REPORT ON PUBLIC CONSULTATION ON THE DETAILED PROPOSALS FOR A COMPETITION LAW

Chapter One – Introduction

In June 2006, the Competition Policy Review Committee (CPRC) recommended that the Government introduce a cross-sector competition law and establish an independent Competition Commission. In November 2006, the Government issued a public discussion document on the way forward for Hong Kong's competition policy. The responses to that document showed broad public support for the above recommendations of the CPRC although there were concerns in the business sector that such a law could lead to higher costs and time-consuming litigation.

2. In view of the support for new legislation, the Government has started work on the detailed design of a Competition Bill. Nonetheless, with a view to addressing the concerns of some stakeholders that the law might create unnecessary regulatory burden, especially for Small and Medium-sized Enterprises (SMEs), on 6 May 2008 the Government issued a consultation paper setting out the proposed major provisions of the Bill and invited the public to comment before 5 August 2008.

3. During the consultation period, copies of the consultation paper were distributed at the 18 district offices and at the Consumer Advice Centres of the Consumer Council. The paper was also posted on the Commerce and Economic Development Bureau (CEDB) website. To promote public engagement, we conducted briefings for the Legislative Council Panel on Economic Development, political parties, chambers of commerce and other interested bodies; and took part in public forums and programmes organised by the electronic media to explain the proposed competition law framework and to listen to the views of stakeholders.

4. To date we have received 176 written submissions (156 during the consultation period and 20 late submissions). Respondents

included members of the public, academics, and representatives of political parties, business organisations and private companies. It should be noted that we have not verified the identities of the respondents. Each submission has been counted as a separate response, with the exception of obvious cases of duplication.

5. We expressly stated that unless specifically requested otherwise, views put forward may be published and attributed to respondents. In this connection, unless otherwise requested we have uploaded all submissions onto the CEDB website for public reference.

Chapter Two – General overview of responses

Many of the submissions received during the consultation period indicate that the respondents have in-depth knowledge of issues related to competition law. The submissions also contain useful insights on how we might design a Competition Bill. This chapter aims to provide a general overview of the main issues raised by respondents on the broad areas covered by the consultation paper. An account of the views on the specific proposals follows in Chapter Three.

(I) Objective

2. Respondents were generally content with the proposed objective of the law, although a few considered that consumer welfare should be a more important consideration than economic efficiency. In addition, the view was expressed that the Government should not actively "promote sustainable competition" through the law, and that simply "enhancing economic efficiency and thus consumer welfare" would be a suitable formulation for the objective.

(II) Institutional arrangements

3. As mentioned in the consultation paper, a key consideration in designing the institutional arrangements for implementing the competition law was to strike a balance between efficiency on the one hand and the need for appropriate checks and balances on the other. In this connection, most respondents agreed that the Commission should be independent from the Government and should have a "two-tier" structure, with a board and a separate executive arm. Some respondents made specific suggestions with regard to the composition of the board. There was general agreement on the proposed functions of the Commission.

4. Many respondents believed that our proposed safeguards, for example the strict separation of investigation and adjudication within the Commission itself and the due process of investigation that the Commission had to follow, provided adequate checks and balances on the work of the Commission. However, others took the view that adjudication of whether or not an infringement had taken place and the

power to impose remedies should be the remit of the proposed Competition Tribunal (or the courts), as this would be more in accordance with the common law tradition observed in Hong Kong.

5. A number of respondents considered that the proposed framework would give the Commission too much power – as well as too much discretion in terms of interpreting whether or not conduct was anti-competitive, particularly if the law were to have a broadly worded prohibition against anti-competitive conduct.

6. Respondents were generally content with the proposal that a Competition Tribunal should be set up to hear full reviews of the Commission's determinations. Most respondents also agreed with the inclusion of both judicial and non-judicial members on the Tribunal.

(III) Conduct rules

7. Many respondents appreciated that as anti-competitive conduct could take many different forms the prohibition against such conduct should be drafted in general terms. However, some of these respondents considered that the law should contain more detail, for example, a non-exhaustive list of prohibited anti-competitive conduct, in order to give certainty to the business sector. On the other hand, a few respondents maintained that the law should only prohibit a few specifically defined types of anti-competitive conduct.

8. Some took the view that when the Competition Bill was tabled before the Legislative Council, the regulatory guidelines governing the Competition Commission's approach to enforcing the law should be available for public scrutiny, and that the Commission should consult stakeholders before finalising such guidelines.

9. Most respondents were content that it should be proved that conduct had the purpose or effect of substantially lessening competition before it could be determined that an infringement had taken place. However, a number of respondents believed that *only* the effect of the conduct - and not the purpose - should be proved, especially when deciding whether an undertaking had abused its substantial market power.

10. Many submissions discussed the issue of abusive conduct by dominant market players. Some respondents agreed that the proposed "substantial market power" threshold would more appropriate than a "dominance" threshold in investigating abusive conduct in a small economy like Hong Kong. However, others made the point that the "dominance" threshold was more commonly used worldwide and offered a clearer benchmark.

11. Views remained divided on the issue of merger regulation, with a slightly higher number of respondents supporting such regulation. The arguments both for and against a merger regime were similar to those set out in the consultation paper.

12. Most respondents agreed that infringement of the conduct rules should be subject to penalties that would act as a deterrent to engaging in anti-competitive conduct, but that only civil sanctions should apply. Views differed on the appropriate level of fine and whether or not sanctions should include disqualification from holding a directorship or a management role in any company. There was broad agreement that the Commission should have the power to make appropriate directions to bring infringements to an end or eliminate their effects.

