REPORT ON PUBLIC CONSULTATION ON THE WAY FORWARD FOR HONG KONG'S COMPETITION POLICY

Chapter One - Introduction

Shortly after the establishment of the Competition Policy Advisory Group (COMPAG) in 1997, the Government issued a statement clarifying its policy objective as being: "to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare". Since then, COMPAG has been responsible for vetting government policies and practices to ensure that they are not anti-competitive and for reviewing other competition policy matters, including complaints of anti-competitive conduct. In recent years, there has been criticism that in the absence of a suitable legal framework, COMPAG is powerless to determine whether or not complaints of anti-competitive conduct might be substantiated, and if so, to take appropriate action to rectify the situation.

2. In June 2005, COMPAG appointed the Competition Policy Review Committee (CPRC) to review the effectiveness of Hong Kong's competition policy. On completion of its review in June 2006 the CPRC recommended that Hong Kong should introduce a cross-sector competition law targeting anti-competitive conduct and that such a law should be enforced by an independent Competition Commission. It also recommended that before beginning preparation of a new competition law, the Government should consult the public on the issues raised in the CPRC report.

Consultation

3. Having taken note of the continuing interest in the community in the issue of whether or not Hong Kong should introduce a general competition law and also the recommendations of CPRC, on 6 November 2006 the Economic Development and Labour Bureau (EDLB) issued a discussion document entitled "Promoting Competition – Maintaining our Economic Drive", with the objective of gauging the views of the community on the relevant issues over a three-month period of public consultation.

4. During the consultation period, copies of the discussion document and leaflets summarizing the contents of the document were made available at the 18 district offices and at the Consumer Advice Centres of the Consumer Council. The document was posted on the EDLB website, and approximately 8,000 copies of the discussion document and 17,000 summary leaflets were distributed to the public. To promote public engagement, we held a public forum in November 2006; conducted briefings for the Legislative Council Panel on Economic Services, several District Councils and other public bodies; and took part in public forums, and programmes organised by the electronic media to explain the contents of the discussion document and to listen to the views of different sectors of the community.

5. By the end of the public consultation period, we had received 114 written submissions and 1276 signatures. The written submissions included letters, fax and e-mail messages from individual members of the public. The signatures included a petition submitted by the Democratic Party (1200), pro forma submissions from District Council Members (21) and other pro forma submissions (55). Respondents included members of the general public as well as academics, political parties, various organizations and private companies.

6. In addition to the above written submissions, proforma submissions and signatures, we also received views from members of the Public Affairs Forum of the Home Affairs Bureau (HAB).

7. It should be noted that EDLB has not verified the identities of the respondents or signatories. Each submission or signature has been counted as a separate item, with the exception of obvious cases of duplication, such as e-mails with identical contents and names.

Publication of Views Received

8. The discussion document expressly stated that unless specifically requested otherwise, views put forward may be published and attributed to respondents. In this connection, we will upload all submissions (except where otherwise requested), including copies of all pro forma submissions and a summary of views expressed by members of the Public Affairs Forum, onto the EDLB website.

Chapter Two - Summary of Public Responses

We have studied the views received during the consultation period and summarise our conclusions below.

General Views

(A) Competition Policy

2. Almost all the submissions took the view that competition serves Hong Kong well and the Government should continue to enhance our pro-market environment. Most respondents commented that competition was crucial to the development of our economy and contributed to the enhancement of our society. This aligns with the Government's policy objective for competition, i.e., to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare.

(B) A Regulatory Regime for Competition

3. In order to help provide a structure for comments on the way forward for Hong Kong's competition policy, in the discussion document we set out 20 key questions relating to the regulation of competition. These questions fall into four main categories, namely: the need for a new competition law, the broad scope of the law, the nature and functions of the regulatory authority, and issues related to the enforcement of the law, including the level of penalties that should be imposed for breaches of any new law.

(I) The Need for a New Competition Law

4. The majority of the written submissions agreed that there was a need to enhance the framework for the implementation of competition policy and acknowledged that anti-competitive practices did occur in the market. Some respondents commented that the small number of companies in the market made Hong Kong vulnerable to anti-competitive conduct, and that there was a practical need for competition safeguards in a small economy like Hong Kong. They supported legislation to provide legal backing for the implementation of competition policy. The remaining submissions considered that the current mechanism worked well and that there was no need for change.

