公民黨
Civic Party

為公為民．香港精神

行政摘要

公民黨就香港特區政府的討論文件的回應

促進自由競爭－保持經濟動力

2007 年 2 月 5 日

1. 公民黨歡迎政府有意考慮爲香港制訂全面的公平競爭法，並認爲這是一個重大的政策改變。

2. 在不同的市場上缺乏競爭，不單令香港的企業甚至消費者亦受害其中。

3. 現行只在電訊及廣播業制訂競爭條例加以規管，而其餘行業均由競爭政策諮詢委員會以行政勸喻的方式來監察的特定行業競爭政策成效不彰。正是由於這些原因，最近有關車用燃油零售市場競爭的研究報告，未能就此作出結論，亦是意料中事。

4. 公民黨提議，政府應盡快向立法會提交全面的公平競爭法條例草案。法例應該一致適用於所有行業。可獲豁免的行業只限於極少數，而獲豁免的情況亦需要有充分的理據支持及明確界定，並且需要經過立法會審核。我們應該採用國際上的最佳做法，並因應香港經濟的特殊需要和特性而制訂有關法例。

5. 就法例的內容，公民黨提出下列的建議。

立法的目的

6. 制訂公平競爭法，先要訂立一套清晰的目標。立法的首要目標，是要爲消費者尋求最大的權益(包括作爲消費者的企業)，以確保市場上公平的競爭。除非有顯著的經濟效益，又或在沒有更合適的方法去保護重大的社會利益時，才可背棄這個原則。

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涵蓋範圍

7. 法例應該適用於各行各業，包括一切政府所進行的經濟活動。而某些特定的行業，在理據充分的情況之下，可以獲得豁免。例如，若果中小型企業之間的協議在有關市場上的競爭影響是微不足道的話，這些協議不會被視爲違反競爭。

司法管轄權

8. 法例應該適用於任何在香港經營商品或服務業的企業，以及在香港市場上有經濟影響力的企業，不論這些企業是在何地註冊，亦不論其反競爭的行爲是在何處出現。

具體內容

9. 濫用市場支配地位－壟斷

如果一家公司透過公平競爭在市場上佔有支配地位，這將被視爲合法的行爲。可是，濫用市場上的支配地位應該被禁絕。香港市場的規模較小，尤其是資本密集的行業，出現高度集中比率的情況難免。因此，我們需要一個嚴謹的市場準則以確定市場地位有否被濫用。與此同時，如果消費者能夠得到合理的利益，則某些行爲可因獲得較大的效益而獲容許。

10. 反競爭協議

只有被證明沒有嚴重妨礙、扭曲或限制市場上的競爭建議，才應予以許可。否則，法例不會容許限制性協議。但操縱價格、串通投標、訂立銷售和生產限額或分配市場則應被法例禁止。

11. 合併活動之監管

若合併活動將不被納入法例範圍，將會危及法例之規管制度的一致性及其成效。因此，我們建議合併活動應同時受法例監管。法例應訂定一個事後的合併通報制度，再配合高營業額/市場佔有率的準則，務求只有最大規模、最集中的合併才會受到監管。這一制度，和現時電訊業行之有效的監管機制相類似。

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懲處

12. 民事制裁

懲處制度應該參照《電訊條例》中的民事制裁部分。

13. 刑事制裁

我們不支持刑事制裁。由於舉證準則的要求較高，加上刑事司法制度比較複雜，所以我們認爲刑事制裁並不合適，效用亦存疑。

14. 剝奪擔任董事的資格

此外，對於鼓吹反競爭行爲的經營手法，設立個人懲處制度是一重要措施。任何導致違反競爭法的人士應失去擔任任何香港公司的董事資格，最高懲罰可達 10 年。

15. 私人訴訟權

我們認爲，私人訴訟權能夠保障每個人參與經濟活動的權利，同時可以補公共執法之不足。理據不足的個案會在訴訟程序的初期被駁回，因此，我們不認爲，私人訴訟權會引發大量的訴訟。我們注意到，六年來從沒有人根據《電訊條例》提出私人訴訟，而根據《廣播條例》申請禁制令的個案亦只有一宗。可是，考慮到各行業在這方面的憂慮，我們建議只限於申請「終止及停止」法令之私人訴訟權被納入法例中。

