

**Competition Policy for Hong Kong SAR**  
**Response from Hong Kong Information Technology Federation**  
**Government Working Group**

The Hong Kong Information Technology Federation (HKITF) is a non-profit association which has the objective of promoting IT business in Hong Kong. HKITF provides a forum for IT-related businesses in Hong Kong to work together, and also to network with international IT companies. Over the years, HKITF has developed into a dynamic and highly respected organization with over 300 members and works closely with the Government to develop Hong Kong's IT industry. In recent years, HKITF has advised the Government in detail on policy matters, including anti-spam, intellectual property rights and IT industry development.

Hong Kong has taken important steps to review its competition policy in relation to regulatory regimes developed around the world. We have received diverse views from members of HKITF on the two fundamental questions – whether we should have competition law in Hong Kong, and if we were to have such law, whether it should be cross-sector or sector specific. With this in mind, we would like to share our general views on this topic, and how we see competition law may impact the high technology sectors.

**The Goals of Competition Law Policy and Enforcement**

We believe that the goal of modern competition policy is to promote the interests of consumers, not the welfare of individual companies that are unable to effectively compete in the global marketplace. The policy should be designed to –

- protect free, fair and contestable markets rather than the welfare of any individual participant in the marketplace.
- generate greater output and variety of choices for consumers at steadily lower costs. Often, achieving this benefit for consumers requires that successful and innovative firms be allowed to grow and capture greater market share at the expense of less efficient firms that fail to innovate or invest in modernizing their infrastructure. Competition policy should not seek to pick winners and losers in this competition between companies, or seek to protect less efficient and less innovative firms from potential failure and exit from the market.
- focus on whether particular conduct is more likely, taking all factors into account, to promote long term efficiency and overall consumer welfare in the form of lower prices, increased output and innovation in products and services.
- be mindful of the nature of the so-called “dynamic” markets. Dynamic markets are often identified by rapid innovation, high sunk costs and low marginal costs, strong network effects, greater reliance on intangible rights (*e.g.*, patents or copyrights) than tangible assets (*e.g.*, warehouses and factories) and, most importantly, intense competition based more on product features than price. Competition in dynamic markets is often “winner-takes-all” in which firms rapidly obtain high market share but nonetheless continually face fierce competitive constraints from new entrants and disruptive innovations in related but distinct markets. Where markets are dynamic in this sense, it is critical that competition regulators intervene only where absolutely necessary and take care not to impose traditional notions of price and output competition on participants.

## **Issues of Particular Importance to High Technology Sectors**

Following the principle that competition law in a dynamic market should protect the interests of consumers, not the less efficient firms that are unable to compete effectively in the market, HKITF would like to highlight below the relationship between intellectual property rights (IPR) and competition. This is particularly important to the high technology sectors as typically firms in this sector would invest in creation of IPRs and rely on the protection offered by IPRs.

- IPR protection encourages competition and innovation - IPRs, by their very nature, sometimes convey rights in their owners that grant some degree of exclusivity as to that right. However, an IPR does not necessarily convey market power. Even where a firm has obtained market power in a product protected by IPR, that is perfectly consistent with the policies and intent of the intellectual property statutes. Market power gained as a result of innovation should be regarded as lawful and beneficial. Competition laws should not call into question the protection afforded to IP rights, given the importance of innovation for economic development, and the shared policy objectives of IP laws and competition rules. The careful protection of IP rights will benefit consumers in the long run by increasing both competition and innovation.
- Respect IPR owner's exclusive rights - The exclusive right of use, including the right to preclude anyone else from using the property, is perhaps the most fundamental right conveyed under the IPR laws. At times, competitors may seek to have competition laws require mandatory licensing of IPRs, for obvious competitive reasons. Competition law policy should strongly discourage those attempts and avoid legislation that facilitates such theories in competitive markets (as opposed to state owned monopoly facilities that might not face any competition for legacy reasons). To the extent that constraints are needed on the exercise of IPRs, they are for the most part provided in the IPR statutes themselves (e.g., through the time limits imposed on patents). This is a sphere in which competition law rarely, if ever, should operate to weaken lawfully granted IPRs.
- Caution against intervention to limit the exercise of IPRs - It is especially important for Hong Kong to be particularly cautious in responding to calls for aggressive competition law intervention to limit the exercise of IPRs. Uncertainty as to when a company may be required to license its IPR will have a chilling effect on innovation, in particular in dynamic markets where firms invest large sunk costs in research and development and take on high risk—based on the expectation that they will be able to amortize the cost of failed efforts and recoup substantial profits on those risks that actually pay off. We definitely want to avoid sending the message to the market that lagging firms are taught that their path to success lies not through aggressive competition but aggressive lobbying of competition authorities.

## **Conclusion**

We hope the above comments would assist the Government in the development of free, fair and contestable markets through wise and carefully selective intervention to prevent anticompetitive conduct while ensuring the long term welfare of Hong Kong consumers.