(II) Broad Scope of the Law

5. Among those who expressed support for a new competition law, the majority commented that such a law should apply to all sectors of the economy. The reasons given for this view were –

(a) Policies which promote fair competition should not be directed primarily or solely against a specific sector and it is difficult to identify which sectors should be regulated from the outset;

(b) Anti-competitive conduct could occur in different sectors and only cross-sector competition law could deal with cases involving "bundling" of products or services; and

(c) Defining the limits of any individual sector would be difficult.

A number of respondents considered that a sector specific approach to competition legislation would be more suitable for Hong Kong. Their main arguments were that –

(a) Every economic sector is unique and a cross-sector competition law would lack the flexibility to deal with sector specific anti-competitive business practices; and

(b) Cross-sector competition law may expose SMEs to legal action.

6. Several of the respondents who supported a cross-sector competition law concurred with the CPRC's observation that Hong Kong's domestic market is relatively small and hence a higher market concentration was inevitable in many sectors to achieve economies of scale and effective operation. Notwithstanding this, they considered that the new law should cover merger and acquisition activity. They commented that the exclusion of such activity from the scope of a new competition law could create a potential loophole that would allow for mergers and acquisitions to take place so that firms could then freely engage in anti-competitive conduct. However, several other respondents expressed the view that there was no justification for regulating market structures in Hong Kong given that there is perceived to be relatively little large-scale merger and acquisition activity in the local market.

(III) Nature and Functions of the Regulatory Authority

7. Stakeholders who commented on the setting up of a regulatory authority supported the establishment of a new authority independent of the Government to enforce the new legislation. They emphasised the need for appropriate checks and balances in the regulatory system, and considered that the regulatory authority should be transparent, simple and efficient.

8. Accordingly, there was a slight overall preference for "Option Two" or "Option Three" in the discussion document, whereby a regulator would have the power to investigate anti-competitive conduct (and could also have the powers to issue "cease and desist" orders and reach settlements with parties in appropriate cases), but the adjudication and sanctioning powers would rest with the courts or a specialist tribunal. They considered that such an approach would lead to a high degree of transparency and fairness. Stakeholders also for the most part commented that the regulator should be overseen by an independent, appointed board.

(IV) Enforcement Powers and Penalties

9. All respondents who expressed views on these issues agreed that the regulatory authority should have formal powers to conduct investigations. They were generally in favour of the authority having powers to enter business premises and to require the production of relevant information. A few respondents considered it too harsh to make failure to co-operate with formal investigations a criminal offence. However, others took the view that this was a serious matter and one that should be considered a crime.

10. Almost all respondents who commented on this issue said that the breach of any new competition law should be considered a civil offence. Some commented that sanctions should have a deterrent effect and were generally in favour of penalties consisting of heavy fines coupled with disqualification from holding a directorship.

11. All respondents who commented on the need for the regulatory authority to have a leniency programme, endorsed the idea and considered that

this would be an effective means of encouraging members of cartels to co-operate with the authority.

Specific Views on 20 Key Questions

12. The 20 key questions listed in the discussion document, together with an assessment of the specific responses to these questions are set out in the following paragraphs. In several instances, we include direct quotes from submissions in which we consider individual stakeholders have put forward clear and succinct arguments that are generally representative of the range of opinions expressed on particular issues. However, the selected quotes are by no means comprehensive, and readers are encouraged to view the complete set of submissions posted on the EDLB website at www.edlb.gov.hk to gauge the full range and content of views put forward by respondents.

The Need for a New Competition Law – Considerations

Key question 1: Does Hong Kong need a new competition law?

Key question 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?

13. Of the submissions in which a clear view was expressed as to whether or not Hong Kong needed a new competition law, **a clear majority supported some form of legislation** in order to enhance the regulatory framework for implementing competition policy. There were other submissions in which respondents did not show a clear preference with regard to legislation, but commented on other aspects of competition policy.

