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Dear Sirs,

**Public Consultation on the Way Forward for Competition Policy in Hong Kong**

**Overview**

Hong Kong has been ranking as the world's freest economy for more than a decade<sup>1</sup> on account of its adhering to policies that safeguard property rights, enforce contracts, allow free trade, maintain low marginal tax rates, ensure sound money, and limit the size and scope of government. The underlying philosophy is to avoid the introduction of regulations wherever possible to let market force to fully operate. It is a trophy that Hong Kong should treasure and, more importantly, it reminds the policy makers that it is the underlying reason for the success of the Hong Kong economy.

As stated in the Consultation Paper<sup>2</sup>, the ultimate objective of competition policy is to “promote economic efficiency or the best use of resources from the society’s perspective”. Does Hong Kong still need to introduce economic regulations (in this instance, a general competition law to regulate market competition) to achieve this policy objective? Are there sufficient grounds in support? Is there clear evidence of market failure to warrant the introduction of such economic regulations? Would it be counter-productive instead?

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<sup>1</sup> *Economic Freedom of the World, 2006 Annual Report*, published by The Fraser Institute in conjunction with the Cato Institute and other think tanks around the world.

<sup>2</sup> Paragraph 12

(A) *The Regulation of Hong Kong Telecom Industry is an Unique Experience on its own*

Hong Kong's free market culture has been providing the vital incentives as well as the essential safeguards for competition across the sectors, which in turn have delivered robust economic growth to Hong Kong. Hong Kong experience illustrates that market force is working well without the aid of a general competition law. Indeed, competition law cannot guarantee economic success. It is only one of the many economic levers that can be employed to complement specific economic policies under certain market conditions.

In the case of the Hong Kong telecom industry, the introduction of sector-specific competition regulations to the telecom industry back in year 2000 was to assist in the then current process of liberalizing and de-regulating the telecom market.

The telecom industry was regulated right from the beginning and has since the late nineties undergone a vigorous process of market liberalization. For example, in the fixed line industry, new operators were licensed in 1995 with the view to introducing competition with the incumbent operator. In a hitherto monopolist market like the telecom industry, it is understandable that the government wanted to use economic regulations to maintain a level playing field for the competition amongst the new entrants and the existing incumbent operators alike in order to facilitate the process of market liberalization.

Against this backdrop, the telecom competition regulations have therefore been by and large "asymmetric" regulations aiming at countering the dominant market position of the incumbent operator which enjoyed a dominant position in the market. These economic regulations aim at pre-empting possible market failures that an incumbent operator may cause, such as refusal to provide access to important bottle-neck facilities and abuse of dominant positions in restricting supply of services.

However, the mere introduction of regulations against anti-competitive behavior would not bring about effective competition in the Hong Kong telecom market. Market forces (such as the advent of rapid technological developments in the telecom field coupled with the market demand), together with the following compatible government policies, have created favorable market conditions for effective competition amongst the operators.

- Facilitating the development of technology (such as the licensing of VoIP service);
- Placing no limitation of foreign investments;
- No government ownership in the telecom industry (unlike countries like Japan and Singapore),
- Adopting competitive cost modeling in determining the relevant interconnection charges amongst operators; and
- Fostering competition with the incumbent operators (such as mandating the fixed-line incumbent to unbundle its local loop to facilitate market entry and to reduce its market share. Under the same policy, the planned withdrawal of such mandate by 2008 has encouraged new entrants to build-out new access infrastructure to provision households

with the result that the majority of Hong Kong households now has physical access to 2 or more alternative networks)

As assessed<sup>3</sup>, the operation of market forces with these policies had achieved the following key consumer benefits to such an extent that surpassed the other developed and competitive telecom markets under comparison<sup>4</sup>:

- Rapid erosion of the market leader's market share;
- Massive take-up of most telecom services (Hong Kong consumers' usage of telecommunications services, as indicated by measurements such as mobile penetration rate, broadband penetration rate, take-up of IPTV and outgoing international minutes per capita, is significantly higher than that of consumers in most of the other markets);
- Rapid price declines (especially in the mobile sector and fixed line broadband access).

Insofar as the implementation of the competition regulations is concerned, it is interesting to note that the past 6-years implementation experience indicates that Hong Kong telecom market has not been suffering from anti-competition malpractices. Over the past 6 years, there have been 12 completed investigations conducted by the Telecommunications Authority based on allegedly anti-competitive conduct. None of these investigations established a finding of breach.

The case of Hong Kong telecom is a unique experience of successful market liberalization driven by market forces and the advent of technologies in the present information age. Competition regulations have not played an important role, as anti-competitive conducts have never been prevalent in Hong Kong.

#### **(B) Does Hong Kong Need a General Competition Law?**

For the other sectors of Hong Kong, they have never been regulated right in the beginning and they need not experience any special market liberalization process. Except for the regulated utilities, the markets in all of these other sectors are free in terms of market entry and exit and there has been free competition right from the start. Given such market conditions in these sectors, it is unlikely that a firm could have monopolist power or a number of firms could act together to create a significant market power and act in such a way that would have the effects of substantially restricting competition.

In these other sectors of the Hong Kong economy, the requirement to maintain a level playing field or to regulate dominant players that have monopoly/oligopoly power is an economic red herring. The imposition of economic regulations may not achieve, and may even upset, the

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<sup>3</sup> The two "Reports on the Effectiveness of Competition in Hong Kong's Telecommunications Market: An International Comparison" prepared by Spectrum Strategy Consultants under the commission of Office of the Telecommunications Authority (OFTA) in 2003 and 2005.

