ATTENTION TO :

Economic Development Branch (Division A)
Economic Development and Labour Bureau
2/F Main Building, Central Government Offices,
Lower Albert Road, Central, Hong Kong

Date : 5 February 2007

Response to Promoting Competition – Maintaining our Economic Drive

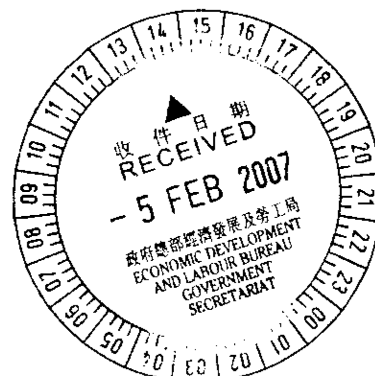
With reference to captioned paper issued on last November by the Economic Development and Labour Bureau, British Telecommunication plc would like to provide our response as attached to the discussion paper.

Hong Kong is BT's Asia Pacific headquarter and we have been in operation to provide high quality of advanced telecommunication and IT services to multinational corporation since the mid 80's. We are glad to have the opportunity to share with the Bureau about our views and comments on the competition policy in Hong Kong.

I am responsible for all the BT's regulatory and public policy in Hong Kong and North East Asia Pacific and would be grateful to discuss with you about our view point and comment we made on the competition paper.

We truly believe the competition policy will be crucial for the further development of Hong Kong economy. If there is any queries about our response or further discussion, grateful if you could contact me at

Yours Sincerely,



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BRITISH TELECOMMUNICATIONS PLC'S RESPONSE TO A PUBLIC DISCUSSION DOCUMENT ON THE WAY FORWARD FOR COMPETITION POLICY IN HONG KONG

5TH FEBRUARY 2007

DIANE MELDRUM
BT GLOBAL SERVICES

5TH February, 2007

British Telecommunications plc's Response to A public discussion document on the way forward for competition policy in Hong Kong

Executive Summary

Hong Kong has been proud of the freedom of trade, freedom of speech and lack of financial barriers enjoyed by its businesses for many years and these factors have been crucial in securing the success of the Hong Kong market economy. This success has been seen not only at the level of multinational conglomerates which span many economic sectors, but also at the level of small and medium enterprises, which have also contributed considerably to the economy. With the development of such a sophisticated market economy composed of multiple vertical and horizontal market niches, the introduction of a competition policy will help to secure level playing fields across all business sectors and will contribute to the ongoing success of the Hong Kong economy.

BT applauds the Hong Kong Government's decision to hold a public consultation on the way forward for competition policy. In the last decade, many countries in Asia have reassessed their approach to competition and its effects on their economies, and as a result, many of them have introduced new competition laws or updated their existing regimes.

BT's opinion is that introducing a cross-sector competition law in Hong Kong will serve to enhance and reinforce the competitive environment, and ultimately, the economic efficiency of the market. Not only will a well drafted competition law create a level playing field, thus providing business certainty, but it is also likely to stimulate investment into the market. Moreover, in a fast changing world of converging markets and a trend towards globalization, a robust competition law becomes increasingly important and will enhance Hong Kong's position in the world economy.

Twenty Key Questions

The Need for a New Competition Law – Considerations

1. **Does Hong Kong need a new competition law?**
Paragraphs 43 to 47 in Chapter 3

BT strongly agrees that Hong Kong does need a new competition law for the following reasons:

(i) *Creation of a Pro-Enterprise, Pro-Market Environment.*

First of all, a robust competition policy in any regime creates a pro-enterprise environment. The public discussion document on the way forward for competition policy in Hong Kong ("the Discussion Document") states that, according to the report of the Competition Policy Review Committee ("CPRC"), the aim *"should not be to benefit or to target specific sectors, nor to stimulate or introduce competition artificially. Rather, the key objectives should be to reinforce business and consumer confidence, enhance Hong Kong's pro-enterprise, pro-market environment and to provide a level playing-field for all by combating anti- competitive behaviour."* In BT's opinion this is the very tenet of competition policy: competition law is needed to reinforce the competitive environment by enhancing competition and efficiency in the Hong Kong market.

In the Discussion Document there is analysis of the pros and cons of having a competition law in place. One of the concerns relates to interference with "normal business operations." However, "normal business operations" will not be affected by the introduction of a competition law – only anti-competitive conduct (i.e. abnormal business operations) will feel its impact. The Discussion Document also raises the concern that a new competition law will increase the costs of doing business locally, particularly for SMEs. However, a well drafted law is unlikely to have this effect – provisions governing abuse of a dominant position will only apply to monopolists who abuse their position in the market and provisions governing anti-competitive conduct can be drafted to apply only where the effect on competition is appreciable, thus excluding any "de minimis" conduct. In any case, the benefits of having the safety net of a competition law in place, which creates a level playing field, will far outweigh any perceived monetary or administrative burden on the Hong Kong economy.