14. Of the respondents who supported some form of legislation, the majority were in favour of a cross-sector competition law. The major arguments advanced in support of such a law included -

- As anti-competitive conduct exists in Hong Kong, a competition law would help the operation of the free market by prohibiting such conduct;

- Anti-competitive conduct could happen in any sector;

- A sector specific competition law could not deal with cross-sector anti-competitive conduct, such as the bundling of products and services across different sectors; and

- It would not be fair to apply different competition rules to different sectors.

"It is common practice for market economies around the world to have in place a basic set of rules, in the form of cross-sector general competition laws, to protect the integrity of the free market system so as to facilitate economic efficiency and benefit consumer interest……It is clear that if Hong Kong had a cross-sector competition law with an appropriate competition authority that had investigative powers, similar to those existing in other comparable advanced economies, the authority would be in a position to obtain information that could establish the veracity of the allegations on anti-competitive conduct, one way or the other."

- Consumer Council

"(the recent history of the European Union) provides living proof that a general comprehensive competition law is the best tool to secure benefits such as increased innovation, lower prices, consumer benefits and a stronger economy……Competition law must extend to all sectors of the economy in order to ensure a coherent approach. Leaving certain sectors outside the scope of a competition law is likely to create imbalances as the oversight of a sector by a specific administration is likely to develop its own dynamics without due regard to competition principles."

- European Commission

"*Anti-competitive conduct can occur in any sector and therefore it is imperative that a legal framework is in place to investigate and sanction that conduct. While the consequences of applying a general competition law to particular conduct may vary across sectors (due to the particular characteristics of a given sector), it is important that the same legislative environment applies to all sectors. The promotion of a more favourable legislative environment in certain sectors could skew investment decisions and distort economic activity, leaving other sectors of the economy at a*

disadvantage. It is therefore the view of the CSL&NWM Group that, in order to improve the business environment and attain the long term advantages that come with a competitive market, any competition law proposed by the government should be applicable to all sectors of the economy."

- Hong Kong CSL Limited and New World PCS Limited

15. However, some respondents from the business sector took the view that a sector specific competition law would suffice in Hong Kong, and there were some who considered that Hong Kong did not need any new competition law. Their main argument was that the Hong Kong economy is working well and anti-competitive conduct is not prevalent in most industries, therefore competition law would only impose unnecessary constraints on business. Some also advanced the view that rather than solve the major competition issues facing Hong Kong, a general competition law would add to the operating costs of businesses, in particular SMEs.

"Hong Kong is commonly recognised as one of the freest economies in the world. This achievement and past experience show that a free and open market is the best guarantee of fair competition." (English translation)

- The Chinese Manufacturers' Association of Hong Kong

"……there is evidence that the law would provide a convenient avenue for large corporations to sue their smaller counterparts for anti-competition. Since many SMEs cannot afford to pay the huge legal costs involved, not to mention the time and energy required of management in such lawsuits, large corporations could eliminate competitors in the courtrooms without having to compete with them in the marketplace."

- The Federation of Hong Kong Industries

16. Views that we have heard at various public forums over the past few months echo those expressed in the written submissions. At most forums there has been general support for the introduction of a cross-sector competition law. Many speakers considered that anti-competitive conduct exists in a number of sectors, and that this should be regulated for the sake of economic efficiency and consumer welfare.

17. However, some have expressed the view that competition law is not a panacea for the competition problems facing Hong Kong, and have commented

that the Government should only target sectors where anti-competitive conduct was more serious. Others have raised concerns that SMEs might unwittingly fall foul of the law, or might be intimidated by big enterprises which could use the law to threaten smaller companies with legal action.

Key question 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?

18. Due perhaps to the somewhat technical nature of this question, it was addressed in relatively few of the submissions. Those respondents who addressed the question held diverse opinions, with some believing that market structure was related to market power and should thus be regulated to help prevent anti-competitive conduct.

> *"……the proposed law should not seek to regulate 'natural monopolies' as government should maintain oversight to protect public interest through other regimes……the Council considers it to be prudent for the Government to have in place a legislative 'reserve power' for oversight where a merger or acquisition might arise and have a detrimental effect on public interest."*
>
> *- Consumer Council*

19. However, other respondents, regardless of their views on the need for a new competition law per se, maintained that market structures need not be subject to regulatory control.