(IV) Private action

13. There was general support for the law providing for "follow-on" private civil actions that would allow parties who had incurred losses as a result of proven anti-competitive conduct to claim damages. Views on whether "stand-alone" action should be allowed were mixed. Whilst some respondents believed that such actions could complement public enforcement of the competition law, some were concerned that this might lead to excessive litigation. There were also diverse views on whether the law should allow for representative actions. Some respondents took the view that allowing such actions could help consumers and SMEs with limited resources seek redress when faced with anti-competitive conduct. Others took the view that the merits of representative action were not proven, and that this would be an unfamiliar concept for Hong Kong.

14. Most respondents who commented on this issue considered it appropriate for private cases that involve *only* competition matters to be heard solely by the Competition Tribunal, given that it would be equipped with the necessary expertise to adjudicate on competition issues.

(V) Issues of concern to SMEs

15. Some respondents remain concerned that the proposed competition law could adversely affect the operation of SMEs. Nonetheless, the various measures proposed in the consultation paper to address SMEs' concerns were well received. Many respondents welcomed the *de minimis* approach, and some suggested that the business turnover of the parties to an agreement, in addition to their aggregate market share should also be a criterion in the application of the *de minimis* approach.

(VI) Relationship with existing sector-specific laws

16. Most respondents agreed that the competition law should apply to all sectors, and that provisions in the Telecommunications Ordinance and Broadcasting Ordinance that were found to duplicate those in the future Competition Bill should be repealed. A few respondents suggested that if merger control was *not* included in the new competition law, the current merger provisions under the Telecommunications Ordinance should be repealed. Some respondents believed that the Commission should have sole jurisdiction over all competition matters in all sectors, as having more than one regulator enforcing the same law in some sectors of the economy could lead to confusion and inconsistency. Other respondents, on the other hand, supported concurrent jurisdiction, in order that the specialist knowledge of the TA and BA can continue to be utilized.

17. Some respondents also raised the issue of the relationship between the competition regime and other regulatory regimes in Hong Kong. They generally considered that conduct required by other laws and practices recommended by other regulators should be exempted from the application of the competition law.

(VII) Exemptions and exclusions

18. Most respondents agreed to the proposal that an agreement should be exempted from the prohibition on anti-competitive agreements if it yielded economic benefit that outweighed the potential anti-competitive harm, although some respondents suggested that the meaning of "economic benefit" should be more clearly defined. Many welcomed the proposal for a mechanism that would allow companies to apply for exemptions, on the grounds that this could increase business certainty. Several respondents agreed that the Commission should have the power to issue a block exemption in respect of a category of agreement that was likely to meet the exemption criteria, with some adding that the law should provide for an open and transparent procedure for issuing such exemptions.

19. Views were mixed as to whether certain activities of undertakings entrusted with the provision of services of general economic interest should be granted exclusions on grounds of public interest. There were similar differences of opinion on the question of exclusions being made by the Chief Executive-in-Council for public policy reasons. Whilst some respondents believed that such exclusions were necessary, others considered that they could give too much discretion to the authorities.

20. As to the question of the application of the law to the Government and statutory bodies, many respondents felt that the competition law should apply equally to all entities engaging in economic activities, so as to uphold the principle of establishing a level playing field.

Chapter Three – Summary of specific public responses

This Chapter aims to set out in summary the specific responses to the proposals in the consultation paper. To help illustrate key points, we include direct quotes from submissions in which we consider individual respondents have put forward clear and succinct arguments that are generally representative of the range of opinions expressed on specific issues. However, the selected quotes are by no means comprehensive, and readers are encouraged to view the complete set of submissions posted on the CEDB website at www.cedb.gov.hk to gauge the full range and content of views put forward by respondents.

(A) Objective

Proposal 1:	The objective of the Competition Ordinance should be to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition.

2. Most respondents agreed with the proposed objective of the competition law, although some felt that the objective should not be framed in such a way as to give the impression that the Government might take an interventionist approach to promoting competition in Hong Kong. A couple of respondents argued that the proposed objective as worded put too much emphasis on economic efficiency.

(B) Appointment and role of the Competition Commission

Proposal 3:	An independent Competition Commission in the form of a body corporate should be set up to enforce the new competition law. The Commission should have a "two-tier" structure, with an appointed board of Commission members overseeing a full-time executive arm.
Proposal 4:	The Commission should have a minimum of seven members, including a Chairman, appointed by the Chief Executive. At least one Commission member should have experience in SME matters. The actual number of Commission members appointed could be more than the

	minimum required so as to ensure that there was a sufficiently large "pool" of members to allow for the efficient conduct of the Commission's business.

3. Most respondents agreed that the Commission should be independent from the Government and should have a "two-tier" structure, and that Commission members should be appointed based on their expertise and experience in relevant fields. A few respondents also suggested that specific industry representatives or experts should sit on the Commission.

Proposal 5:	The Commission should have the power to investigate, determine and apply remedies in respect of infringements of the conduct rules under the competition law.
Proposal 6:	The Commission should have other functions directly related to the objective of the competition law, including educating the public and business about the competition law and promoting compliance programmes.

4. The majority of respondents agreed that the Commission should have both investigative and adjudicative powers. Such an arrangement would ensure that cases could be dealt with effectively and efficiently. The various safeguards proposed, in particular the strict separation between investigation and adjudication within the Commission itself and the availability of a "full merits" review of the Commission's determinations by an independent Competition Tribunal were felt by many to provide adequate checks and balances on the Commission's power. Nonetheless, some respondents believed that investigation and adjudication should be handled by two different bodies, arguing that this would be consistent with Hong Kong's common law tradition.