執法機關

16. 架構與問責

我們應該成立一個獨立運作的香港公平競爭委員會(委員會)。由於政府不時亦有參與不同範疇的經濟活動，因此委員會應該直接向立法會，而非政府問責。

17. 職員

委員會應該設立一個小型的管理委員會，並由一名行政總裁領導。委員會需要聘用 50-60 名職員，其中 15 到 20 名爲律師和經濟學家，以進行調查和分析個案。

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18. 職權
委員會應該被賦予類似現時電訊管理局監管電訊業的獨立權力，以進行調查、裁決和懲處，包括頒布臨時命令要求終止及停止反競爭行爲。

19. 倡導
委員會應該向政府、業界和消費者積極倡議公平競爭。所有政府的監管措施都應該以支持市場公平競爭爲原則。

20. 合作
委員會應獲授權和內地或外國的監管機構，以及國際組織緊密合作，就執法和法律協調等問題進行探討。

21. 調查權力
委員會應有如《電訊條例》所賦予電訊管理局的類似權力。在調查中採取不合作態度或阻礙調查工作均應被列爲刑事罪行。

22. 保密權力
委員會及其職員應負有法定的保密責任。舉報人應受法例保護，以免因此而被解僱。舉報人如因提供資料而受到不公平對待，應擁有索償的權利。

23. 和解與寬限
爲協助調查，委員會應該擁有商討和解的權力。此外，如犯事者能夠提供有用資料，並協助委員會進行調查，委員會應有權判處較輕的刑罰。

24. 上訴
爲增加透明度和獨立性和獲得正當的法律程序的權利，敗訴的一方應享有向由專家組成的獨立上訴委員會上訴的權利。

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25. 結論

公民黨相信，香港值得擁有一個世界級、切合本土經濟需要的公平競爭體制，從而協助本港的公司迎接全球化所帶來的挑戰，鞏固他們在國際間的競爭力。這政策將會加強香港達至亞洲國際都會的目標的能力。制訂公平競爭法實在刻不容緩。政府必須採取果斷行動，改善本地市場的競爭情況，以保障香港未來的經濟發展。

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Executive Summary

Civic Party's Response to the HKSARG Discussion Document

Promoting Competition – Maintaining our Economic Drive

5 February 2007

1. Civic Party welcomes the government's willingness to consider the enactment of a general competition law for Hong Kong and notes that this is a significant policy change.

2. Lack of competition in many markets damages not only Hong Kong businesses, but also the private consumer too.

3. The existing sector specific competition policy, with competition rules in just the telecommunications and broadcasting sector, and administrative exhortation in the rest of the economy overseen by COMPAG is discredited and completely ineffective. The recent investigation into the auto fuel sector was a predictable fiasco for exactly these reasons.

4. Civic Party proposes that the government bring forward a comprehensive competition law bill to the Legislative Council (Legco) as soon as possible. The law should apply equally to all sectors of the economy with any exemptions from the law to be very limited, explicitly stated, and fully justified and subject to the scrutiny of Legco. The law should adopt international best practice but should be tailored to the specific needs and characteristics of the Hong Kong economy.

5. Civic Party makes the following recommendations for the content of the law.

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Objective of the law

6. The competition law should set out a clear set of objectives that it seeks to achieve. The attainment of the maximum consumer welfare (which includes businesses who are consumers) should be the primary objective to be achieved by ensuring that opportunities to compete are safeguarded. Departure from this principle should only be justified by clear evidence of economic efficiency or a vital social objective that cannot be adequately protected in a more appropriate way.

Coverage

7. All sectors of the economy, including all activities of government of an economic nature, should be included within the purview of the law, though specific sectors might be excluded if a rational and convincing case can be made. For example, agreements between small and medium sized enterprises which have no or little effect on competition in the relevant market will not be regarded as anti-competitive.

Jurisdiction

8. The law should apply to any undertakings operating in a Hong Kong market for goods or services or having economic effect on a Hong Kong market, whatever the legal domicile of the undertaking or wherever the complained act is carried out.

Substantive Content

9. Abuse of dominance – monopolies

Attaining a dominant position in a market would be lawful if achieved by fair, competitive means. However, abuse of a dominant position should be outlawed. We accept that a high market threshold test is appropriate for dominance in Hong Kong markets given its small size and the inevitability of high concentrations ratios, especially in capital intensive industries. Some conduct might be subject to a greater efficiency defence where it could be demonstrated that consumers receive a fair share of the efficiency gain.

