PCCW

Government Consultation

On the way forward

for

Competition Policy in Hong Kong

Comments

of

PCCW Limited

PCCW Limited ("PCCW") welcomes this opportunity to present its initial views on the future direction of competition policy in Hong Kong. PCCW is a major investor and vigorous competitor in both the telecommunications and broadcasting markets. As such, it operates in the only two sectors subject to full competition law oversight. These comments therefore reflect our rather unique experiences under this regulatory regime.

PCCW is the product of the competitive market in which suppliers vie for the affection (even if short term) of consumers. This has transformed PCCW into an efficient and customer focused organization, to the benefit of users and the Hong Kong economy. Regardless of what happens in this review or via legislation that will not change.

Government policies that reduce barriers to entry generally promote competitive outcomes. Nevertheless, such policies by themselves may not ensure maximum productive and allocative efficiencies, or maximum user benefits. Supplementary policy decisions may also be considered regardless of whether a market is 'large' or 'small'. PCCW congratulates the Competition Policy Review Committee ('CPRC") on its hard work and its 2006 report which helped form the basis of this Consultation Paper.

Competition policy may be seen to be a very broad topic, covering a range of issues including investment, innovation, technology, labor, immigration, education, consumer protection, competition law, etc. In the context of the CPRC report the issue is narrow: the advantages and disadvantages of a competition law. PCCW's comments are therefore made within this narrower context.

PCCW sees the Government's role regarding competition policy to lower entry barriers and to establish/ensure a level playing field in which competitors act out of their self interest to drive investment, innovation, efficiency gains and to maximize benefits to users and the economy. Competition and market forces best achieve these results. To do more than this is likely to be intrusive and counter-productive. Within the context of this consultation "competition law" relates to anti-competitive conduct, abuse of dominant position, and mergers and acquisitions.

It is the case that Hong Kong has a free and open economy with minimal restraints to trade, entry, investment flows or ownership. It is also the case that Hong Kong is in some respects (or sectors) a small market where high levels of efficiency may not be easily obtained. Nevertheless, competitive levels in Hong Kong are generally high and users enjoy substantial benefits without a formal competition law. On the other hand, a large number of other developed markets do have competition legislation (without the disastrous results predicted by some) and many of these are not large markets. Further, allegations have been made as to cartel-like behaviour in some Hong Kong markets.

The state of competition in Hong Kong absent a competition law regime must be considered. User benefits created by competitive markets are high in Hong Kong. Even in the telecommunications market, which is local, user benefits are high. Ten fixed line network and five mobile network operators vigorously compete in a relatively small market. The issue then is, would the introduction of a competition law regime (i.e. a regime requiring complex legal and economic analysis) clearly provide substantially more benefits to users?

Before turning to the specific questions raised in the consultation paper, PCCW would emphasize based on its own experiences operating in the two markets with full competition law provisions the following points:

First, there is absolutely no basis to continue sector specific competition law regulation in the telecommunications market. The telecommunications market is probably the most competitive market in Hong Kong. Indeed, the market is hyper-competitive. Retail rates over the past several years have fallen dramatically. This includes residential and business lines, broadband, mobile and IDD. Penetration rates are very high for both fixed line and wireless services. At the same time, investment levels and service quality remain satisfactory, and the scope of services available to users are equal to or better than in other markets. Most recently, PCCW announced plans to transform Hong Kong into a global leading Wifi city. Structurally, barriers to entry are relatively low, multiple operators have built fixed and wireless networks which reach most households, and interconnection is ensured by the market.

On a forward looking basis, PCCW would challenge any observer to explain why sector specific competition provisions should continue to apply to the telecommunications market. In other words, on what basis are policy makers convinced that such statutory provisions should continue apply to the telecommunications market: what structural or conduct issues are anticipated which would warrant singling out this market? Why should such provisions apply to telecommunications and not other sectors? Is the telecommunications market an example of market failure? Is the telecommunications market the least competitive local market? Are all other markets characterized by substantially falling prices greater than those in telecommunications?

On any analysis, there is no convincing argument for the continuation of sector specific competition regulation for the telecommunications market. PCCW would invite those who would argue that the hyper-competitive competitive telecommunications market should be singled out for this disparate and discriminatory treatment on a going forward basis to share their analysis and crystal balls with the rest of us. In reality, the existing statutory approach is more likely than not a simple result of inertia (i.e. allowing provisions that may have been justified almost a decade ago to remain in effect well past their use-by date). The time has come to remedy this discrimination.