> *"These proposals are similar to the arrangements under the current Hong Kong Telecommunications Ordinance and to existing competition legislation in Singapore and the UK. This seems a satisfactory system of checks and balances."*
>
> *- DLA Piper*

"To maintain proper checks and balances, the law should separate the regulatory/enforcement mechanism from the adjudicative regime. Provisions that guarantee fair hearings and published decisions are critical."

- The American Chamber of Commerce in Hong Kong

5. Most respondents agreed that the Commission should have other functions directly related to the objective of the competition law, as proposed in the consultation paper. A number of respondents raised the importance of education of the public as a priority of the Commission's work.

Proposal 7:	The Commission should be able to commence an investigation either of its own initiative or in response to a complaint. It should be able to exercise its formal investigative powers when it has reasonable cause to believe that an infringement of the conduct rules has taken place.
Proposal 8:	The Commission should have the power to require a person, by notice in writing, to provide information and produce documents that it considers relevant to an investigation or to appear before the Commission to give evidence. The Commission should also have the power to conduct a physical search of premises if so empowered by a warrant issued by a magistrate.
Proposal 9:	There should be a formal separation within the Commission between the investigation and adjudication of infringements, through the establishment of an Investigation Committee, which is to be responsible for conducting the investigation. The Investigation Committee will be chaired by a Commission member who will not then participate in the decision on the complaint in question.
Proposal 10:	A Commission member who in any way, directly or indirectly, has interest in a matter being investigated by

	the Commission should be required to disclose the nature of his or her interest. The relevant member should thereafter not take part in any deliberation or decision of the Commission with respect to that matter.
Proposal 11:	Before the Commission makes a determination of infringement of the conduct rules, it should first notify the party concerned of the material facts and particulars of the conduct and its considerations in making such a determination. The party should be given the opportunity to provide information or documents and make submissions that it considers are relevant to the case, which the Commission should be required to take into account.

6. Most respondents agreed that the Commission needs to have the proposed investigative powers in order to discharge its duties effectively. The formal separation within the Commission between the investigation and adjudication of infringements was welcomed by most respondents. A few respondents felt that the Commission should only act on complaints and should not commence investigations on its own initiative. A few respondents preferred a higher threshold than "reasonable cause to believe" for the Commission to exercise its investigative powers.

> *"…if the accusation is unfounded, it is undoubtedly a nuisance to the undertaking concerned. Therefore, we propose that the Commission should only exercise its formal investigative power when it is "more likely" to believe (instead of have "reasonable cause to believe" as mentioned in paragraph 7 of the consultation paper) that an infringement has taken place."* (English translation)
>
> *- Hong Kong Professionals and Senior Executives Association*

7. In order to ensure that the Commission's determinations were arrived at fairly and impartially, respondents generally agreed with the proposed arrangements regarding conflict of interest. One respondent further differentiated substantial interests and non-substantial

interests, and recommended different treatment accordingly. Most respondents also considered that informing the party concerned before the Commission made an infringement decision and allowing that party an opportunity to make submissions were important safeguards.

Proposal 12:	The Commission should have the power to enter into binding settlements with a party under investigation.

8. Respondents generally agreed with this proposal, although noting the possible implications of settlements for third parties' rights to damages, some respondents argued that binding settlements should be made public.

> *"We considered that in any binding settlement, the rights of third parties to take private action should be preserved. Further, any binding settlement must be made public."*
>
> *- The Law Society of Hong Kong*

Proposal 13:	Confidential information provided to the Commission by complainants or persons under investigation, or acquired by the Commission using its formal investigative powers should be protected under the law.

9. There was broad consensus that confidential information should be protected under the law. As the consultation paper only set out the principles for protection of confidential information rather than going into detail, some respondents raised questions relating to technical issues, for example, the circumstances under which the Commission might disclose confidential information, or when information might be disclosed to other authorities or to third party plaintiffs in damages actions.

Proposal 14:	The Commission should keep proper accounts and records of transactions, and prepare financial statements which give a true and fair view of its financial status.
Proposal 15:	The Commission should furnish an annual report to the Secretary once a year. The Secretary should table this

	annual report in the Legislative Council no later than six months after the end of the previous financial year.

10. There was no objection to these proposals, although a few respondents suggested that the Commission should also include an annual plan in its annual report.

(C) Appointment of a Competition Tribunal

Proposal 16:	A Competition Tribunal should be established to hear, among other things, applications for review of the decisions of the Commission and private actions under the competition law.
Proposal 17:	Tribunal members would be either "judicial" members (i.e., judges or former judges), or "non-judicial" members with expert knowledge of economics, commerce or competition law. One of the judicial members would be the President of the Tribunal. Both the President and other judicial members would be appointed by the Chief Executive on the recommendation of the Chief Justice. Non-judicial members would be appointed by the Chief Executive.

11. Respondents generally welcomed the idea of setting up an independent Competition Tribunal to review the Commission's determinations and hear private actions under the competition law. Most respondents were also satisfied with the proposed composition of the Tribunal and the appointment mechanism.

Proposal 18:	When hearing reviews, the Tribunal should sit as a three-member panel, chaired by a judicial member, and comprising at least one non-judicial member with expertise in economics. The Tribunal should have the power to review cases on their merits on the same evidence as was before the Commission, and should have the power to admit new evidence if it considers this appropriate.