> *"We agree with the CPRC's recommendation that the Government should focus on the seven specific types of anti-competitive conduct at the initial stage of introduction of competition law. This will have the benefit of letting the community and the relevant authority build up understanding and experience in this new area of law. Further considering Hong Kong's small population in a compact geographical area as compared with other developed countries, the whole set of competition rules as implemented in such countries may not be appropriate in the Hong Kong context. In any case, once the new competition law is in place, it would not be difficult to expand and amend the law to address any other area of concern in future should the case be called for after consultation with the community."*
>
> *- Television Broadcasts Limited*

> *"Mergers and acquisitions are an important way for enterprises to achieve economies of scale through expanding their scale of operation. The objective might not necessarily be anti-competitive."* (English translation)
>
> *- The Hong Kong Policy Research Institute*

20. Some respondents who were against the introduction of a competition law also explicitly objected to the idea of regulating market structure.

> *"The clearance process (for acquisition and disposal) merely added a layer of complexity, delay, uncertainty and costs to the transactions, none of which were productive for the seller, the buyer, the business nor its employees. We would observe that competition clearances are deterrents to foreign investment and would not be applicable in a small economy or ultimately beneficial for Hong Kong."*
>
> *- ParknShop*

21. Views expressed at the various public forums were equally diverse. Some stakeholders observed that the existing market structure was often a result of free market forces rather than anti-competitive conduct. Accordingly, they believed that market structure should not be targeted. Others were concerned that enterprises might use mergers and acquisitions to circumvent prohibitions on cartel behaviour. Some commentators who were opposed to the introduction of a cross-sector competition law nonetheless took the view that regulation of market structures would address perceived competition problems in Hong Kong more effectively than prohibiting anti-competitive conduct.

Key question 4: Should a 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?

Key question 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?

22. Most respondents who answered this question favoured a general prohibition. They cited the difficulties of embracing all possible types of

anti-competitive conduct in an exhaustive list, given the evolving nature of market conditions and business practices. Some were also concerned that specifically listing the types of conduct to be covered by the law might divert attention from the ultimate objective of competition law, which was to assess whether conduct had the purpose or effect of distorting competition.

> *"business practices and commercial conduct come in a variety of shapes and forms. A particular conduct may not fit neatly into one of the delineated categories, but may nonetheless be clearly anti-competitive……One of the categories suggested by CPRC is unfair and discriminatory standards. One can easily imagine litigants spending countless hours arguing whether a certain business practice constitutes a standard, not to mention whether it is unfair or discriminatory, both highly malleable and nebulous terms."*
>
> *- Thomas Cheng*

23. A few commentators argued that having an exclusive list of the types of anti-competitive conduct to be covered in the law (based on the seven types of conduct identified by CPRC) would have the advantage of increasing legal certainty, and would give businesses a clearer idea of what would and would not constitute an infringement.

24. Almost all of the respondents who answered this question commented that any new legislation should be supported by guidelines issued by the regulatory authority, for the sake of clarity and certainty.

Key question 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?

25. In addressing this question, a few respondents argued that practices such as price-fixing, bid-rigging and market allocation were almost always anti-competitive, seldom produced any economic benefit, and should thus always be regarded as offences. Such an approach would have the benefit of saving enforcement resources and reducing uncertainty in compliance.

> *"We consider that the legislation should regulate the 'behaviour', but not the 'purpose' or 'effect'. On one hand, it would be difficult to prove the 'purpose' of the behaviour by the companies or groups, and this would make prosecution a very challenging job……on the other hand, if we regulate the 'effect', some activities arising from natural monopolies or market dominance under fair competition, would likely be affected by the law and thereby reduce the business incentives for improvement."* (English Translation)
>
> *-Hong Kong Christian Service*

26. The majority of respondents who answered the question took the view that many types of market conduct that were ostensibly anti-competitive could benefit consumers or the wider economy, and should be regarded as offences only if the said conduct had the purpose or effect of preventing, restricting or distorting competition.

> *"Having regard to the above and the concerns raised by SMEs, the Council agrees with Competition Policy Review Committee that a cautious approach should be taken, any alleged anti-competitive conduct should not be an offence per se, but rather, it must be proven that the particular conduct does in fact have the purpose and effect of substantially lessening competition in the relevant market."*
>
> *- Consumer Council*

Key question 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?