Second, PCCW has not seen any convincing evidence that in general supports a sector-by-sector competition law approach. The clear pre-condition of this approach is that policy makers must know (i.e. looking forward several years) which sectors require competition law oversight and which do not. PCCW would suggest that it is an impossible task to predict if participants in a market will agree to fix prices, restrict the supply of goods to competitors, share markets, or engage in other unlawful practices. Similarly, who can predict if a market participant will obtain a dominant position and thereafter abuse that position? Further, who can predict if a proposed merger would substantially lessen competition in a market? The logic of this is either all sectors are subject to the same competition law provisions or none are. On a global best practices basis, a sector specific competition law approach is simply not defensible.

Third, the possibility of retaining the status quo for telecommunications and broadcasting while enacting a general competition law regime for all other markets should be rejected. The approach must be "all or none" without discrimination. Indeed, an approach that would discriminate against participants in the telecommunications and broadcasting sectors without very good reasons would be irrational and unlawful. Inertia is not a good enough reason. In addition, inconsistencies in statutory language and/or interpretations would be likely if different regimes were to be in force side by side. There could also be questions as to which statute applied.

Fourth, a competition law regime is intended to protect the competitive process, not particular competitors. At the same time, big does not equate to bad and only conduct that is anti-competitive and which "prevents or substantially restricts" competition should be barred. Conduct that is routinely engaged in by market participants in competitive markets (e.g. discounts, bundles, promotions, term contracts, etc) should not be seen as anti-competitive absent substantially more analysis. The economic and legal issues are complex and thus the enactment of any general competition law must be accompanied by a commitment to staff the regulatory authority with sufficient expertise, powers and other resources. Otherwise, the outcome will be the worst possible result: substantial public funds spent on mis-regulation. Absent such a commitment to excellence the possibility of a competition law should not be seriously considered.

Fifth, Hong Kong is a rather unique market. It may be seen to combine small local markets with globally recognized sectors such as trade, finance and business. It may also be seen as generally open and competitive across all sectors. At the same time, the Hong Kong economy (and its various markets) is evolving at it integrates more and more with the Pearl River delta region. This not only may complicate the threshold issue of defining markets, it may also require cross-border cooperation and solutions.

Sixth, there is a relationship between sector specific regulation and competition law. That is, sector specific regulators (e.g. OFTA) are usually created to govern on an "ex ante" basis those markets where a participant likely has market power (e.g. a incumbent in a newly liberalized market) and reliance on competition law (which is generally "ex post") is seen to be insufficient to initially protect the competitive process. However, once the market becomes competitive, and indeed the telecommunications market is probably the most competitive market in Hong Kong,

debate should arise as to whether the regulator is needed at all. That is, can the regulator be sunsetted and instead reliance placed on competition law provisions? PCCW would suggest the time is ripe for that debate as the issues are inter-twined with the question of whether to enact a general competition law.[1]

Questions 1 and 2

PCCW takes no position on whether Hong Kong needs a (new) competition law. However, PCCW would strongly suggest that there is no basis to have a sector specific approach. Such a approach is discriminatory, without factual support and inconsistent with global best practices. Accordingly, all sectors should be subject to the same competition law policy. A regime of different statutes and authorities will invariably create inconsistencies and should be avoided.

Questions 3, 4, 5 and 6

While most anti-competitive conduct might fall within a limited number of specific categories such as those listed, there is no compelling case to bar some types of anti-competitive conduct and not others. The statute (if any) should be drafted broad enough to address any anti-competitive conduct that prevents or substantially restricts competition.

A competition law can be flexible in its implementation. There is nothing inconsistent with a competition policy/law regime which phases-in certain aspects of the law, which places an emphasis on the educational function in the early days of the authority, which directs the authority to consider efficiency concerns (i.e. the small size of the market), or which establishes no 'per se' (i.e. strict liability) test. Of course, guidelines could be written which explain the law, anti-competitive conduct and provide examples.

Question 7

Any new law should provide for exemptions (and waivers). An example of an exemption would be a market which the government has designated to be served by a monopoly. Such markets have historically covered a limited range of goods and services such as utilities (e.g. post, gas, water, electricity) or public transportation. In Hong Kong an example might be the provision of water and sewage services.

Exemptions for size (by employees or revenues) is neither consistent with global best practices nor logical. Nevertheless, it is unlikely that the conduct of a small firm, or perhaps even several small firms acting together in a large market, could prevent or substantially restrict competition.

The statutory test to be used by any new authority is a critical although not directly addressed by the CPRC. One approach is a strict liability or per se test: if a market participant does "x" it violates the competition law. A second approach is a test which after identifying the questionable conduct asks the question of whether the conduct prevents or substantially restricts competition.

[1] There are a few issues (e.g. spectrum) that of course would not be sunsetted and would be allocated to CITB or a much leaner merged TA/BA.