(ii) *Encourage Investment in the Market*

Research shows that there is a correlation between effective competition policy and investment in the market. A robust competition law creates business certainty and improved transparency as to what constitutes anti-competitive conduct and therefore the expected standards of behaviour in a market. Creating such standards encourages new entrants to the market in the knowledge that any anti-competitive behaviour by existing

players will be controlled. An analysis demonstrating how an effective competition and regulatory regime encourages investment in the telecoms sector has been published in a report carried out by the European Competitive Telecommunications Association ("ECTA"). In its report published 27 April 2006, ECTA noted that the greater the regulatory effectiveness, the greater the level of investment in the market.[1] This is true both for the imposition of effective competition rules, and where competition rules are not sufficient in their own right, the imposition of effective ex ante regulatory remedies.[2]

(iii) *Meeting International Standards on Competition Policy*

The Discussion Document highlights the World Trade Organisation's ("WTO") opinion on competition policy in Hong Kong in 2002 where it stated "the seeming lack of coherent measures to address anti-competitive practices in all but a few sectors could constitute an obstacle to greater competition." The WTO has taken an active role in the enforcement of free-trade rules which apply to members of the international community. Indeed a recent international judgment[3] has served to underscore the WTO's commitment to ensuring that its members are in compliance with WTO obligations. Having a meaningful competition law in place in Hong Kong will certainly reduce the risk of WTO scrutiny and negative comment by other international organizations.

On the other hand, it is important to recognize that the competition law proposed in the Discussion Document is not "new" policy. As outlined in the Document, Hong Kong will merely be following best practice laid down in the developed, and many of the developing, nations in the world.[4] Competition law and its continued enforcement has been accepted policy in all major economies for many years. It has served to enhance those economies in an increasingly globalised world, not hinder their development, and there is a great bank of precedent and learning from its application. Indeed, Hong Kong stands out as one of the few developed nations not to have adopted a comprehensive competition regime.[5] Therefore, introducing a competition law into the Hong Kong economy should be seen as a simple business formality. It will enhance Hong Kong's position in the world economy.

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[1] www.ectaportal.com/en/basic651.html. According to ECTA, the Regulatory Scorecard concludes "that across 16 EU countries, investment in telecoms has suffered where regulation has failed to tackle dominant companies, whilst countries that have opened their markets to competition by imposing effective regulation have stormed ahead."

[2] The EC Framework Directive 2002/21/EC highlights the need for ex ante regulation where there is no effective competition and where national/Community competition law remedies are not sufficient to address the problem – Recital 27.

[3] The WTO decision in March 2004 that Mexico was in breach of its WTO commitments in that it failed to prevent its dominant telecoms carrier from engaging in anti-competitive practices.

[4] In Asia, competition laws were introduced into Vietnam in 2004, Singapore in 2004, Cambodia in 2002, and in Indonesia in 1999. Moreover, competition law has been in existence in Taiwan and Korea since the 1980's, in India since 1969 and in Japan since 1947.

[5] Indeed, China's Anti-Monopoly Law, which includes competition provisions and regulations governing mergers and acquisitions, was approved by the State Council in June 2006. It is currently being reviewed by the National People's Congress and is expected to be adopted in 2007.

2. Should any new competition law extend to all sectors of the economy, or should it only target a limited number of sectors, leaving the remaining sectors purely to administrative oversight?

(Paragraphs 49 to 55 in Chapter 3)

BT would strongly recommend that any new competition law introduced be cross-sector, so that it is applied uniformly to all sectors. The reasons for this are as follows:

(i) Certainty and Fairness

First, the application of competition law to some sectors and not to others would lead to a fragmented and unbalanced regime. It would undoubtedly lead to confusion, especially where the anti-competitive behaviour spans more than one sector. That in turn would lead to unfairness – why should the players in one sector "play by the rules" while those in another be exempted? Moreover, the competition agency would find it extremely difficult to adequately police and enforce sector-by-sector competition law particularly in converging or complementary markets. For example, if there are different rules in the different markets, competitors in one market may be allowed to engage in conduct not permitted in a related market, even though the conduct has a competitive impact in that related market. This is of particular relevance in Hong Kong where there are several huge cross-sector conglomerates with leading positions in various markets. A cross-sector competition law will be vital to avoid cross-industry anti-competitive behaviour.

(ii) Uniformity of Application

A piecemeal application of competition law across different sectors could produce differing outcomes which would mean that a confusing and non-uniform body of law and precedent would be developed. Whereas, a single simple competition law across all sectors could be adapted for the specific circumstances and dynamics of individual sectors, allowing uniformity of application. Equally, a single competition law across all sectors will be harder to circumvent, especially in a world of converging and overlapping industries. A single competition law also allows for the creation of a single, expert appeal body and co-ordination of expertise in one organisation.

(iii) Experience shows that sector-specific competition rules are ineffective.

In 2004, the Singapore Government introduced the Competition Act – a well drafted, robust competition law containing adequate enforcement and investigative provisions and remedies. It was the first generic competition law introduced into Singapore but excluded certain industry sectors. A notable exclusion was the telecoms sector, excluded on the basis that the National Regulatory Authority ("NRA") for telecommunications in Singapore had jurisdiction over

competition matters relating to the sector[6] and, therefore, it was already subject to adequate competition and regulatory provisions in the Competition Code. Unfortunately for the telecoms industry in Singapore, the Competition Code contains a weaker set of competition law provisions compared to the Competition Act. For example, under the Competition Code, the NRA has wholly inadequate investigative and enforcement powers and remedies, compared to those of the Singapore Competition Commission. Thus, Singapore in effect created a two-tier system: a general competition law embracing international competition law standards and a weak Competition Code for the telecoms sector, lacking adequate enforcement measures and remedies. The result is that competitive carriers in the telecoms industry in Singapore are severely disadvantaged when compared with other industries. This lack of symmetry is likely to have a resultant effect on investor confidence in the telecoms sector.

