition law enforcement in Hong Kong can be further improved."

As a licensee under both the TO and BO, PCCW would prefer to fall within the jurisdiction of one competent fully staffed regulatory body rather than two or three regulators of varying skills and approaches. The concurrent jurisdiction approach lacks substantial merit, creates substantial and unnecessary risks, and should be dropped.

Delegation of Powers: Schedule 5, Part 7, Committees, Schedule 5, Part 8, Delegation

These two Parts of the proposed bill give the Commission the discretion to establish committees and to broadly delegate its functions, including decision making, to a committee. See Schedule 5, Parts 7 and 8, Clauses 28 and 29. We consider it is inappropriate to provide for such delegation without ensuring the delegate has appropriate expertise and authority.

There is no requirement that some, most or all committee members also be Commission members. Indeed, there is no requirement that any committee member be a Commission member (or even a high ranking Commission employee). Thus, not only is the delegation of authority and functions broad, but Commission functions (including decision making) can be carried out by Committees with zero Commission members. There is little doubt that committees can assist the Commission, but broad delegations of decision making powers should be avoided or strictly limited to secondary functions.

Respectfully submitted by

PCCW Limited