Proposal 19:	The Tribunal should possess the necessary powers for discharging its functions effectively and efficiently. The Tribunal proceedings should be conducted as informally and expeditiously as possible. The Tribunal should not be bound by rules of evidence.

12. Most respondents were content with the arrangements proposed and agreed that the Tribunal should possess the necessary powers for discharging its functions effectively and efficiently. Whilst respondents appreciated that Tribunal proceedings should be informal and expeditious, some added that a clear set of procedures is still needed, particularly given the Tribunal's role as a venue for hearing private actions.

> *"The Australian experience has shown that the Tribunal inevitably creates its own rules and procedures and typically regulations are issued as to procedure.....The ability of the Tribunal to hear private actions.....without being required to abide by the rules of evidence provides some concern, given there could be significant damages awarded against a party."*
>
> - *International Bar Association*

Proposal 20:	Any person aggrieved by a determination by the Commission should have the right to seek a review by the Tribunal of the determination, including the penalty imposed by the Commission.
Proposal 21:	The Tribunal should have the power to decide whether or not to suspend a Commission decision before determining a review application.
Proposal 22:	An appeal against a decision of the Tribunal should be available. Such an appeal should be heard by the Court of Appeal and should be limited to points of law or any remedy applied in respect of an infringement, including the amount of any fine.

13. Respondents generally agreed with the proposals regarding the right to seek a review by the Tribunal, although some respondents took the view that the person seeking a review should be required to show that he or she had a direct interest in the matter. While some respondents thought that the power to decide whether or not to suspend a Commission decision before determining a review application would give the Tribunal flexibility to deal with different situations, others were concerned that such flexibility might induce companies that had infringed the law to use application for review as a delay tactic. Respondents in general also agreed with allowing for further appeals to the Court of Appeal, and the proposed scope of matters that could be addressed in such an appeal.

(D) Prohibition against anti-competitive conduct

Proposal 23:	The conduct rules should apply to "undertakings", which may be defined as individuals, companies or other entities engaging in economic activities.

14. It was generally agreed that the conduct rules should apply to entities when they engaged in economic activities. Some respondents further suggested that when a number of entities together functioned as one single economic unit, they should be considered to be one undertaking and thus should not be subject to the prohibition against anti-competitive agreements.

> *"This definition also suggests that all separate legal entities are included, regardless of whether such undertakings are related or otherwise.....We would therefore suggest the definition is amended in a manner similar to the UK guidelines issued by the Office of Fair Trading which states 'an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal entity, enjoys no economic independence."*
>
> *- The Law Society of Hong Kong*

Proposal 24:	There should be a general prohibition on agreements and concerted practices that have the purpose or effect of substantially lessening competition.
Proposal 25:	The Ordinance should not give a list of examples of anti-competitive agreements. However, the Commission should be required to issue guidelines that would give examples of the types of conduct that would commonly be considered anti-competitive.

15. Many respondents agreed that a general prohibition on anti-competitive agreements and concerted practices was appropriate, as anti-competitive conduct could take different forms at different times and under different circumstance. However, some of these respondents considered that the proposed general prohibition lacks clarity, particularly if the law would not define key terms such as "market" and "substantially lessening competition". These respondents put forward various suggestions aimed at making the conduct rules clearer, with a view to providing more certainty to businesses and consumers. These included -

- providing a non-exhaustive list of the types of agreement that would commonly be considered anti-competitive in the law itself;

- either defining terms such as "market" and "substantially lessening competition", or setting out the factors that the Commission would take into account when interpreting these terms, in the law;

- tabling the draft guidelines on how the Commission would interpret and enforce the law before the Legislative Council when the Government introduces the Bill; and

- prohibiting only certain specific types of conduct instead of imposing a general prohibition on all anti-competitive conduct.

"DG Competition therefore welcomes the approach in Proposals 23 to 25, which suggests a provision with a scope similar to that of Article 81 EC with respect to horizontal agreements.....Experience shows that restrictions on competition can assume many shapes and forms. We believe that it is therefore very sensible that Proposal 25 states that the Ordinance should not give a list of anti-competitive agreements. This leaves scope for dealing with types of restrictions that do not fit neatly into one of the pre-defined categories of restrictions in the Ordinance.

- The European Commission

"In the interest of clarity and to provide guidance both for those who may be affected by the legislation and for the regulators who are expected to enforce it, we would suggest that a non-exhaustive list of anti-competitive agreements and abusive conduct should be included in the Competition Bill itself.....the Competition Commission would have the authority to pursue other types of anti-competitive conduct. This flexibility would enable the Commission to address changing market practices and conduct.....Given that it is intended that there should be detailed Competition Commission guidelines to supplement the express powers given by the legislation we would hope that drafts of those guidelines would be made available at the time of introduction of the Competition Bill into the Legislative Council."

- Slaughter and May

"The Chamber's position with regard to competition law can be summarized in four words: minimalist law, incremental implementation.....the coverage of the law must be restricted to a limited set of anti-competitive behaviour.....The seven categories of conduct as suggested (by the CPRC report) are reasonable and there is no need to extend to other types of conduct."

- The Hong Kong General Chamber of Commerce

Proposal 26:	The focus of the prohibition on agreements should be on horizontal agreements. Vertical agreements should only be addressed in the context of abuse of substantial market power.

16. Whilst most respondents agreed that the focus of the prohibition should be on horizontal agreements, there were mixed views on how to deal with vertical agreements. Some respondents believed that vertical agreements should not be a concern in the absence of substantial market power, but others considered that some vertical agreements could still have an anti-competitive effect even when the parties had a market power that was below the proposed "substantial market power" threshold.