Furthermore, the close inter-relationship and degree of reliance across the ICT supply and distribution chain means that vendors supplying infrastructure to telecom service providers fall within the ambit of the Competition Act while telecom service providers are separately regulated under the Competition Code. The outcome of excluding certain sectors from general competition law will only distort the playing field in the sector and its related sectors.

BT would urge the Hong Kong Government not to make the same mistake. The Discussion Document inquires whether Hong Kong should introduce one cross-sector competition law or just target sectors where the risk of anti-competitive conduct is high. If the present system is simply extended, would the Hong Kong Government draft separate laws for each sector? If so, there would be a very real risk that this would create an unwieldy and unbalanced series of competition laws. As each additional sector was included in the competition regime, it would add to the complexity. Differing standards and precedents would also likely be developed and the whole regime could become unworkable as similar conduct in two jurisdictions could produce differing legal outcomes.

There is also a timing issue to consider. By the time a sector is identified as high risk and rules adopted, the actual or potential monopolist engaging in abusive conduct may have already succeeded in erecting sufficient barriers to entry as to be able to obtain/maintain its monopoly power.

By contrast, a single generic competition law applying to all sectors would create certainty and permit a uniform and balanced application. The generic law could then be developed to cater for the particular characteristics of individual sectors by producing a series of guidelines. For example, in the UK, the Competition Act 1998 applies to all industries without distinction but is supplemented by guidelines explaining how the Act will apply to various sectors.[7] Interestingly, the initial drafts of the Chinese Anti-Monopoly Law exempted postal services, railroads,

[6] Singapore Competition Act 2004, Third Schedule, part 5

[7] For example, Guidelines on the Application of the Competition Act 1998 in the telecommunications sector.

electricity, gas and water utilities, but these sectors were later included so that the new law will be applicable to almost every industry.

It is well recognized that some sectors require greater regulatory intervention than others. For example, the UK telecoms regulatory regime (enforced by OFCOM) sits alongside the UK Competition Act (enforced by the Office of Fair Trading (OFT)) and exists to deal with those situations where the ability to impose additional controls is needed to foster competition and protect the consumer. Indeed, in most European countries, as well as the US, generic competition rules and sector-specific telecoms regulations co-exist and are applied in a complementary fashion.

BT would therefore urge Hong Kong to adopt a single, comprehensive competition law applying to all sectors to avoid setting up a discriminatory two-tier system. This will ensure consistency of enforcement and outcome across all sectors and will additionally ensure that Hong Kong conforms to international best practice. If competition laws in Hong Kong are consistent with those in other jurisdictions, the ability to consult foreign precedents will speed the resolution of disputes. This will speed the formation of a highly skilled competition agency with the ability to work across sectors.

3. Should the scope of any new competition law cover only specific types of anti-competitive conduct, or should it also include the regulation of market structures, including monopolies and mergers and acquisitions?
(Paragraphs 56 to 61 in Chapter 3)

BT is of the view that the new competition law should contain, as a minimum, provisions covering restrictive agreements and abuse of market dominance because these are the key provisions which ensure fair competition in the market. As regards further provisions relating to monopolies, BT agrees that the safeguards against anti-competitive conduct will certainly go some way to ensuring that monopolists do not abuse their position in the market.

However, the Hong Kong Government may wish to note the example set in the UK for dealing with monopoly situations. Originally the UK's competition authority had power under the Fair Trading Act 1973 to investigate monopolies and make market-wide investigations. These provisions were replaced by the Enterprise Act 2002 which gives the OFT power to make a market investigation reference to the UK Competition Commission where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or part of the UK. The "feature" referred to could relate to the structure of or conduct on the market. Importantly, the OFT has the discretion rather than a duty to make a market investigation reference. It is this last point that will be of particular relevance to the situation in Hong Kong.

The Hong Kong Government may wish to consider giving the new competition authority the power and discretion to make market investigations in the new law. It would then be up to the competition authority to make its own decision as to its priorities in enforcing the new competition regime. If some highly

irregular market features were later to come to its attention, at least it would have the power to act without the need for further legislation. Therefore, the Hong Kong Government may find it expeditious to enact such powers in the new legislation from the outset.[8]

As regards mergers and acquisitions, in a world of increasing globalization and with a trend towards larger and larger enterprises, the Hong Kong Government would be well advised to introduce some level of merger control. As stated in the Discussion Document, without some level of scrutiny, firms could use M&A activity to circumvent the new competition rules. Further, merger rules have already been introduced in some sectors and it would be more equitable to introduce one single merger control regime applying to all sectors than to introduce legislation on a piecemeal, sector by sector approach. If the Hong Kong Government is concerned about the workload and prioritisation of the activities of the new competition authority, then thresholds could initially be set at a relatively high level so that only the largest mergers, acquisitions and joint ventures having an effect on competition in Hong Kong need investigating. The thresholds could subsequently be adjusted, depending on experience and the policy objectives set.