10. Anti-competitive agreements

Restrictive agreements would only be allowed if it can be shown they did not substantially prevent, distort or restrict competition save where there are strong reasons to exempt. However, price fixing, bid-rigging, market or production limitation or allocation of market share should be prohibited.

11. Mergers

Merger control should be included as not having this provision would endanger the coherence and effectiveness of the system. There should be an ex post merger notification system with a high turnover/market threshold test, so that only the largest and most concentrative mergers would be caught. This is similar to the well-functioning system already in operation in the telecommunication sector.

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Penalties

12. Civil Sanctions

The penalty system should be based on civil sanctions similar those in the Telecommunication Ordinance.

13. Criminal Sanctions

We do not support criminal sanctions as this would be inappropriate and ineffective given the difficulties of higher standards of proof and the additional complexity of the criminal justice system.

14. Director Disqualification

Additionally, it is vital to have individual penalties against errant management who promote anti-competitive practices. Such persons should be subject to disqualification as a director of any Hong Kong company for a period of up to 10 years.

15. Private rights of action

We think that private rights of action protect individual rights to participate in economic activity and also supplement public enforcement. We do not believe that they would create a large number of new cases and unmeritorious cases can be dismissed at an early stage of proceedings. We note that there has not been a single private rights case under the Telecommunications Ordinance in 6 years and only one case for injunctive relief under the Broadcasting Ordinance. However, in view of the concerns of various sectors on this issue, we propose that private rights of action be included in the new law but the relief be limited to "cease and desist" orders.

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Enforcement Agency

16. Structure and Accountability

A new Hong Kong Competition Commission (the Commission) should be established as an independent body accountable to the Legislative Council, not to government, given the close involvement of the administration in many aspects of economic activity.

17. Personnel

The Commission should have a small management board headed by a Chief Executive. The commission should have a staff of 50-60, with 15 to 20 lawyers and economists to carry out investigations and case analysis.

18. Remit and Powers

The Commission should have sole power to investigate, adjudicate and sanction, including the ability to issue interim orders to cease and desist from anticompetitive conduct, similar to the powers currently provided to OFTA in the telecommunications sector.

19. Advocacy

The Commission should have a strong competition advocacy role to government, industry and consumers. All government regulatory decisions should have to pass pro-competition criteria.

20. Collaboration

The Commission should have a mandate to work closely with mainland and foreign competition agencies and international bodies in enforcement and harmonization issues.

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21. Investigatory powers

The Commission should have similar powers to those given to OFTA in the existing telecommunications Ordinance. Failure to co-operate or to obstruct investigations should be a crime.

22. Confidentiality

The Commission and its staff should have a statutory duty of confidentiality and also "whistle blowers" should have statutory protection from dismissal and a right to compensation if prejudiced by providing such information.

23. Settlements and Leniency

To assist investigations, the Commission should have the power to negotiate settlements and to apply lesser penalties where law breakers provide useful information and cooperate with the Commission in its investigations.

24. Appeals

To enhance transparency, independence and rights to due process, aggrieved parties should have a right of appeal to an independent specialist appeal tribunal, as currently provided in the telecommunications sector.

Conclusion

25. The Civic Party believes that Hong Kong deserves a world-class competition system tailored to the individual needs of the domestic economy in order to strengthen our local firms to better match the increasing challenge of globalization and international competitive forces. Such a policy will enhance Hong Kong's ability attain its goal of remaining one of Asia's World Cities. Action on this issue is long overdue. Government must now act to improve competitive conditions in the domestic market and so safeguard our economic future.

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Civic Party Response to the Government's Discussion Document Promoting Competition-Maintaining our Economic Drive

5 February 2007

Introduction

The Civic Party welcomes the opportunity to respond to the government's discussion document on the vitally important issue of the swift introduction of a general competition law in Hong Kong. This measure is long over due, having been recommended by the Consumer Council as long ago as 1996. The Civic Party is pleased to note that the government has now seen the necessity of addressing this issue with an open mind and is prepared to contemplate the adoption of a new law to promote a fairer and more open domestic economy that should improve economic efficiency and prohibit egregious unfair trade practices.

The Civic Party is strongly in favour of the adoption of a general competition law that includes all sectors of the economy, has as few exemptions as possible with effective sanctions sufficient to deter breaches of the law. The new ordinance must be fairly administered and enforced by an independent competition agency with appropriate investigatory powers whilst ensuring due process and a judicial appeal.

