On 19 March 2012 PCCW Limited and HKT Limited made a submission regarding the treatment of the telecommunications industry under the proposed bill. HKT addressed four important areas where the telecommunications industry was treated differently from other sectors. HKT requested that the telecommunications industry be treated the same as all other sectors, on a non-discriminatory basis.

In a paper dated 24 April 2012, CB(1)1652/11-12 (02), the Administration replied to the points raised by HKT. In this submission HKT replies to the Administration's response.

First, HKT raised the point that the telecommunications industry would be burdened with an additional Second Conduct Role (CR2) as found in Section 7Q of Schedule 8. HKT indicated that Section 21 of the bill (i.e. CR2) generally represented global best practices. HKT also indicated that Section 7Q did not generally represent global best practices. If it did, then approach found in Section 7Q would have been included in Section 21. Further, HKT indicated that Section 7Q represents a controversial approach under the Telecommunications Ordinance and is a matter pending before the Telecommunications (Competitions Provisions) Appeal Board (Appeal board).

In its reply, the Administration states that Section 7Q would "maintain the status quo". This may give the reader the impression that this is either the existing written law or well established case law in Hong Kong. With respect, neither is the case. Section 7Q is not the current written law; it is not an extract from the existing TO Section 7L. Instead, Section 7Q represents the TA's interpretation of TO Section 7L. This interpretation is found in only one TA decision, and that interpretation of the TO is controversial and disputed, and is under appeal to the Appeal Board by SmarTone and HKT.[1] Therefore, Section 7Q is neither the existing written law nor well established case law. The suggestion that Section 7Q merely maintains the status quo is an over-statement. Since Section 7Q is neither well established law nor global best practices, HKT requests that Section 7Q be deleted and that the telecommunications sector be subject to merger control in the same manner as all other sectors without discrimination (ie, under Section 21).

Second, HKT raised the point that CR2 cases may only go to the Tribunal and Section 7Q cases may only go to the Appeal Board. In abuse of dominance cases it is not at all unlikely that multiple allegations will be made, some under CR2 and some under Section 7Q. Under the existing bill, those cases must be split, with CR2 issues going to the Tribunal and Section 7Q issues going to the Appeal Board. This raises obvious inconsistency risks and process/timing complications, as well as doubling appeals/litigation costs.

The Administration did not reply to this point. HKT would suggest that if Section 7Q is to remain, then appeals of Section 7Q go to the Tribunal in order to at least ensure consistency and to reduce appeals/litigation costs. HKT would note the Administration's comment below as to concurrent jurisdiction: that the Tribunal ensures consistency. But that will not

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[1] The parties to the appeal, including HKT have now settled the appeal and anticipate that the Appeal Board will formally dismiss the matter in due course. Further, Section 7G of the TO gives the Secretary price control powers which could be employed instead of Section 7L or Section 7Q.

be the case under Section 7Q cases since such cases cannot go to the Tribunal. Accordingly, no cases should go to the Appeal Board; all cases should go to the Tribunal. Of course, the best solution is a non-discriminatory one: to remove Section 7Q *and* to have all appeals go to the Tribunal.

Third, HKT asked why concurrent jurisdiction between the Commission and OFCA should occur. HKT indicated that OFCA did not have a wealth of competition law experience and that concurrent jurisdiction created a real risk of inconsistent approaches, increased costs and was not global best practices. HKT requested that no concurrent jurisdiction be created, meaning that the Commission handle all cases.

In reply, the Administration stated that inconsistencies should not arise due to the common role of the Tribunal. The Administration also stated that it is the long run policy to have just one competition authority (ie no concurrent jurisdiction).

The administration's reply is revealing. If the long run policy is to have just one competition authority, then let's not start with a sub-optimal concurrent jurisdiction approach with its inherent weaknesses. Tellingly, the Administration does not dispute the cost implications, the fact that concurrent jurisdiction is not global best practices and that OFCA does not have real competition expertise. The statement that consistency will exist at the Tribunal level ignores the key role played by the Commission (and OFCA under concurrent jurisdiction) in initiating investigations, prosecuting cases, negotiating settlements, issuing infringement and warning notices, etc.

In short, concurrent jurisdiction is a bad idea and an unnecessary risk, and should not be legislated. The Commission should be the sole front line enforcement agency for all sectors on a non-discriminatory basis.

Fourth, HKT raised the question of whether a merger regime should apply solely to the telecommunications industry. The Administration in its reply stated that such merger regulation already applies to the sector.

The Administration's reply is factually correct (ie, the current situation) but fails to answer the right question: on a *going forward basis* are there real and compelling reasons to impose a merger review regime on the telecommunications sector alone? The answer is not obtained by looking backwards to old legislation and referencing the status quo. The answer can only be obtained by looking forward…what is it about the telecommunications sector (but apparently not about other sectors related to real estate, petrol, supermarkets, transportation, utilities, etc) that warrants on a going forward basis the imposition of merger control?

PCCW and HKT thank the Bills Committee for considering these comments. We would welcome an opportunity to participate further in the debate of these issues.