This approach focuses on the actual effect of the conduct. PCCW would very much suggest that the second approach is more suitable to smaller markets and allows the authority greater flexibility in using common sense in looking at market conduct. Other 'tests' may use similar language, for example "substantially lessen competition" or "substantially distort competition"

Waivers should be included in any competition law regime. A waiver system permits the authority to balance and weigh the advantages and disadvantages of specified conduct or a merger, and to conclude that the public interest advantages outweigh the disadvantages. The conduct or merger is therefore allowed per a waiver. Examples of waivers might include fishermen cooperatives and mergers which (on balance) promise substantial efficiency gains or substantial R&D increases.

Questions 8 and 9

Paragraphs 93-106 outline both the options as well as the advantages and disadvantages of the structure of the enforcement entity and process. The essential requirements are speed and appeal rights, and each option reflects a certain balance of those considerations. From PCCW's experience, expeditious access to the appeals process for a de novo review is of critical importance. A specialist tribunal provides these "checks and balances". Simplicity is also a virtue here.

Question 10

There is certainly a substantial attraction to a process in which only the authority can launch formal investigations. This enables complaints to be fully vetted, and protects market participants from the time and cost of responding to frivolous allegations.

Questions 11 and 12

The authority should have formal investigative powers. However, reasonable cause must exist before an investigation is launched in order to not waste the time and money of the authority or market participant, or to harm the market participant's reputation. PCCW would suggest that before an investigation is launched (i.e. before information, data or records are requested from a party), that the authority seek and obtain the approval of the specialist tribunal or designated court. This would add to the checks and balances approach. Civil, not criminal penalties, would be more appropriate especially in the early years of the regime for proven instances of non-cooperation (with warnings perhaps being the first step).

Question 13

It is absolutely essential that confidential information obtained from any party be fully protected. This protects not only the entity being investigated but also any other party that is assisting in that inquiry. Of course, a great deal of information may not be confidential, but that which is should without a doubt be very well protected. The fact that the authority is considering an investigation or is in an early phase of an investigation may also be treated as confidential, otherwise a market participant's reputation may be adversely affected without cause.

Question 14

As emphasized in our initial comments above, under all circumstances, sector specific competition law regulation should be terminated. There are no competition concerns that apply to the very competitive telecommunications and broadcasting sectors that do not apply to other sectors. Thus, all sectors should be subject to the same regime. To do otherwise is discriminatory, without factual or legal basis, and not supportable.

It is noted that the CPRC report suggested that sector specific competition law regulation should continue during the initial period of any general competition law. The CPRC report based this suggestion on three factors: that the general competition law may not be as comprehensive in coverage; that the sector specific regulator had built up a body of procedures and expertise that the new authority would not have; and that the sector specific regulators have detailed knowledge of their sectors.

Upon reflection, these reasons are not convincing. First, the all or none approach is non-discriminatory and must be the right approach. This is recognized in the CPRC report by only suggesting disparate treatment during the 'initial period' of the new law. Second, initial periods are a slippery slope and often last much longer than anticipated. There is no evidence that discriminatory treatment is justified by the facts in the market.

Third, whether the proposed general competition law will have a different scope is unknown and purely speculative. But it is irrational and discriminatory to have without cause one approach for two markets and a different approach for all other markets. The level of 'comprehensiveness' should be the same. Fourth, the existing regulators (i.e. the TA and BA) have in truth limited expertise and would have at best only a small 'head start' on a new authority. Institutionally, the TA and BA have dealt with relatively few competition law cases, and most of them have been overturned on appeal. In reality, the expertise is held by a very limited number of persons who logically would move to the new authority.

Fifth, the expert knowledge required is primarily law and economics. The sector knowledge of the TA and BA are useful but not critical. If sector knowledge was a critical factor, then the global best practice would be a series of sector specific competition regulators. This is obviously not the case as there are about 100 general competition law authorities. Indeed, the logic of sector specific competition law regulation would result in each jurisdiction having perhaps dozens of laws which may not be the same and dozens of authorities with different skill levels and interpretations. An obvious quagmire. In sum, the approach clearly should be all or none, from day one.

Questions 15, 17 and 18

At least in the early years of any competition law the penalties should be civil. The penalty amounts now found in the Telecommunications and Broadcasting Ordinances are reasonable and can be combined with negotiated resolutions, settlement agreements cease and desist orders,

warnings and education campaigns to round out the enforcement regime. Specific authority may also be considered to work with international (e.g. Mainland) authorities on cross-border cases.

Question 16

A leniency programme is a useful aspect of an investigative and enforcement regime. It should be included.

Question 19 and 20

Initially, it may be prudent to not allow parties to make civil claims for damages arising from anti-competitive conduct. In the alternative such civil claims could be limited in amounts via ceilings. This will enhance the acceptance of the regime and emphasize its educational aspects. When dealing with the conduct of SMEs, common sense will likely dictate educational rather than strict enforcement measures.