This response will seek to answer the questions posed by the discussion document sequentially but will also address issues omitted from the government's paper.

1. Does Hong Kong need a new competition law?

The clear answer is yes. Despite government's assertions to the contrary, over many years, it is clear to objective observers that Hong Kong's traditional free trade and laissez-faire domestic economic policy does not guarantee that the non-traded sector of the domestic economy is free from competition problems. Anti-competitive structures, barriers to entry to various markets, abuses of the dominant economic positions as well as active cartels and other restrictions on competition in the economy are extensive and well known.

Assertions that government economic activity is unimportant and that regulatory activity is benign are fallacious. Government is intimately concerned with many economic activities principally as the ultimate monopoly owner and supplier of all

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land in HKSAR. This fundamental economic power creates grave and continuing conflicts of interest over the timing and quantity of leasehold land sales, caused by a predominant desire to maximize revenue above all other considerations. Questions of appropriate land use in the greater public interest are subsumed by the need to maintain high land prices which perfectly align with the interests of the most powerful real estate developers and the banks that finance land purchase through mortgage lending. This neat alignment seriously distorts both revenue-raising decisions and also distorts public spending priorities especially on public transport infrastructure projects, leading to over provision of roads and bridges and a lack of investment in rail transport. Severe adverse environmental and social consequences also follow.

The need to maintain high land prices for the sake of revenue and to maintain confidence in the real estate market is also at the root of many distortions of the domestic economy and serves to ensure that higher than necessary prices for all goods and services in Hong Kong are charged by vendors. Government land policy needs to be addressed as part of an over all pro-competitiveness strategy for Hong Kong as a whole.

Other aspects of government policy also distort the operation of the market in many cases where licences are required, for example bus, taxis, rail, ferry and even funeral services. Certain liberal professions, acting under statutory authority, set restrictive entry requirements to shield existing members from greater competition, often under the guise of the maintenance of professional standards but often as an effective means to prevent increased competition in the provision of services. This may then ensure higher than competitive prices for professional services.

In the energy markets, the existing scheme of control for electricity supply effectively prevents a market in electricity being created due to the impossibility of breaking into the two private territorial monopolies currently in existence. Piped gas is an unregulated private monopoly with no possibility of a market being created without statutory intervention to allow the creation of a competitive market. The education and health services market is dominated by government provided services with charitable or private operators dependent on government for land grants. Government provided trade services such a commercial exhibitions, export documentation and the airport are government owned or granted monopolies. The seaport is a tight oligopoly with the highest terminal handling charges in the world. Thus, many vital aspects of the domestic economy are profoundly influenced by

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government direct ownership, licencing or policy prescriptions and many sectors of the economy often do not functions as 'markets' at all.

In the private sector, large scale commercial activity is dominated by a small number of family owned conglomerates that control substantial parts of divergent economic sectors with webs of interconnected subsidiary companies, that often prefer to contract with each other, rather than contract-out business to 'outside' firms. Various sectors of the economy are either absolute private monopolies or characterized by small numbers of incumbents with very high market shares. In the retail sector, access to appropriate numbers of sites with the good locations is often blocked by real estate developers, who often have extensive retail interests with high market shares. These structural phenomena have the effect of perpetuating existing economic arrangements and effectively prevent new market entrants from accessing the market at all. These existing market structures in the private sector have profound competition implications and their scale, scope and ubiquity may well be unique to Hong Kong. This analysis suggests that existing and future market structures cannot be ignored if a credible pro-competition policy is to be created.

Where new entrants do establish themselves, dominant firms will seek to eradicate competitors by use of their market power to intimidate potential suppliers of the new entrant to withhold supplies. Alternatively, the incumbent might selectively reduce prices to below cost levels to drive the upstart competitor into insolvency. Once elimination of the competitor has been achieved, the incumbent raises prices to pre-competitive levels and innovative services introduced to thwart the newcomer are promptly withdrawn. Innovation and change in the market is thereby suppressed.