27. Most respondents who answered this question commented that exclusions and exemptions were justifiable in some situations. Views differed as to what exactly these situations might be. Some respondents argued for exemptions for specific industries. Others recommended that a strict approach should be taken to assessing whether an exemption was warranted.

> *"Hong Kong must not exempt monopolies without clear objective reasons for doing so."*
>
> *- The Civic Party*

> *"There is no compelling reason why blanket exceptions should apply to certain sectors. The better position is for proposed exemptions to be tested under economic analysis, and if considered fit, be exempted from particular aspects of the law only……Sectoral exceptions, if justifiable, should be kept to a minimum and subject to periodical review."*
>
> *- Edward Chen & Ping Lin*

The Regulatory Framework for Competition Law - Options

Key question 8: Which would be the most suitable of the three principal options set out in Chapter 4 of the discussion document for a regulatory framework for the enforcement of any new competition law for Hong Kong? The options are –

- ***Option One: A single authority with power to investigate and adjudicate***
- ***Option Two: Separation of enforcement and adjudication***
- ***Option Three: Adjudication by a specialist tribunal***

Key question 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?

28. Respondents who commented on the various options for the establishment of a regulatory authority expressed the view that certain key features are essential to the success of the authority, namely: independence, transparency and efficiency. They also emphasised the need for appropriate checks and balances. Although several stakeholders considered that "Option One" would provide for a more cost-effective and straightforward regulatory structure, a number of respondents argued that "Option Two" or "Option Three" was preferable, in that it offered a greater assurance that appropriate checks and balances would be in place. The following direct quotes are typical of the range of views expressed.

> "*In addressing the issue of institutional structure, a balance needs to be struck between, on the one hand, the preference for a simple enforcement structure, and on the other hand, the need for check and balance to ensure that the Competition Authority's powers are not abused. In line with the principle of 'the simpler the better', we are inclined towards supporting*

Option One, i.e., a single authority with power to investigate and adjudicate"

- Hong Kong General Chamber of Commerce

"The Law Society considers Option 2 to be the most suitable option for enforcement of any new competition law in Hong Kong: i.e. separation of the roles of adjudication by the regulator and enforcement by the courts. By separating the processes of adjudication and enforcement, the operation of the law will be seen to be fairer and more transparent as the courts will act as a balance to the enforcement agency. This will allow the general public as well as businesses to have greater confidence in any new competition law. To this end, the government must allocate sufficient resources to the Judiciary to enable it to undertake the additional work. Although the separation of enforcement and adjudication functions under any new competition law will require more resources, the public in Hong Kong is keen on transparency of decision making processes, especially those made by government or quasi-government agencies."

Law Society

Enforcement and Other Regulatory Issues

Key question 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?

Key question 11: What formal powers of investigation should a regulatory authority have under any new competition law?

Key question 12: Should failure to co-operate with formal investigations by the regulatory authority be made a criminal offence?

29. Almost all respondents who commented on enforcement issues considered that the regulatory authority alone should be able to make the decision as to whether an investigation should be undertaken in response to a complaint. Respondents were in favour of the regulatory authority having the formal powers related to investigation. Many commented that failure to cooperate with formal investigations should constitute a criminal offence.

> *"Access to information in investigating allegations of anti-competitive conduct is crucial and the Council considers that the competition authority should have the power to obtain documents, examine witnesses under oath; and require the production of relevant information to assist in the proper examination of alleged anticompetitive conduct. To safeguard these powers, strong sanctions should be brought to bear on any persons who act so as to frustrate the legitimate actions of the competition authority and its staff, and intimidate witnesses, such as 'whistleblowers'."*
>
> *- Consumer Council*

Key question 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?

30. A small number of respondents expressed views on the issue of confidentiality. They all considered that the information gathered during the investigation process should be handled carefully.

> *"Cathy Pacific is of the opinion that the regulatory authority should deal with disclosure of information in line with international practice. Other major competition regimes (such as in the United States, the countries of the European Union and in Singapore) all recognize the fact that the information provided to the regulator should be protected by appropriate confidentiality provisions. During investigations, companies should be made aware of the extent to which they may be able to prevent the disclosure of their documents (for example on grounds of legal professional privilege or because they contain commercially sensitive information). Confidential information should otherwise only be disclosed with the agreement of the relevant company."*
>
> *Cathay Pacific*

> *"When the Competition Commission conducts investigations in the future, it should maintain a high degree of confidentiality to avoid any disclosure of the identity of complainants……Meanwhile, all information collected during the investigation should be also kept confidential so as to protect the*

business interests of the persons under investigation." (English Translation)

- Democratic Party

Key question 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?