> *"BT notes that the Hong Kong Government proposes to follow the EU approach to dealing with vertical agreements.....We would agree that this would be an efficient and effective way forward."*
>
> *- British Telecommunications plc*

> *"While it is generally true that a vertical agreement only presents competitive concerns when the undertakings entering into such an agreement possess considerable market power, this market power could often be less than what is required to establish significant market power as outlined in the consultation paper.....Moreover, it is sometimes difficult to classify an agreement as horizontal or vertical. A seemingly vertical agreement between a manufacturer and its wholesalers may have a horizontal element at the wholesale level, among the wholesalers.....The correct way to analyse this agreement is to examine its horizontal and vertical effects together."*
>
> *- Thomas Cheng*

Proposal 27:	There should be a general prohibition on an undertaking that has a substantial degree of market power from abusing that power with the purpose or effect of substantially lessening competition.

17. Views on this issue were mixed, particularly with regard to whether the law should adopt a "substantial market power" or a "dominance" threshold in considering whether abuse of a market had taken place. Some respondents preferred the former, maintaining that in a small economy, a less than dominant share of market power could still enable an undertaking's conduct to have competition implications on the market. Others preferred using a "dominance" threshold, arguing that a higher degree of concentration could be tolerated in a small economy. These respondents also maintained that the "dominance" threshold was more commonly used in overseas jurisdictions and would therefore provide for greater legal certainty.

> *"These provisions are similar to those used in other jurisdictions but with the caveat that the abuse provision can be used at a lower threshold than an abuse of dominance provision in other jurisdictions. This is appropriate given Hong Kong's concentrated market structures in capital intensive sectors and the existence of conglomerates that wield a disproportionate degree of market power that may adversely affect competition."*
>
> *- Civic Party*

> *"We are concerned that the adoption of a "substantial market power" test instead of a "dominance" test would lead to unsatisfactory results in the Hong Kong economic context. In those few jurisdictions which follow the test proposed in the Consultation Paper, we understand that there has been considerable uncertainty as to its actual meaning.....While the Consultation Paper (at paragraph 24) recognizes that Hong Kong's compact geographical area naturally leads to market concentration levels that are higher than those of larger economies, it is surprising that a market power test that is lower than that adopted in most other jurisdictions seems to be proposed.*
>
> *- The Real Estate Developers Association of Hong Kong*

Proposal 28:	There should be no per se infringements and the Commission would be required to conclude that conduct had the purpose or effect of substantially lessening competition before it could determine that an infringement had taken place.

18. There was wide support for the proposal that there should be no per se infringements. Most respondents agreed that conduct that has the *effect* of substantially lessening competition should be prohibited, however some respondents felt that *purpose* should **not** be taken into account when determining whether an infringement has taken place.

> *"The Chamber respectfully suggests that the proper focus is whether the conduct has the effect of substantially lessening competition. Intent or purpose can be difficult to discern. It can also be difficult to distinguish an anti-competitive purpose from a legitimate business purpose. This ambiguity would make the law less clear and predictable, which may deter innovation and pro-competitive behaviour."*
>
> *- The American Chamber of Commerce in Hong Kong*

Proposal 29:	Infringement of the conduct rules should be subject to civil, but not criminal, penalties. Fines of up to $10 million could be imposed by the Commission. More serious penalties, including higher fines and disqualification from holding a directorship or a management role in any company for up to five years, could be imposed by the Tribunal, on application by the Commission.
Proposal 30:	The Commission should have the power to make such directions as it considers appropriate to – a) bring the infringement of the conduct rules to an end b) eliminate the harmful effect of such infringement c) prevent the re-occurrence of such infringement.

Proposal 31: On application by the Commission, the Tribunal should have the power to make an interim "cease and desist" order before a decision is made on whether conduct constitutes an infringement.

19. Most respondents agreed that infringement of the conduct rules should be subject to civil rather than criminal penalties. It was also generally agreed that the Commission should have the power to make directions to stop an infringement, and that the Tribunal should have the power to make interim "cease and desist" orders. There were differing views on the precise levels of fine that should be imposed under the law, and some respondents questioned whether it would be appropriate to disqualify people from holding directorships.

Proposal 32: The Commission should introduce a leniency programme, under which a party to a prohibited agreement that comes forward with information that is helpful to an investigation may have any subsequent penalty waived or reduced.

20. Respondents generally agreed that the Commission should introduce a leniency programme, noting that in other jurisdictions this had proved to be a very effective means of uncovering cartels. Some respondents further suggested specific elements to be incorporated in an effective leniency system.

> *"We agree that this is an essential tool to unearth cartels, which by their nature are often secret and unwritten. Leniency regimes work best when they are clear, transparent, predictable and thus offer potential whistle-blowers with adequate up-front comfort (guarantees).....Most successful leniency programmes offer full immunity for the first company to provide information that (i) allows an investigation to be launched; or (ii)allows for an infringement to be proven, even if the information is supplied after an investigation has been launched. We strongly*

recommend this approach and for it to be made clear upfront."

- Baker & McKenzie

(D) Merger regime

21. In discussing whether the competition law should provide for a merger regime, the consultation paper put forward three options for the way forward on these options -

a) to introduce merger provisions that would be suitable in the Hong Kong context, e.g., provisions similar to those in the Telecommunication Ordinance;

b) to introduce merger provisions as described in a) above in the new law, but to delay the enforcement of such provisions until after a review of the effect of the other provisions of the law; or

c) not to include merger provisions in the Bill initially, but rather to reconsider whether there might be a need to add such provisions only after a review of the effect of the new law.