Cartels that reduce output, raise prices to supra competitive levels, allocate contracts, fix bids or collude to invalidate open tenders are common in Hong Kong. A number of sectors are notorious in this respect. It is highly likely that cartels exist in the provision of building repair and maintenance services in both the public and private sectors. Public sector infrastructure projects are also probably compromised by collusive conduct, so inflating public spending on such projects and providing exorbitant profits to firms involved. Cartels are also suspected to operate in many other sectors of the economy and foreign operated cartels, such as in the electrical equipment sector and provision of vitamins, uncovered by overseas competition agencies, clearly operated in Hong Kong in the past. They may still be doing so now, quite legally, in the absence of any local prohibition. Government impotence

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effectively condones theft from Hong Kong businesses and domestic consumers, who are exploited in this fashion.

It is clear that Hong Kong is riddled with monopolies, cartels and restrictive practices in the domestic non-tradable sector of the economy to the detriment of the long term competitiveness of Hong Kong as a whole. Such egregious practices are illegal in all developed economies because they hinder the ability of the society to compete in the globalizing economy. Hong Kong must now act to open the domestic economy to further competitive pressure, so as to ensure that it is not enfeebled as the forces of globalization increasingly pressurize economies to leverage their particular advantages.

Arguments that as a small and open economy Hong Kong is necessarily competitive are fallacious and indeed recent academic research shows that whilst higher concentration ratios are inevitable in small isolated economies, this does not mean competition law is unnecessary and ineffective. Rather, the clear conclusion is that an appropriate and economy-specific competition law is, in fact, more important is such small economies than in larger ones. However, the law must be specifically tailored to deal with particular local conditions.

Competition problems do exist in Hong Kong. Current government policy via COMPAG lacks credibility as COMPAG has no legally enforceable standards to condemn anti-competitive conduct or structures, no mechanism to investigate complaints – the fiasco of the outsourced 2005 auto fuel study reinforces the lack of credibility of the existing arrangements – and no powers of sanction. COMPAG has no investigatory or analytical competence and the mechanism is wholly ineffective in dealing with existing or future competition problems. Hong Kong has needed a general competition law for many years and one should be legislated with all possible expedition.

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 to purely administrative oversight?

No competition law system anywhere in the world seeks to address competition problems by selectively applying the law to some commercial activities but not to others. This is true of both large and small economies. Countries do exempt certain sectors for economic or political reasons, for example defence industries or agriculture (in the EU). Sometimes a more intrusive regulatory, as opposed to a pure competition system, is deemed necessary in certain utility sectors, for example a private sector water supply industry, where the nature of the activity makes effectively competitive markets impossible to achieve. Even here, sector regulators have pro-competition powers to be used exclusively or concurrently with the competition agency. Usually a pro-competition policy is given primacy, unless there is an overwhelming countervailing argument on economic efficiency or public interest grounds, with suitable safeguards of public benefit, that justify a derogation from a pro-competition approach.

Currently Hong Kong has a sector specific pro-competition system in telecommunications and broadcasting but the rest of the economy is exempt and subject only to the ineffective and discredited COMPAG administrative system. Continuing the statues quo is unacceptable, even to the government's own Competition Policy Review Committee.

Continuation of the COMPAG/sector-specific system is illogical, unworkable and unjust. There is no rationale as to why some industries are subject to pro-competition rules and some are not. Political whim or prejudice as to which sectors to target would be the only yardstick to use in determining which industries were brought within the new statutory net and which would escape and so be allowed to continue to indulge in anti-competitive practices. Thus, the only defensible position is to have a general competition law with the minimal exemptions.

Further, all government economic decisions and regulatory schemes should be obliged to take pro-competition measures into account when exercising regulatory functions and to explain convincingly the reasons for any deviation from that objective. A recent example of regulatory failure was the decision to grant additional capacity to

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the largest funeral services operator as it had offered the highest bid in a tender for the use of funeral home facilities owned by government. Highest government revenue trumped considerations of market competition. Flawed decision such as these disadvantages the Hong Kong's economy as a whole, as consumer welfare is reduced, not enhanced. In such cases, government needs to balance the narrow interest of highest revenue against the enhancement of market power of the incumbent, the overall consumer welfare and any countervailing benefits from economies of scale or scope to arrive at a defensible decision.

3. Should the scope of any new competition law cover only specific types of anticompetitive conduct or should it also include the regulation of market structures including monopolies and mergers and acquisitions?