31. Although relatively few respondents commented on this issue, those who did comment generally considered that only a single competition authority would be required in the long run.

> *"It is better to migrate the current sector specific regulatory frameworks (telecommunication & broadcasting) to a generalised framework in the long run. But noting the maturity of the current sector regulatory bodies, it is advised to set up a road map with time frame for this to happen. Under a general framework, the legislation, adjudication and enforcement effort can be streamlined, and fairness is more visible."*
>
> *- Leung Siu Cheong,*
> *ex-Chairperson of Professional Information Security Association*

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

32. Almost all respondents took the view that civil penalties and disqualification from holding a directorship in a company would have a suitable deterrent effect.

> *"As suggested in the consultation document, if the level of fines is sufficiently high, it would be a sufficient deterrent. To strengthen the deterrent effect, the law could also provide for the disqualification of any person found responsible for anti-competitive conduct from holding a directorship of any company for a period of time. DAB considers the civil penalties are sufficient deterrent and this would also address the concern that SMEs would infringe the law unknowingly."* (English Translation)
>
> *- Democratic Alliance for the Betterment and Progress of Hong Kong*

Key question 16: Should any new competition law include a leniency programme?

33. All of those who commented on this question endorsed the idea of the regulator putting in place a leniency programme.

> *"Shell welcomes the proposal to introduce a leniency programme, and would encourage the authority to ensure that any leniency programme is consistent with leniency programmes in other major jurisdictions.*
>
> *Guidelines on the terms on which leniency will be available will need to be very clearly articulated, so that businesses are clear as to the circumstances in which leniency is available and how an application for leniency should be made."*
>
> *- Shell Hong Kong Limited*

Key question 17: Should any new competition regulator be empowered to issue orders to "cease and desist" from anti-competitive conduct?

Key question 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?

34. Most of the respondents who referred to the issues of "cease and desist" orders and binding settlements with parties suspected of anti-competitive conduct considered that the regulator should have recourse to such mechanisms.

> *"A 'cease and desist' order will minimize harm to markets soonest possible. We endorse the CPRC's observation that the process of securing such an order from the courts could lead to delay. We further argue that justice delayed is often justice denied. To expedite an injunction against anti-competitive conduct, we are of the view that the new competition authority should be empowered to issue orders to require parties to cease and desist from anti-competitive conduct.*
>
> *Binding settlement is a viable possibility. It has the benefit of expediency and spares both parties considerable sums in terms of litigation costs. We propose that the new competition regulator be empowered with the authority to reach binding settlements with relevant parties as appropriate,*

provided that transparent procedures and policies are established with proper safeguards to achieve justice."

- Edward K. Y. Chen and Ping Lin
Lingnan University of Hong Kong

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

Key question 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?

35. The majority of respondents who commented on this question considered that parties should have the right to make civil claims for damages as a result of anti-competitive conduct. Some argued that such a right should only be exercised after the regulatory authority had made a decision that the conduct in question constitutes an infringement of competition law, as this could allay SME's concerns over frivolous complaints.

"It is logical to allow civil claims to follow. However, we will only support this if SME's concern over frivolous complaints can be allayed. Thus the right of private action should be limited until the regulator has made a decision. Moreover, there should be a promotion and assistance programme to help SMEs deal with the new law."

- Hong Kong General Chamber of Commerce

36. The majority of responses to this question, with similar views expressed in some public forums, referred to the concerns of SMEs, including -

(a) They might have to incur extra costs in complying with a new competition law;

(b) As they were not familiar with the law, they might infringe the law unknowingly; and

(c) Large enterprises might lodge unreasonable complaints or even initiate private lawsuits against them, or threaten to do so, to

disrupt their normal operation and make them incur huge litigation costs.