22. Views on this issue were diverse. Slightly more than half of the respondents who commented on this issue were in favour of a merger regime taking immediate effect. However, some respondents argued that there was no need for a merger regime at the initial stage, if at all. The actual arguments put forward for and against the introduction of a merger regime were similar to those that were outlined in the consultation paper.

(E) Private actions

Proposal 33: Parties should have the right to take both "follow-on" and "stand-alone" private action.

Proposal 34:	Any person who has suffered loss or damage from a breach of the Ordinance should have the right to bring private proceedings seeking damages.

23. Among respondents who commented on these proposals, there was almost unanimous support that anyone who had suffered loss or damage from a breach of the Ordinance should have the right to bring a follow-on private action seeking damages. Views on whether to allow stand-alone actions were less clear-cut. Those who supported this right took the view that it provides a safeguard for individuals to seek redress in case the Commission decided not to pursue a case of alleged anti-competitive conduct. Others were concerned that providing for such a right in the competition law might lead to excessive litigation, and questioned whether it is necessary to provide for stand-alone action at the initial stage of implementing the law.

> *"If the Ordinance did not provide a specific right of action the courts might well allow claims in tort for breach of statutory duty in any event. It is much better to provide a specific right of action and an adjudiciary route to the Tribunal or in appropriate cases, through the ordinary civil courts with powers of referral. Fetters on the right of private action to 'follow on' claims only limits both the role of private parties in helping to enforce the law and prevents citizens, who cannot arouse the public authorities to action, from defending their legal rights."*
>
> *- Mark Williams*

> *"PCCW supports follow-on actions but not stand alone or representative/class actions. This recommended approach permits entities that have been harmed to obtain appropriate relief while not burdening the market participants or the regulator/courts with unnecessary litigation, costs and distractions.....Only allowing follow-on actions (particularly in the early years of a general competition law regime) also has the added benefit of allowing the Commission and Tribunal to focus on the investigations and appeals, their educational responsibilities, transition and establishment*

requirements, and other obligations without being overwhelmed with other matter which may at the end of the day be frivolous and distractive."

- PCCW Limited

Proposal 35: Private cases that involve only competition matters should be heard solely by the Tribunal.

Proposal 36: For "composite" claims that involve both competition and non-competition matters, the courts should have the power to transfer competition matters to the Tribunal for determination. When a court decides that it would hear a composite case in full, it would have the power to issue remedies in respect of all aspects of the case, including matters related to the competition law.

24. Respondents who commented on these issues generally agreed that the Tribunal is well placed to hear private cases that involve competition matters, though a few respondents took the view that private cases should be heard by the courts. There was general agreement that the courts should have the discretion either to transfer competition matters in "composite" claims to the Tribunal for determination, or to hear the case in full.

Proposal 37: The Tribunal, of its own motion or on application by a party or the Commission, may strike out any action which the Tribunal considers to be without merit or vexatious.

Proposal 38: Where a matter is being investigated by the Commission and a third party commences a private action on the same matter, the Tribunal may adjourn the private case pending the outcome of the Commission's investigation if the Tribunal considers that the matter would be better handled by the Commission.

Proposal 39:	With the agreement of the Tribunal or the courts, the Commission may intervene in any private proceedings relating to a contravention of the competition conduct rules.

25. Most respondents agreed that the Tribunal should be able to strike out any unmeritorious or vexatious claims. Most respondents also agreed that the Tribunal might adjourn a private case pending the outcome of the Commission's investigation. On intervention by the Commission in private cases, whilst some respondents believed that such intervention could be useful, some maintained that in such situations the defendant would not be subject to a fair hearing.

> *"Experience in other jurisdictions indicates that such a system brings significant benefits to both the civil proceedings as well as the efforts of the authority in the area of shaping competition policy. The Working Group suggests that thought should be given to a possible duty of ordinary courts to notify the Commission of any cases pending before them in which competition law issues are raised."*
>
> *- International Bar Association*

> *"Shell believes that permitting the Commission to intervene in a private case (acting as an expert body, 'friend of the court' or full party to the action in question) could raise serious issues for the defendant. It could be argued that the defendant would not be subject to a fair hearing if it were defending against a third party and the Commission."*
>
> *- Shell Hong Kong Limited*

Proposal 40:	With the permission of the Tribunal, representative actions, such as on behalf of consumers or SMEs should be permitted. In granting such permission, the Tribunal must have reached the view that the representative can fairly and adequately represent the interests of the parties concerned.

26. Many respondents believed that it was not necessary for the competition law to allow for representative action at this stage. Some respondents agreed that representative action could provide for full compensation of victims and enhance deterrence, but recommended that procedural safeguards be put in place to avoid abusive litigation and eliminate unnecessary costs.

> *"Cathay Pacific believes representative actions are a step too far for a new competition regime. In particular, Cathay Pacific notes that representative actions are not typically found in new competition regimes – or even many older regimes. For example, the UK has only recently introduced representative actions to its regime (and this has not been viewed as being entirely successful) and the European Commission is still considering it – if at all – it will introduce them at the EC level."*
>
> *- Cathay Pacific*

> *"It will be important under any system of representative actions, however, to ensure that procedural safeguards are in place to avoid abusive litigation, eliminate unnecessary costs, and ensure that antitrust victims are adequately represented.....The Sections respectfully suggest that specific criteria be developed for assessing proposed representative claims and for ensuring adequacy of representation.....these requirements promote numerous goals, including protecting the due process rights of plaintiffs while also protecting the defendants' rights of defense."*
>
> *- Section of Antitrust Law, Section of Business Law and Section of International Law, The American Bar Association*

Proposal 41: The Tribunal should have power to apply the following remedies in cases of stand-alone private action – a) injunction or declaration b) award of damages c) termination or variation of an agreement d) such other relief as the Tribunal deems appropriate.