To answer this question, one must first consider what is the aim or objective of a competition policy for Hong Kong. Countries have wide variations in their rationales for adopting a pro-market, pro-competition system. Some wish to create single internal markets; some seek to ensure equality of economic opportunities; some seek fair play or equity as between large and small scale producers; some have special measures to protect small and medium sized enterprises; some wish to promote regional economic development and others wish to dismantle the legacy of state planning and improve the competitiveness of their economies overall by exposing formerly protected industries to the rigor of competition.

Thus, it is vital at the outset to decide what a Hong Kong law will seek to achieve?

Most orthodox economists now conclude that the principal object of a competition law should be the enhancement of 'consumer welfare', that is, to provide the opportunity for a market to be created where none exists and then to ensure that the process of competition is unimpeded. Rivalry between market players ensures that consumers (both businesses and private individuals) can reap the benefits of competition. The benefits usually expected are lowest prices and greater choice of products or services, which classically yield most 'consumer welfare'.

Hong Kong should seek to achieve this goal, which will best ensure that the Hong Kong economy, as a whole, is equipped to compete in the global economy. Barriers to entry to industries should be removed, wherever possible, so as to allow free entry and

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exit. In order to achieve this open market, it is necessary for all aspects of the economic picture to be taken into account by a new competition agency. Competition is an economic concept and consequently, the economy must be viewed holistically if one is to achieve the paramount aim of optimal economic welfare.

Thus, any competition law should be general and subject to only minimal exemptions of sectors, structures or conduct. Logically existing monopoly duopoly or oligopoly structures must be subject to review to ensure that barriers to entry erected by incumbents or regulatory regimes are lowered, so as to allow new competitors to have access to the market concerned. Prohibitory statutory schemes should be rigorously examined to see if such restrictions are still justified. Closely held conglomerate companies are ubiquitous in Hong Kong and they may well have substantial anti-competitive effects with the ability to erect insurmountable barriers to entry to potential market entrants. These structures may be unique to Hong Kong and so deserve special consideration as to their effect on competition in the domestic economy.

Hard core cartels are universally condemned as they provide no benefit, save to the conspirators themselves and should be made unlawful. If that is done, the logical and rational choice of erstwhile apparent competitors would be to combine to form a monopoly, which would be lawful. An anti-competitive outcome is thus ensured and the aim of enhancing competition defeated.

Consequently, merger control is required to scrutinize excessively concentrative mergers between actual or potential rivals that would create or enhance a position of market power. Exercise of such power might be detrimental to a competitive market. However, vertical integration is generally not a significant concern in most merger cases.

We propose that the regime should be a light touch ex post system, such as is currently in force in the telecommunications sector. An existing or combined market share of perhaps 50-60% should be the threshold for examination, given that high concentration ratios are likely in a small economy such as Hong Kong. Thus, very few acquisitions would fall within the compliance net. Efficiency defences should also be available.

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If market structure is to be considered in merger cases, it is logical that in extreme cases, existing market structures that substantially inhibit or distort or prevent competition should also be subject to scrutiny. We propose that such powers should only be used in the last resort after all behavioral remedies have been exhausted. If structural divestiture is necessary, the specific approval of the Legislative Council should be required after full consideration of a market assessment report by the competition commission. This would ensure that that case for such a draconian remedy was clearly and publicly made out.

Whatever the political protests from outraged vested interests, the government's clear public duty lies in the enactment of a comprehensive competition law that that has jurisdiction over both conduct and structure. This is the case in the telecommunications sector as regards mergers. Any deviation from such a logical and consistent policy would undermine the credibility and fairness of a new general competition system and maintain a sectoral regime with telecommunications having merger control but other industries would be exempt.

As merger control provisions and structural remedies are the most complex and contentious issues, we propose that such provisions should be included in the new law but they might be held in suspense for a period of say, two years from the entering into force of the Ordinance and would only be bought into effect on the recommendation of the new competition commission and after a specific resolution of the Legislative Council.

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

5. **Should a new competitive 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?**

Competition law is directed to remedy deficiencies in markets, so as to allow the competitive mechanism to function. As a result it is both unwise and impractical to specify, in very precise legal terminology the range of conduct or situations that might be inimical to competition. Consequently competition statutes world-wide often provide broad legislative wording in terms of activities that damage competition.
The prohibitions are explained by way of non-exclusive examples in the legislation supplemented by detailed guidance issued by the competition agency that can more fully take into account the characteristics of the local market.

