On 9 February 2011 PCCW submitted comments to the Bills Committee on Institutional Arrangements (Component 4). In particular, PCCW suggested that the concurrent jurisdiction proposal be deleted. PCCW would invite members of the Bills Committee to review that submission.

In response to the Administration's reply on this issue, PCCW would make a further short submission.

Under the concurrent jurisdiction proposal, the Competition Commission would share its jurisdiction with the Telecommunications Authority ("TA") and Broadcasting Authority ("BA")(or in the future a merged TA/BA). Thus, the TA and BA could handle competition cases involving their respective licensees. The Commission would have no role in these cases.

The Administration has justified this approach by stating that concurrent jurisdiction retains the specialist knowledge of the TA and BA in competition regulation. Indeed, each time the issue of concurrent jurisdiction has been raised by various parties (e.g. HKGCC, AmCham, various competition law experts, PCCW, CSL, Dr Andrew Simpson, etc) the Administration's answer is exactly the same: specialist knowledge exists and this knowledge will allow the TA and BA to share some of the Commission's workload (i.e. by handling competition cases involving TA or BA licensees).

PCCW has considered the Administration's argument supporting concurrent jurisdiction and finds it to be unconvincing for several reasons.

First, with respect, there is little or no competition law expertise within the TA or BA. This is not stated by PCCW to be a criticism of either the TA or BA. Instead, in view of the small number of competition law cases handled by the TA or BA, any "warehousing" of competition law expertise would likely be a significant waste of taxpayers' money.

Indeed, because of its lack of in-house experience the BA routinely hires competition law consultants/experts when a competition complaint is filed. For example regarding the recent ATV complaint against TVB relating to artist contracts and advertising practices, the BA has hired a London QC with competition expertise, a local SC, an international economics consulting group with competition expertise and a local professor of law who teaches competition law.

As to the TA, it has limited competition law experience. However, its Competition Affairs Branch has suffered a reduction in expertise and it has been down-graded to a unit reporting to an engineer. As with the BA it handles very few competition law cases. Perhaps the Administration could provide detailed information as to whom the TA's in-house competition law experts are, where they have obtained their expertise, in which competition authorities they have worked, in which law firms' competition groups they have worked in, in which consultants' competition groups they have worked in, case experience, etc.

If there is no substantial expertise, then the Administration's argument as to concurrent jurisdiction falls away per its own language.

Second, the primary staffing objective should be to establish a competent regulator (i.e., Competition Commission) as soon as possible. If there is expertise within the BA and/or TA, the best use of these individuals would be to move them to the new Competition Commission where their expertise would be both welcomed and fully utilised. There is no point in warehousing them in an institution that sees very few competition cases.

Third, concurrent jurisdiction by definition creates real risks of inconsistent approaches and decisions. Sector regulators typically distrust the market and assume that they should intervene in it. Competition regulators typically respect the market and accept that they should not intervene absent clear evidence of conduct that is significantly lessening competition.

Hong Kong has for a long time recognized the benefits of effective competition. These benefits can be clearly seen in the liberalisation of the telecoms markets that started in 1995. This liberalization has brought keen competition. Indeed, Hong Kong now has one of the most competitive telecoms markets in the world. Industry and consumers reap the benefits of this through cutting edge telecoms products and services, the variety in those products and services, very competitive prices, innovation, development of Hong Kong's IT industries and the broader benefits that flow from IT led economic growth, job creation and the resulting improvement of living conditions and opportunities in Hong Kong. These benefits would be seriously undermined by inconsistency in the application of competition law or premature, unnecessary or ill conceived regulatory intervention in the telecoms and broadcasting markets. Why create risks of inconsistency where the cost for Hong Kong could be so high?

Fourth, concurrent jurisdiction will create unnecessary complexities in the administration of the general competition law. Complaints may not be easily divided between sectors and may have sector and non-sector components, meaning that cases may be heard before different regulators and appeal bodies. Forum shopping may also occur. Certainly concurrent jurisdiction will increases costs for both the Administration and for enterprises (including SMEs). This concern as to complexity and costs extends to both the first level of a complaint as well as to any appeal (i.e., the Tribunal v the Telecommunications Appeal Board). The industry is now highly competitive and, given the risks identified above, it is clear that there is significant potential downside in concurrent jurisdiction and no real benefit that could justify taking that risk.

Fifth, concurrent jurisdiction is not global best practices. If it were, each country would have competition regulators for each industry sector. The fact that concurrent jurisdiction exists in the UK (to mixed reviews) does not make it EU, OECD or global best practice. It needs to be recognized in this context that a key reason for the UK's decision to have concurrent regimes was the less liberalized state of the UK's telecoms markets and media markets, which necessitated regulatory intervention to manage liberalization and a transition to more competition. Hong Kong, on the other hand, has already successfully made that transition, with highly liberalized telecoms markets which are among the most competitive in the world. There is simply no case for concurrent jurisdiction and all of the risks and costs that it brings.