4. **Should a new competition law define in detail the specific types of anti-competitive conduct to be covered, or should it simply set out a general prohibition against anti-competitive conduct with examples of such conduct?**
(Paragraphs 74 to 77 in Chapter 3)
&

5. **Should a new competition law aim to address only the seven types of conduct identified by the CPRC, or should additional types of conduct also be included, and should the legislation be supported by the issue of guidelines by the regulatory authority?**
(Paragraphs 74 to 77 in Chapter 3)

In line with other jurisdictions, BT would recommend that the new competition law set out a general prohibition against anti-competitive conduct. There are several reasons why this approach has proved successful in Europe, the US and elsewhere. First, it is very difficult to list all the various types of anti-competitive conduct that may occur. Businesses that wish to engage in anti-competitive behaviour are likely to exploit any exclusions and loop-holes in the legislation. Second, a general prohibition helps to "future proof" the legislation – i.e. anti-competitive behaviour adapts to changing market dynamics and technological developments and it is difficult to foresee the effects of these events on the market. Third, a general prohibition can be supplemented by sets of guidelines and case precedents which evolve over time. Again, such an approach will allow the legislation to cover all types of anti-competitive behaviour, both present and future.

It has been suggested that a broad prohibition would give rise to uncertainty as to how it would be applied. BT agrees with the Discussion Document's summary at paragraph 76 that the way to address this would be to issue a set of guidelines to clarify the types of behaviour that would be regarded as anti-

[8] The Hong Kong Government could also consider setting triggers for investigation into sectors, such as the cross media ownership control provisions under the Broadcasting Authority Ordinance.

competitive and how the competition authority would conduct its investigations into allegations of such behaviour. This approach is in keeping with international best practice. These guidelines would provide greater certainty for business and would complement the competition rules.

6. **In determining whether a particular anti-competitive conduct constitutes an infringement of the competition law, should the "purpose" or "effect" of the conduct in question be taken into account? Or should such conduct on its own be regarded as sufficient in determining that an infringement has taken place?** (Paragraphs 78 and 79 in Chapter 3)

Article 81 of the Treaty of Rome prohibits agreements, decisions and concerted practices "which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Likewise, Section 34 of the Singapore Competition Act 2004 contains a similar restriction, as does the Chapter 1 prohibition in the UK Competition Act 1998. The reference to object or effect in all these pieces of legislation has the consequence that there is no requirement to show the actual effects of an agreement provided it appears that it has clearly the object of restricting, preventing or distorting competition. The European Court of Justice has stated that when considering the object or effect of an agreement it is necessary to consider the agreement in its economic and legal context. This is an important step because it requires an examination of the relevant market and an analysis and appraisal of all the circumstances of the case.[9]

BT believes that the "object or effect" test is an important step in rigorous anti-trust analysis and that a "per se" approach would be unwieldy. Without it, as the Discussion Document rightly points out, there would be an unduly onerous burden on normal business operations. Again, guidance notes and precedent can be used to ensure greater certainty for business.

7. **Should any new competition law allow for exclusions or exemptions from the application of some or all aspects of the law, and if so, in what circumstances should such exemptions apply?** (Paragraphs 80 to 84 in Chapter 3)

Undoubtedly, any new competition law in Hong Kong should contain provisions relating to exemptions or exclusions, otherwise restrictive agreements with pro-competitive effects or agreements affecting the national interest or public security would be prohibited unnecessarily. The Discussion Document sets out some circumstances in which exemptions might apply and follows, generally, the precedents set by overseas competition laws. In BT's view, the Hong Kong Government should consider placing the following provisions regulating exemptions in any competition law:

(i) de minimis exemption (for firms with a small market share.) For example, the EU's de minimis test is a threshold of 10% market share for agreements between competitors and 15% for agreements between non-competitors;

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[9] C-7/95P John Deere Ltd v Commission 1998

(ii) exemption on the grounds that the pro-competitive benefits of an agreement outweigh the restrictive effects on competition and the agreement has been notified to and exempted by the competition authority. (Again, the EU, UK and Singapore competition legislation all set out a rigorous test for the application of such an exemption by the competition authority);

(iii) block exemptions applying to, for example, some types of vertical agreement which are pro-competitive (the legislation could empower the competition authority to recommend the drafting of such an exemption where the circumstances warranted, subject to public consultation).

BT would, however, not be in favour of excluding entire industry sectors from the ambit of the competition law, as is the case in Singapore. The Singapore Competition Act 2004 excludes many key sectors such as telecoms, water, postal services, bus and rail services and as a consequence, these sectors are at a distinct disadvantage compared to other sectors falling under the Act.

BT further agrees with the findings of UNCTAD set out on page 35, especially the recommendation that exemptions should be generic relating to types of economic activity rather than being industry or sector specific.

The Regulatory Framework for Competition Law - Options

8. Which would be the most suitable of the three principal options set out in Chapter 4 for a regulatory framework for the enforcement of any new competition law for Hong Kong?

BT agrees with the Discussion Document that, no matter what regulatory framework is chosen for the new competition authority, some key features are essential to its success. First, the authority must be an independent body with a degree of separation from the main body of government, so that it is unaffected by changes in the political landscape. It needs to have adequate resources to function efficiently and effectively so that it complements business activities in Hong Kong, not hinders them. Second, it needs robust powers of investigation and be well staffed with the appropriate expert economists, lawyers and accountants capable of carrying out an in-depth analysis of competition issues. Third, no well-resourced, efficient competition authority with good investigatory powers will make any impact on the market without an adequate range of remedies (both civil and criminal) at its disposal. There would simply be no point in having a competition policy and enforcement body in place if an offending enterprise is simply able to pass off fines as a "cost of doing business". Remedies need to have a real, deterrent effect and the competition body must be prepared to make use of its powers.