Consequently, it is inappropriate to enunciate in legislation a restrictive list of anticompetitive conduct. The benefit of legal certainty implicit in this approach is outweighed by the negative effect on the proper implementation of a pro-competitive policy; where situations may arise in the future that do not neatly fall into the precise categories set out in the law. This might mean that activities or situations that have very anti-competitive effects might not be caught by the legislation, so subverting its pro-competitive intent. This trap should be avoided.

However, certain categories of competition 'offense' are often prohibited per se. In particular, hard-core cartel offences – price fixing, bid-rigging, market allocation, sales and production quotas, joint boycotts are particularly pernicious and are usually automatically unlawful.

Other types of restrictive agreement may well be exempt if there are countervailing benefits that offset the anticompetitive effect of the agreement or concern agreement or arrangements that relate to the relationship between employers and workers, principal and agent and contractor and sub-contractor.

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Further, agreements that constitute contractual restrictions that are reasonable and proportionate to obtaining a legitimate purpose or apply in regulated markets, or are de minimis and have no appreciable effect on competition in the relevant market, may also not be exempted from the application of a competition law.

Additionally, whole categories of agreement may be exempted via 'block exemptions' such as those concerning research and development, joint ventures or distribution arrangements in certain product lines (for example cars or luxury goods). Patent licencing also has to be considered in this context too.

As regards abuse of a dominant position, the concern here is the use of market power either solely (or possibly collectively) by an undertaking (which can be broadly defined as a firm, association of firms or public sector bodies exercising a commercial function as opposed to a regulatory one. Dominance has been defined by the European court of justice as:

> *'a position of economic strength....[enabling an undertaking] to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers' – United Brands v Commission, Case 27/76 [1978] ECR 207.*

Prevention of competition is inextricably linked to independent action. Added to this must be an assessment of market power in relation to a specific, defined market. This is a complex task of economic analysis including definition (by economic tests) of the product market, the geographical market and the temporal component of the market in which the undertaking is potentially dominant. Size of market share and barriers to entry (technological, legal, economic or physical) are all part of the analytical process to discover dominance, as true monopoly is rare.

Once dominance is established, abuse has to occur. Two types are generally recognized exploitative (excessive prices/terms of supply) and anti-competitive/exclusionary practices - harming the competitive structure of the market, contractual tie-ins, refusals to supply or agree use of essential facilities, elimination of competitors by, for example, selective price cutting and price discrimination. Usually there are no exemptions for proven abuse of dominance. However, this strict application of the abuse doctrine is ameliorated under EU

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jurisprudence by the concepts of objective justification and proportionality; both of these concepts are complex and of uncertain legal extent. A further perplexing and complex issue is the interface of the exploitation of legitimate intellectual property rights that might shade into an abuse of dominance.

Thus, the nature of the prohibition of abuse of dominance under a competition law is a complex and technical issue but if the object of the law is to protect the competitive process, restrictive definitions should not be adopted in any new Ordinance in Hong Kong; otherwise the very purpose of the law would be compromised from the outset.

A further note of caution on adopting a 'formulistic' or prohibited conduct/list approach is appropriate here. Currently, the EU is in the process of reforming its Article 82 abuse of dominance provisions as part of a general 'modernization' of the structure and administration of EU competition law. The EU proposes to move toward a more economics-focused approach (as has the United States), rather than continuing to use the existing formulistic/legalistic methodology. The debate is ongoing but Hong Kong must be careful not to adopt out of date provisions, when the leading competition jurisdictions have moved on from a prohibited list approach to a newer model of competition regulation, better suited to the fast-moving and globalizing economy of today. It is essential that Hong Kong must not be saddled with an out of date legal model. Hong Kong must adopt a model that fits it particular economic circumstances. This issue is further discussed below.

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.

One needs to separate issues of restrictive agreements and abuse of dominance.

In relation to restrictive agreements between competitors, EU law, for example, requires that the agreement 'must have as its 'object or effect the prevention, restriction or distortion of competition' – Article 81 (1) EC Treaty. This provision requires proof of the object or effect of conduct and, in the case of hard core cartel practices, the object or effect can easily be inferred from the conduct of participants and the effect it has on the market. Price fixing or big rigging, for example, can have

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no other logical or credible explanation other than exploitation and are not exempted by Article 81 (3), see below. In situations where collusive conduct can have an explanation other than subverting competition, no breach of the law will occur. Thus, it would be preferable to have the 'object or effect' doctrine included, rather than blanket prohibitions, which might, inadvertently, condemn conduct that was not anti-competitive at all.