<sup>4</sup> Ibid. The countries under comparison in the two Reports were Japan, South Korea, UK, Australia, US, Sweden and Singapore.

efficient allocation and utilization of resources. The government should continue observing the principle of positive non-intervention to allow market force to work effectively and resources to be utilized efficiently in these sectors.

By the same token, it is our belief that by the time the telecom and broadcasting markets are fully liberalized, the existing regulations should be withdrawn for these two industries because it is only beneficial for market forces to operate without the command of economic regulations.

In this critical review as to whether Hong Kong should introduce a legal framework to regulate competition across the board, one should not be presumptuous of the benignity of economic regulations. One must carefully consider the fundamental question as to whether Hong Kong economy should allow the government to formally intervene by way of a legal framework of economic regulations.

In answering this fundamental question, one must carefully assess, firstly, whether the market across the board has presented many instances of market failures that warrant government intervention by way of economic regulations. Even if it is the case, it is still necessary to further assess the costs of implementing such economic regulations.

As explained above, the previous introduction of competition regulations in Hong Kong was not driven by the concern that Hong Kong has had a notorious history of anti-competitive conducts and dominant market players had abused their positions. The fact that there has been no finding of breach in the past 6 years of implementation indicates that the industry has not been suffering from prevalent market failures. Some cases had gone to appeal and were heard at the level of Telecommunications (Competition Provisions) Appeal Board. Despite the final findings of no breach, these proceedings had caused both the regulator and the operators concerned tremendous time and resources right from the commencement of the investigation up to the final determination of the matter<sup>5</sup>. It is also our experience that our business and marketing programs were from time to time disrupted by unfounded allegations of anti-competitive conducts.

In the other sectors in Hong Kong, it does not appear that there are prevalent market failures in terms of anti-competitive practices in the market place that warrant a dose of government intervention. Hong Kong is known to be highly competitive in its market. In the major sectors such as banking, real estate and retails, consumers have been enjoying a lot of choices of products and services at competitive price. It is doubtful that any major player in these sectors has achieved a dominant position in its own sector, let alone being seen to have abused its market power. There is no urgency to introduce anti-competition regulations to cure any precarious situation.

If there is no urgent reason to introduce general competition laws, the government should not rush into imposing on the market players such a complicated area of laws. One should not

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<sup>5</sup> It is estimated that the legal costs incurred by an operator and the regulatory authority in handling a complaint up to, say, the completion of the proceedings at the appeal board level could reach HK\$10 millions or more.

underestimate the economic costs associated with the resources that would be wasted in implementing such regulations.

The exercise of assessing the costs should not simply be an estimation of public expenditure on operating the new regulating agency but also, ever more importantly, the economic and social costs that the economy would have to bear as a result of the introduction of such legal framework to regulate across all the sectors. On the part of the private sectors, big corporations and small medium enterprises (SMEs) alike would have to expend costs and resources on interpreting and complying with the regulations which may not have been necessary. More importantly, the economic dead weight loss incurred as a result of conservative interpretation on the part of either the regulator or the regulated would only upset economic outputs and adversely affect public interest. One should not under-estimate the disruptions that could cause to legitimate business strategies as a result of unfounded allegations and complaints.

It is a particularly acute concern for the SMEs that play an important role in the market. It has been commented that:

*“It is a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict after the fact.”<sup>6</sup>*

The SMEs' concerns would not be allayed by the propositions that they are small in size and therefore it is unlikely that they would be affected by the operation of general competition law which only targets at behaviors which have material anti-competitive effect. It may be a too simplistic view of the matter, in light of the complications of the relevant laws. At the end of the day, whether or not an entity (be it small or large in size) is to be scrutinized would depend on what is the relevant market in the case under consideration. Furthermore, depending on the law to be passed, an entity may be considered to have breached the regulations on account of the behavior per se.

### (C) Conclusion

In economics, legal regulations may not necessarily be the best tool to achieve efficient allocation of resources.

*“... the ultimate regulator of competition in a free economy is the capital market. So long as capital is free to flow, it will tend to seek those areas which offer the maximum rate of return.”<sup>7</sup>*

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<sup>6</sup> By Alan Greenspan (Former Chairman, Board of Governors, United States Federal Reserve) as cited in Honorable Ron Paul of Texas (1999): “Congressional Record: 18 May 1999 – Introduction of H.R. 1789”, [www document] <http://www.house.gov/paul/congrec/congrec99/cr051899.htm> (accessed 5 January 2007). Ibid.

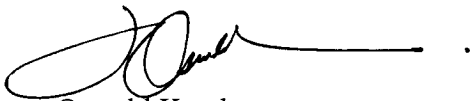
<sup>7</sup> Ibid.

Once there is a formal framework for government intervention in policing anti-competitive conducts, the government would have both the power and propensity to manage competition in the market.

The economic success of Hong Kong, and the absence of any market failures of proven anti-competitive practices, demonstrated that Hong Kong has been enjoying effective competition in its market. The government should continue to take a light-handed approach to avoid an over-kill that may backfire and disrupt the efficient working of the market.

Yours faithfully

For and on behalf of  
Hutchison Telecommunications (Hong Kong) Limited



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