As regards the various options for the regulatory framework, BT would make the following comments:

(i) Option One: A single authority with power to investigate and adjudicate

(Paragraphs 93 to 96 in Chapter 4)

BT agrees that a single competition authority with power to investigate and adjudicate would prove to be the simplest and most effective option for Hong Kong. This approach has been tried and tested in the EU and UK and has recently been adopted by the Singapore Government for its new competition regime. The experience in the UK and EU demonstrates that a single competition authority can deal with cases quickly and efficiently, because the authority does not have to consider competing agendas[10] or overlaps with other bodies.[11] The single authority will also be able to centralize resources and expertise, making it a centre of excellence for competition issues. The notion that an investigator which is also an adjudicator may lead to claims of bias or unfairness can also be dispelled by putting in place appropriate structural safeguards between those two offices as well as an appropriate appeal mechanism.[12] Finally, the single authority option is not only tried and tested overseas, but also exists in Hong Kong already with the establishment of OFTA and OFBA. These authorities have functioned successfully and effectively and the Hong Kong Government would be well placed to continue with this model.

(ii) Option Two: Separation of enforcement and adjudication

(Paragraphs 97 to 99 in Chapter 4)

BT would be reluctant to recommend the adoption of Option two because of the difficulties of this system, experienced in the US and Australia. In Australia, enforcement of decisions by ACCC by the courts can take years – competition cases add to the backlog of workload of the judiciary. Often cases are delayed because of complex competition and economic issues and the need to follow correct procedures and rules of law. In the US, the affected parties have the right to a jury trial and there is some debate as to whether a jury can meaningfully evaluate the complex economic issues involved. In BT's judgment, competition cases need to be dealt with quickly and efficiently by an agile and expert body otherwise it may be too late to rectify a problem. Leaving enforcement solely to the courts will simply play into the hands of those accused of anti-competitive conduct.

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[10] In the UK, the OFT does have concurrent jurisdiction with the sectoral regulators in the application of competition law, but in practice only one, usually the sectoral regulator, takes action. See response to Question 14 for further detail.

[11] In the US, the Fair Trade Commission and Antitrust Division of the Department of Justice have overlapping jurisdiction. Oversight is informally divided between the two agencies by industry expertise, a division of labor complicated where there is convergence. In an effort to reach consistent results, the agencies have issued joint guidelines and at times held joint hearings on policy issues. Nevertheless their different structure (while both are headed by presidential appointees, the leadership of the latter includes minority representation by those not of the president's political party) can result in somewhat different approaches toward various issues.

[12] For example, in 2002 the European Court of First Instance (CFI) overturned a 1999 European Commission decision to block a merger between UK tour operators Airtours and First Choice. The CFI subsequently annulled the Commission's prohibitions of Schneider/Legrand and Tetra Laval/Sidel.

(iii) Option Three: Adjudication by a specialist tribunal

(Paragraphs 100 and 101 in Chapter 4)

Whilst BT supports the idea of a specialist tribunal dealing with competition issues, a tribunal that merely adjudicates and does not investigate might prove inefficient for Hong Kong's purposes. If such tribunal were established purely to adjudicate on competition issues, more resource would be required and at the same time it would lead to increased bureaucracy and time taken to process cases.

As regards appeals, BT would recommend that the Hong Kong Government set up a system of appeals from decisions of the competition authority to a single specialized competition appeal body covering all industry sectors (with further appeals through the courts limited to points of law). The reason for this is that competition cases often involve complex economic arguments and often require specialists and experts to process the data and issues. Appeals to a specialist body are likely to be quicker and more expeditiously dealt with than entering the general appeals system. Checks and balances can be maintained through a right of further appeal to the courts on points of law.

To summarise, BT would recommend that the Hong Kong Government establishes a single competition authority with power to investigate and adjudicate, with appeals to an independent and specialized competition appeal body. The competition appeal body should be staffed by experts who can deal expeditiously with complex competition issues in all sectors. It should have the power to review all the facts of the case and should have the ability to act quickly.

9. Regardless of the option you may prefer, should the regulator be self- standing or should a two-tier structure be adopted, whereby a full-time executive is put under the supervision of a management board made up of individuals appointed from different sectors of the community?

(Paragraph 105 in Chapter 4)

The Discussion Document asks whether the competition authority should be a stand-alone body like OFTA, or a two-tier body with an executive overseen by a management board, like OFBA. It could be argued that creating a stand-alone body would lead to claims that it has too much power and lacks the checks and balances of having a management board overseeing its activities. This could particularly be the case if the Hong Kong Government were to opt for option one. Indeed, in the UK, the Enterprise Act 2002 abolished the role of Director General of Fair Trading (DGFT) and established the Office of Fair Trading as a statutory board composed of a Chairman and six other members (five non-executives). Previously the OFT existed on a non-statutory basis as the administrative support for the DGFT, but this model was seen as imbalanced.

If the Hong Kong Government decides to set up a two-tier competition authority along the lines of OFBA, BT would urge the Government to fully resource the executive. For example, OFBA has been criticized for not managing industry issues closely enough because the management board is

mainly employed on a part-time basis and meets relatively infrequently. BT would urge the Hong Kong Government, in the event that it decides to set up a two-tier competition authority, to set up a fully functioning and engaged board of executive and non–executive members who are given statutory powers and responsibilities.[13]

Enforcement and Other Regulatory Issues

10. In order to help minimise trivial, frivolous or malicious complaints, should any new competition law provide that only the regulatory authority has the power to conduct formal investigations into possible anti-competitive conduct?
(Paragraphs 109 to 110 in Chapter 5)

BT agrees with the Discussion Document's proposal that although any party may make a complaint to the competition authority, only the competition authority should be able to make the decision as to whether further investigative action should be undertaken. However, the competition authority should be obliged to make available to the complainant written reasons for its decision.