"*Some economists have pointed out that the introduction of a new, cross-sector competition law, which is similar to that of overseas jurisdictions, may not be able to enhance the operating environment of SMEs or increase their competitiveness. On the other hand, this might be used as a ploy to require business rivals to incur heavy legal costs and discourage them from pursuing valid business objectives, and larger corporations would use the threat or exercise of civil action to constrain small business activities.*" (English Translation)

- Liberal Party

37. There were also respondents who believed that SMEs should not be unduly worried as they did not possess the power to distort the market.

"*SMEs form the largest business sector in Hong Kong. The majority of these companies operate in highly competitive business sectors in which no individual player has the power to distort the market. SME members of the Chamber view competition legislation positively. A new competition law should stipulate a sufficiently high threshold (defined, for example, by market share and/or annual turnover) which would have to be met before the regulatory authority would be required to initiate a formal investigation so that SMEs, by virtue of their lack of market power, would be unlikely to be targeted by the regulatory authority.* "

- British Chamber of Commerce in Hong Kong

38. Some SMEs considered that a competition law could help prevent harassment from larger companies. This view was particularly prevalent at the forum organized by the Consumer Council. One SME proprietor noted that SMEs should strive to improve their efficiency rather than fix prices, as this would not help them compete against foreign enterprises in an open economy like that of Hong Kong.

Chapter Three - Conclusions

The consultation exercise drew regular media coverage and a good response from various sectors of the community. Many of the written submissions were detailed and well presented, and the views and suggestions received both in writing and via public forums and meetings with stakeholders provided the Government with useful insights on how we might develop the regulatory framework for implementing competition policy.

Outcome

2. From the feedback received during the consultation period, we observe that **there is majority support in our community for the introduction of a new cross-sector competition law**. For the most part, those in favour of such a law agreed with the broad approach suggested in the CPRC report, that is, rather than address market structures, the law should focus on prohibiting conduct that would be likely to lessen competition or distort the normal operation of the market. We also note that there is general agreement that a breach of such a law should be subject to civil rather than criminal penalties, and that whilst the scope of the law should be wide enough to cover all sectors, there should be room for exemptions from the application of the law where this is in the wider economic or public interest.

3. Judging by the response from stakeholders, there is **general support for strengthening the regulation of competition through the establishment of a Competition Commission**, as recommended by the CPRC. There is a consensus that any future authority should be transparent and efficient, and that there should be appropriate checks and balances in the enforcement of competition law. There is a general preference for the Commission to be overseen by an independent, appointed board.

4. The detailed enforcement and other regulatory issues related to the implementation of competition law were the subject of comment from relatively few stakeholders. There was **general consensus on issues such as the need to protect confidentiality and the importance of a leniency programme** to encourage cooperation with the regulator. However, diverse opinions remained on certain technical issues, in particular on how best to

ensure that SMEs were not unduly burdened by a new law.

Way Forward

5. There is significant support for the introduction of a new cross-sector competition law and the establishment of a Competition Commission. We will accordingly begin work on the drafting of appropriate legislation, having regard to the views expressed during the public consultation exercise on some of the detailed issues where appropriate.

6. Based on the feedback received from the consultation exercise, we envisage that the main aspects of the legislation might include –

(a) the definition of anti-competitive conduct to be covered and the introduction of an appropriate prohibition against such conduct;

(b) the establishment of a Competition Commission as the regulatory authority;

(c) a mechanism for exempting from the application of the law conduct that was considered to be in the wider economic or public interest;

(d) provisions related to confidentiality and a leniency programme; and

(e) the penalties that are applicable to a breach of the prohibition against anti-competitive conduct, refusal to cooperate with investigations or unauthorized disclosure of confidential information.

7. At the same time, we note that some respondents (including some from the business sector) have expressed concerns that such a law could lead to higher business costs and potentially costly and time-consuming litigation - although there are others in the business community who support the introduction of a cross-sector law on the grounds that it could encourage free market discipline and protect SMEs from anti-competitive conduct.

8. With the above considerations in mind, in taking forward the drafting of the new competition law, we would continue to engage the public to enhance their understanding of its content and implementation. We would take into account the concerns that have been raised by some respondents (including the worries on the part of some SMEs) in our endeavour to draw up a regulatory framework that suits Hong Kong.

Economic Development and Labour Bureau
March 2007