Proposal 42:	Any leniency granted to a party by the Commission should have no impact on rights of private action. Information provided to the Commission by a party granted leniency should not be discoverable in private proceedings.

27. There was general agreement that the Tribunal should have the power to apply a full range of remedies when hearing private actions. Most respondents also agreed that any leniency granted to a party by the Commission should have no impact on rights of private action and that information provided to the Commission by a party granted leniency should not be discoverable in private proceedings, so as to strike a balance between maintaining the effectiveness of the leniency programme and protecting the rights of victims to damages. Some respondents submitted suggestions in relation to the technical issue of exactly what information should or should not be discoverable.

(F) Issues of concern to SMEs

Proposal 43:	The Commission should be required in its guidelines to clarify that it would not pursue an agreement where the aggregate market share of the parties to the agreement did not exceed a certain level, except where "hard core" conduct was involved. The guidelines should give clear examples of what would be considered "hard core" conduct.

28. In addition to the proposed *de minimis* approach to agreements, the consultation paper set out other proposals to help address SMEs' concerns as expressed during the previous consultation exercise. These included: exemptions for vertical agreements; power of the Competition Tribunal to strike out vexatious claims; appointment of Commission members with SME experience; and availability of representative action. Most of these proposals were well received. Some respondents suggested fine-tuning the *de minimis* approach to provide more safeguards for SMEs.

"Having thoroughly studied the proposed competition law set out in the consultation document, we find that the Government has striven to allay our previous concerns about the potential adverse effects of a cross-sector competition law on SMEs."

- Federation of Hong Kong Industries

"We would suggest that the 'de minimis' test be based on either turnover or the market share of the undertakings concerned, particularly as it is sometimes very difficult or impractical to assess market shares of SMEs accurately."

- British Telecommunications plc

(G) Relationship with existing sector-specific laws

Proposal 44:	The Competition Ordinance should apply to all sectors, including the telecommunications and broadcasting sectors. The competition provisions in the Telecommunications and Broadcasting Ordinances that duplicate those in the Competition Ordinance should be repealed.
Proposal 45:	The Telecommunications Authority and the Broadcasting Authority should share with the Competition Commission jurisdiction over competition matters in their respective sectors.

29. Most respondents agreed that one single competition law should apply to all sectors, including telecommunications and broadcasting. Several respondents proposed that all the competition provisions in the Telecommunications and Broadcasting Ordinances, not just the duplicating provisions, should be repealed upon the enactment of the cross-sector competition law. Some considered that the treatment for mergers should also be uniform in the telecommunications sector and other sectors. On whether the Telecommunications Authority and the Broadcasting Authority should share jurisdiction with the Competition Commission, some respondents took the view that the Competition Commission should be the sole authority to enforce the competition law in all sectors, in order to ensure consistency in application. Other respondents, on the other hand, considered that the TA and BA should have concurrent jurisdiction because of the regulators' understanding of the industries they regulate, and the specialist knowledge they have acquired in handling competition issues.

> *"We believe that this proposal (proposal 45) is not required in that it is inconsistent (with a) generally applicable competition law. It would also appear to be a duplication of authority between the Telecommunications Authority and Broadcasting Authority which when combined with the proposed Competition Commission, will confuse the market and consumers alike as to who has responsibility over what."*
>
> *- Computer Technology Association*

> *"We do not agree with the Government's proposal to maintain a concurrent exercise of power by both the TA (and BA) and the future Competition Commission. This would create room for divisive standards for interpretation and enforcement of the law, which is not conducive to a unified development of the competition regulatory regime in Hong Kong."*
>
> *- Hutchison Telephone Company Limited*

> *"We agree the OFTA and OFBA should share jurisdiction with the Competition Commission. Sectoral regulators have an important role because of their long-term understanding of the dynamics and complexities of these particular industries."*
>
> *- British Telecommunications plc*

30. Some respondents also raised the issue of the relationship between the competition regime and other regulatory regimes in Hong Kong. These respondents typically suggested that conduct required by other regulators should not be subject to scrutiny of the competition law.

> *"In light of the current regulatory environment for the banking sector, we are of the view that the Competition Law should expressly recognize that conduct that is required or recommended by sector-specific regulations and guidelines, for example, those issued by the Hong Kong monetary Authority, will not be liable to constitute a breach of law. Moreover, the Competition Law should also clarity what the relationship would be between the powers of the competition authority and other financial regulators such as the Hong Kong Monetary Authority and the Mandatory Provident Fund Schemes Authority....."*
>
> *- The Hong Kong Association of Banks*

(H) Exemptions and exclusions

Proposal 46:	An agreement may be exempted from the prohibition on anti-competitive agreements if it yields economic benefits that outweigh the potential anti-competitive harm. A party to an anti-competitive agreement may apply to the Commission for an exemption if it has grounds to believe that such an exemption should be granted.
Proposal 47:	The Commission may issue a block exemption in respect of a category of agreement that is likely to yield economic benefit that outweighs any anti-competitive harm.