BT further believes that, regardless of the competition authority's decision whether or not to investigate, parties affected by anti-competitive conduct should have the right to take civil actions at any time.[14]

BT also agrees that the new competition law should lay down a threshold to be met before the competition authority will decide to initiate a formal investigation. The Singapore Competition Act 2004 contains a threshold of reasonable grounds. BT regards this as a reasonable threshold.

11. What formal powers of investigation should a regulatory authority have under any new competition law?
(Paragraphs 111 to 114 in Chapter 5)

To ensure the efficacy of any competition law, it is key that the competition authority is given adequate powers of investigation, otherwise the competition law will be unenforceable. The Discussion Document sets down the existing powers of enforcement enjoyed by OFTA and OFBA. BT would recommend that these powers be given to the new competition authority as a minimum and that the Hong Kong Government takes steps to ensure that all bodies enforcing competition law have the same or equal powers of investigation.[15]

BT therefore would agree with the recommendations of the Discussion Document and the CPRC that the new competition authority be given formal powers of investigation to require: the production of documents; a person to

[13] For example, the Hong Kong Government could consider appointing a full-time Chairman of the Board to ensure its professional operation. The Board could be comprised of senior members of the management team (executive members) and representatives from other industries (non-executive members) to ensure a level of balance.
[14] See further discussion in response to Question 19.
[15] This would avoid the situation that has occurred in Singapore whereby the telecoms regulator, IDA, has much weaker powers of investigation than the newly formed Competition Commission whose powers stem from the Competition Act 2004. The IDA is thus prevented from making the same in depth investigation into claims of anti-competitive behaviour as the Commission.

give written or oral information; and to enter premises and seize documents. The latter power could be with or without first acquiring a warrant, in the same manner as Sections 27 and 28 of the UK Competition Act 1998 and Sections 64 and 65 of the Singapore Competition Act 2004. Moreover, the UK's Enterprise Act 2002 gives the UK competition authority the additional power, on obtaining a warrant, to take authorised non-OFT, staff on company visits. The OFT expects to use this power to take specialists such as IT experts to use their expertise in collecting and assessing evidence stored in computers on site. BT would recommend that the Hong Kong Government includes such a power in the new competition law to assist with the difficult task of assimilating evidence in anti-trust cases.

12. Should failure to co-operate with formal investigations by the regulatory authority be made a criminal offence?
(Paragraph 115 in Chapter 5)

Yes, without the threat of a criminal conviction for failing to co-operate with a formal investigation, it will be difficult to investigate alleged anti-competitive behaviour adequately. The Discussion Document lays down a number of offences which appear in the UK Competition Act 1998 for failure to co-operate with an investigation. There are various levels of seriousness of offences and each offence carries the sanction of fine and/or imprisonment for up to 2 years. The threat of the use of these powers to convict individuals of a criminal offence has undoubtedly aided the OFT in its investigations. Likewise, the Singapore Competition Act 2004 contains similar provisions whereby any person found guilty of an offence (defined in Sections 75-81) is liable on conviction to a fine or imprisonment for a term not exceeding 12 months, or both.[16]

BT would urge the Hong Kong Government to include similar powers in its new competition law.

13. How might a competition regulatory authority deal with the disclosure of information that comes to its knowledge having regard to the need to protect various categories of confidential information on the one hand, and the need to make appropriate disclosure in order to take forward an investigation when the circumstances so require?
(Paragraph 116 in Chapter 5)

BT agrees with the Discussion Document that a balance must be found between the need for the competition authority to function effectively, the commercial interests of affected parties and the public interest. The Discussion Document sets out how this issue has been dealt with in Singapore. The UK Enterprise Act 2002 contains similar rules on disclosure. It states that the OFT is permitted to disclose information for the purpose of facilitating any of its functions or where consent of the individual to whose affairs the information relates has been given. Before making a permitted disclosure, the OFT must have regard to similar considerations to those observed by the Singapore Competition Commission. This means that the OFT may have to edit documents it proposes to disclose to remove information. Moreover, where the OFT proposes to disclose any information

[16] Section 83

identified by the person supplying it as being confidential information, the OFT must inform the person supplying the information of its proposed action and give that person a reasonable opportunity to make representations to the OFT. BT would urge the Hong Kong Government to give similar powers to the Hong Kong competition authority.

UK law contains further exclusions. The power to require the production of documents does not extend to privileged communications[17] and there is a right of privilege against self-incrimination (as recognized under EU law). The Hong Kong Government may wish to consider adding these exclusions to a new competition law.

14. Should the existing sector specific regulators that also have a competition role continue to play such a role if a cross-sector competition regulatory authority were to be established?
(Paragraphs 117 and 118 and Chapter 5)

Sector specific regulators would have an important role to play in the event that a cross-sector competition authority were to be established because these regulators understand the dynamics and complexities of these particular industries. BT would urge the Hong Kong Government to have regard to the UK system, which divides responsibilities between the OFT and the sector regulators. For example, in the UK, as previously stated, there is one generic competition law which applies to all sectors. The OFT has, subsequent to the introduction of the Competition Act, published a series of guidelines which explain how the law will be applied in the sectors which have a specific regulator. Thus the guidelines applying the Competition Act 1998 to the telecoms sector (the "Guidelines")[18] cover:

(i) *Concurrent Jurisdiction*

OFCOM, the UK telecoms regulator, has concurrent jurisdiction with the OFT with regard to "commercial activities connected with telecommunications." Commercial activities are defined as "..... the provision of telecommunication services, the supply or export of telecommunication apparatus and the production or acquisition of such apparatus for supply or export." In practice, agreements or conduct that relate to the telecoms sector are usually dealt with by OFCOM. However, OFCOM and the OFT always consult with each other before a decision is made as to who will deal with a case where there is concurrent jurisdiction.[19]

(ii) Relationship between the Competition Act and Communications Act

OFCOM can decide whether to take action under the Competition Act or the Communications Act where conduct is potentially in breach of either piece of legislation.[20]

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[17] Defined in Section 30 of the Competition Act 1998

[18] Ref – OFT 417

[19] For more information on concurrent jurisdiction see Guidelines on Concurrent Application to Regulated Industries.

[20] Paragraph 10.9 of the draft enforcement guidelines states: "On each occasion before using its powers under the Communications Act for competition purposes, OFCOM will consider whether a more appropriate way of proceeding would be under the Competition Act and will proceed under the Competition Act if it considers that it is more appropriate to do so."

(iii) *Application of the Competition Act to the telecoms sector*

The main body of the Guidelines explains how the OFT/OFCOM will apply such principles as market definition, assessment of market power, restrictive agreements and abusive conduct to the specific circumstances and dynamics of the telecoms sector. For example, it gives guidance on how to assess pricing abuses and how the Competition Act will deal with interconnection agreements. The result of this regime is that competition law is applied to all sectors uniformly but the application is made by experts who understand sector dynamics and economics.

BT would recommend that the Hong Kong Government follows a system similar to the UK system and that OFTA is given concurrent jurisdiction with the new competition authority to apply the new competition law to the telecoms sector. OFTA would also be responsible for applying the remaining provisions of the Telecoms Ordinance. BT would further recommend that OFTA and the new competition authority have their decisions referred on appeal to the same competition appeal body. Moreover to ensure consistency and uniformity of application, it is important that the new law affords OFTA the same powers of investigation and enforcement as the new competition authority and that roles and responsibilities are clearly set out (as is the case with the OFT and OFCOM).

BT would urge the Hong Kong Government not to follow the Singaporean example of introducing a competition law which presently does not apply to those industries already subject to sectoral competition regulation. This has created a two-tier, unbalanced system where competition law has been "tagged on" to existing regulations in those industries. As stated above, the telecoms sector in Singapore has been severely disadvantaged by its omission from the Competition Act 2004.

15. Should breaches of any new competition law be considered civil or criminal infringements? What levels of penalty would be suitable?

(Paragraphs 119 to 122 in Chapter 5)

No competition law will have any deterrent effect in the market unless backed by rigorous and effective enforcement and penalty mechanisms.

Most jurisdictions worldwide have now introduced criminal sanctions as the ultimate deterrent effect to combat anti-competitive conduct. However, the introduction of criminal sanctions has not been taken lightly. For example, under the UK Competition Act 1998, criminal sanctions are applied only where a person has intentionally obstructed the investigating officer or has intentionally destroyed or falsified documents relating to the investigation or has provided false or misleading information. Moreover, the courts have the option to impose financial penalties on conviction – imprisonment is reserved only for the most serious offences (i.e. where a court warrant had been issued). The UK Enterprise Act 2002 introduced a criminal offence for individuals who dishonestly engage in the worst examples of cartel agreements, such as price fixing, market sharing and bid-rigging. Likewise,

the US system reserves criminal penalties only for the most serious breaches of its competition law. In the US criminal liability is imposed only for clearly settled "per se" offences, that is violations that are irrebuttably presumed to be unlawful because their effects are virtually always anti-competitive. Criminal enforcement is currently essentially limited to horizontal price fixing (including bid rigging) and customer and market allocations; that is, cartel-type activities.[21]

The reason for the introduction of criminal sanctions in jurisdictions which have had competition laws in place for some time is that, in certain circumstances, civil sanctions have simply proved insufficient to deal with the conduct in question and to change the mindset and behaviour of the market participants. Without such sanctions there is a risk that businesses may accept that civil sanctions (i.e. fines) are "business as normal" and carry on as before. BT would therefore urge the Hong Kong Government to put in place effective penalty mechanisms consisting of fines (up to 10% of turnover); powers to disqualify an individual as a director, and criminal sanctions reserved for the most serious breaches of competition laws or dishonesty in the investigation process.

16. Should any new competition law include a leniency programme?
(Paragraph 123 in Chapter 5)

Yes, leniency programmes are vital to assist competition authorities in uncovering and breaking up cartels. The secrecy surrounding cartels means that they are very difficult to detect or build a sufficient case against without assistance from one or more members. Leniency programmes, as described in the Discussion Document, have proved to be very efficient in the detection and dismantling of cartels in the UK. They are particularly useful in dealing with cartels in established industries, often those with spare capacity or where reduced numbers of players are involved. BT would consequently recommend that the Hong Kong Government includes a leniency programme in its new competition law.[22]

17. Should any new competition regulator be empowered to issue orders to "cease and desist" from anti-competitive conduct?
(Paragraphs 125 and 126 in Chapter 5)

Interim measures similar to those contained in Section 67 of the Singapore Competition Act 2004 and Section 35 of the UK Competition Act 1998 should be included in the new Hong Kong competition law. Anti-competitive behaviour often has a lasting and devastating impact on the market – new competitors may quickly be driven out of business through the actions of cartels or dominant undertakings. The application of ex post remedies will often be insufficient to preserve the competitive status quo. Therefore it is imperative that, where the situation arises, the competition authority is in a position to act quickly to end the anti-competitive behaviour before it is too late. Moreover, the legislation quoted above provides adequate checks and balances to ensure that the accused party is not unduly punished or discriminated against.