31. Most respondents considered it reasonable to exempt from the law anti-competitive agreements that yield economic benefits that outweigh the potential anti-competitive harm. Some respondents further gave suggestions as to the appropriate criteria for assessing economic benefits. On the mechanism for seeking such exemptions, whilst some respondents agreed that an application system for individual exemptions would provide legal certainty to businesses, some expressed concern that such a system would create a substantial administrative burden for the Commission. Most respondents who commented on this area agreed that the Commission should have the power to issue block exemptions, which should be granted in a transparent manner. Stakeholders in some industries - in particular the shipping industries - requested that certain of their activities should be granted block exemptions.

> *"Although the 'economic benefits' or 'general economic interest' should be viewed as benefits that can ensure efficiency in the market place, CC suggests that 'consumer interest' should be considered as an important component that would be in line with the objective of the law aiming at protecting the competition process thus benefiting consumers."*
>
> *- Consumer Council*

> *The possibility for companies to apply for exemptions of individual agreements where the benefits can be shown to outweigh any detriment to competition does introduce a welcome element of flexibility into the system and enables companies to obtain legal certainty in advance which may be important where large investments are required."*
>
> *- DLA Piper*

> *"DG Competition considers that it is a prudent approach to opt for a notification system (proposal 46). However, it is important to appropriately manage the quantity of notifications as undertakings may be tempted to notify large numbers of very minor and non-distorting agreements in order to obtain legal certainty and immunity for*

sanctions.....This would create a very heavy administrative burden on the Authority and prevent it from adopting a pro-active enforcement stance.....”

- European Commission

“Such block exemptions are common in EU competition law and are generally regarded as a good thing; they are particularly important in relation to ‘self-assessment’ procedures.

We support the statement that such block exemption will be subject to a public consultation process, as we consider this fundamental to the adoption of an effective block exemption.”

- The Law Society of Hong Kong

Proposal 48:	The conduct rules should not apply to any undertaking entrusted with the operation of services of general economic interest, such as essential public services of an economic nature.
Proposal 49:	The Chief Executive-in-Council may exclude conduct from the prohibition on anti-competitive conduct if he considers that there are sound reasons of public policy for so doing.

32. Views were diverse as to whether exclusions should be granted on grounds of public interest. Some respondents believed that such exclusions, either in respect of services of general economic interest or for public policy reasons were necessary given that society had objectives other than economic efficiency. However, others felt that the proposals were too vague and left too much power with the authorities.

“The general economic interest exemption appears to be much too widely drawn.....Many ‘public service’ utilities in Hong Kong are de facto private monopolies; even worse they are not subject to public regulatory regimes.....The proposal to exempt all such undertakings in Hong Kong in the

circumstances that there is no proper regulatory oversight would be dangerous, undermine the effectiveness of the competition regime and would be blatantly inequitable to other sectors of the economy that would be subject to the competition rules."

- Mark Williams

"I found this (Proposal 49) problematic. First, the overriding power is very extensive, if not excessive. This defeats the very purpose of establishing a competition law in the first place. Second, ...it does not provide sufficient checks and balances. Third, ...[t]his tends to politicise the whole issue, given that public policy is prone to be subject to bias by the lobbying efforts of special interest groups."

- Catherine Ching-yi Fung

Proposal 50:	The conduct rules should not apply to the Government or statutory bodies. The Government would conduct a review of the issue in the light of actual experience in implementing the competition law.

33. Many respondents took the view that the competition law should apply to the Government and statutory bodies when they were engaging in economic activities, so as to uphold the principle of a level playing-field.

"In order to send a clear and strong signal to the community that the Government is determined to enact a general competition law to curb against anti-competitive conduct, the Government or statutory bodies should not engage or be perceived to engage in anti-competitive conduct. As such, CSL does not see any compelling reasons as to why the Government or statutory bodies should be exempted from the realm of the general competition law."

- CSL Limited

Chapter Four – Conclusions and way forward

The consultation exercise on the proposed major provisions for a competition law drew a good response from various sectors of the community. In addition to submissions from members of the public and interested stakeholders, we received responses from experts and practitioners in competition law, which provided helpful insights into areas such as the institutional set-up for enforcing the law, the arguments for and against merger regulation, and arrangements for making exemptions and exclusions from the application of the law.

2. The feedback received during the consultation period suggests that there is general support for most of the proposals in the consultation paper, although in certain areas respondents have put forward additional proposals ranging from detailed and technical legal points to recommendations on how we might enhance the clarity of the law and explain its likely effect to the public.

3. One of the areas on which many respondents commented was the proposed institutional framework for enforcing the competition law. In this regard, we recognise that we should aim to strike an appropriate balance between efficiency and transparency on the one hand and the need for appropriate checks and balances on the other.

4. Another area that was the subject of considerable comment was the issue of how best to frame the conduct rules – in particular, the level of detail that was required in the law so as to provide a reasonable degree of clarity to business and consumers, whilst allowing the Commission flexibility to enforce the law effectively. We will further consider how to improve our proposals in the light of comments received.

5. Other issues on which respondents expressed concern were the arrangements for allowing private action, the relationship between the competition law and existing sector-specific laws, and the question of exemptions and exclusions. In all these areas, the submissions have provided useful insights that we will take into account when preparing the draft competition law.

6. In his 2007 Policy Address, the Chief Executive said that the Government planned to introduce a Competition Bill into the Legislative Council in the 2008-09 legislative session. We will continue to work towards meeting this target.

7. With the introduction of the Bill, members of the community will have the opportunity to comment on the draft legislation, and to make submissions on the detailed provisions therein. The Government will participate fully in this process, explaining where necessary the rationale behind the specific proposals.

Commerce and Economic Development Bureau
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