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[21] The continued viability of the *per se* rule to vertical price fixing is currently pending before the US Supreme Court.

[22] Leniency programmes have been adopted in other jurisdictions. The original US programme was introduced in 1978, and revised in 1993. The EU adopted a formal policy in 2002 and updated it in December 2006.

18. As an alternative to formal proceedings, might any new competition regulator have the authority to reach a binding settlement with parties suspected of anti-competitive conduct?

(Paragraphs 127 and 128 in Chapter 5)

A provision giving the new competition authority the power to reach a binding settlement with parties suspected of anti-competitive conduct would be valuable. The UK Competition Act 1998 gives the OFT the power to accept commitments offered by a person(s) under investigation if it is satisfied that that those commitments meet its competition concerns. The OFT has published guidelines[23] as to the circumstances in which it may be appropriate to accept binding commitments. According to the guidelines, the OFT is only likely to accept binding commitments where:

- the competition concerns are readily identifiable;
- the competition concerns are fully addressed by the commitments offered; and
- the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.

The OFT will generally not accept commitments where cartels have been involved in price fixing, bid rigging, quota/output restrictions, and sharing/dividing markets. The OFT will also not accept binding commitments in cases involving serious abuse of a dominant position.

Further, the OFT will not accept binding commitments where compliance with and the effectiveness of any binding commitments would be difficult to discern, and/or where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.

Commitments may be structural or behavioural and, once accepted, the OFT will terminate its investigation into the aspects of the alleged infringement addressed by the commitments. The procedure followed by the OFT in accepting binding commitments is set out in the guidelines.

Such a provision would be beneficial and give business efficacy to the new Hong Kong competition authority and BT would recommend that a similar provision be inserted into the new Hong Kong competition law. However, in order to avoid claims of bias or unfairness, BT would recommend that any settlement process is clearly transparent and subject to a consultation process involving all affected parties and that a right of appeal is given to third parties.

[23] published 21/12/04

19. Should any new competition law allow parties to make civil claims for damages arising from anti-competitive conduct by another party?

(Paragraphs 129 to 135 in Chapter 5)

BT agrees that the new competition law should permit parties to take civil actions. Indeed, the importance of civil actions has recently been underlined in a Green Paper entitled "Damages actions for breach of the EC antitrust rules" (December 2005), in which the European Commission wrote: "Facilitating damages claims for breach of antitrust law will not only make it easier for consumers and firms who have suffered damages arising from an infringement of antitrust rules to recover their losses from the infringer but also strengthen the enforcement of antitrust law". The European Commission also stated that "private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy". Importantly, the Green Paper highlighted the purposes of damages actions – "namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence)".

However, BT does not agree with the suggestion that any right of action should only be exercisable after the expiry of the regulator's decision and determination of any appeal. If such a condition were imposed it would seriously hamper emerging competition in the market. For example, a monopolist would have nothing to lose by appealing every decision. By the time the complainant obtained the right to sue for damages, it could well have been forced to exit the market completely because of the monopolist's behaviour. One only has to consider the on-going Microsoft case before the European Commission to understand the true power of the monopolist. Moreover, the experience more recently in the US has shown that private actions commenced in the courts have led to the initiation of government investigations and/or litigation.[24]

The concern that an unlimited right of civil action could lead to extensive litigation is, in BT's opinion, unfounded. That is because, in many instances the complainant will wait until the final decision of the competition authority before it commences a civil action for damages as this will ease the burden of proving the alleged anti-competitive conduct. However, where time is of the essence, the right to commence a private action will be an important step for the complainant and it is essential that this right is preserved in the new law.

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[24] For example, MCI's private lawsuit against AT&T, filed March 6, 1974, *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.) cert denied, 464 U.S. 891 (1983), led, in part, to the US Government's successful antitrust case against AT&T filed on November 20, 1974 and settled in January, 1986. *United Sates v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) *aff'd sub, nom. California v. U.S.* 464 1013 (1983).

20. How should any new competition law address the concerns that our businesses, especially our SMEs, may face an onerous legal burden as a result of such civil claims?
(Paragraphs 129 to 135 in Chapter 5)

BT's view is that SMEs will not be burdened by, but rather will benefit from, the adoption of a new competition law because it is by its very nature pro-competition and will therefore work in their favour. It is the monopolists engaging in abusive conduct and firms engaging in cartels and anti-competitive agreements that will need to fear the new legislation. SMEs will be able to look forward to a statutory mechanism for ensuring fair competition and a more level playing field. To achieve this result, the new legislation should contain a complaints procedure so that firms suspecting anti-competitive conduct may take their grievances to the competition authority for further investigation. As regards the expense of taking legal action, SMEs can simply let the competition authority bear the expense of the investigation and proving anti-competitive conduct. Once there is a decision, SMEs will be in a good position to seek damages. Moreover, SMEs are much less likely to be the subject of an investigation or civil action.