As regards abuse of dominance, current thinking is to move away from legal formulism towards a more economics-based approach, which is the norm in the United States. Also much higher market shares, as a preliminary threshold in assessing dominance, is suggested by reformers, of at least 50% of the relevant market. The cumulative effect of greater economic analysis and higher thresholds is to reduce the number of firms that are caught by 'dominance' provisions and to excuse many previously condemned types of conduct that are now seen as actually pro rather than ant-competitive. However, some academics and others believe that a move to a too economics-based approach is impractical and just as fraught with the possibility of error as too great a reliance on a strict legal-form based system. Part of the problem as to which approach to adopt stems from a lack of clarity in the objectives that the law seeks to achieve – consumer welfare alone or some other socio-political objective, such as creation of an integrated market or ensuring that competition is possible even in markets that might provide more efficient short term economic efficiencies from a smaller number of giant players.

Hong Kong must take account of these current debates in order to ensure that the government, industry and the public are clear as to what the law seeks to achieve. If a clear decision on objectives is made the choice of a formulistic or economics approach becomes clearer. It should be noted that it is commonly accepted that an economics-base approach would tolerate higher concentration ratios, smaller numbers of dominant firms and approve of the elimination inefficient competitors. However, a hidden danger is the possibility that the market may then become near impossible for new competitors to emerge due to various types of barriers to entry that might be reinforced by such a policy; the benefit of lower prices today may lead to higher prices and the entrenchment of dominant firms for prolonged periods in the future.

It should be noted that an economics based approach involves extensive economic analysis and access to accurate market and price information may be difficult or impossible to obtain or to interpret, as economists genuinely disagree about which

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theory best enhances consumer welfare. Anti-monopoly investigations would take longer and be much more expensive and difficult to undertake, than if a form-based system was adopted. Also, complainants would be at a major disadvantage in an economics based system given information asymmetries and the financial power of dominant incumbents. Critics say that the economics approach is neither intellectually convincing nor effective in ensuring actively competitive markets.

On the other hand, a formulistic approach (as proposed by the CPRC) might be simpler to operate for the agency, give more legal certainty, and allow easier case handling and more opportunities for competitors to complain. But it could also unnecessarily restrict the ordinary operations of efficient dominant firms by penalizing, almost automatically, many commercial practices that might in fact be pro-competitive and consumer-welfare enhancing. This would provide comfort to inefficient competitors and paradoxically lead to less competition, not more, by inhibiting efficient dominant firms for being aggressive price cutters.

Again this paradox is overcome if a clear view is taken of the objectives the law seeks to achieve as well as assessing the nature of existing and potential future competition problems, for example, greater economic integration with the mainland and the activities of huge mainland firms in the Hong Kong market.

These crucial issues need to be debated fully. A correct assessment of the function of the law and the future economic environment is of crucial importance to Hong Kong's economic success. Decisions must be made on the basis on the best available evidence and a judgment made on the most appropriate model of legislation to adopt.

We propose that a workable solution to this conundrum. The new law should adopt a form- based system that would indicate a non-exclusive list those types of conduct that might be sanctionable but with an exempting provision which allowed conduct that could be shown, on the balance of probabilities, to be consumer welfare enhancing and did not exclude or substantially prevent competition from occurring by the entry of effective new competitors. Guidelines issued by the new competition commission would set out a relatively high threshold test for dominance and indication a sound method of economic assessment of dominance and the interpretation of the basis upon which judgments would be made as to whether conduct amounted to unlawful conduct or not. In this way a middle course might be steered between the simplicities of a form-based approach with its inherent danger, of

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unnecessarily condemning aggressive pro-competitive conduct, and an excessively economics-heavy approach that would be more costly, difficult to administer and potentially unsatisfactory in the practical world of the Hong Kong economy. This course would provide sufficient legal certainty as well as granting the competition agency adequate discretion to allow competitive behavior that did not unnecessarily damage competitive markets.

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?

Again it is necessary to distinguish between restrictive agreements and abuse of dominance. In respect of agreements, in EU law for example, Article 81(3) the prohibition on agreements that restrict or distort competition may be lawful if they satisfy two positive and two negative conditions, namely:

- the agreement **must** improve the production or distribution of goods or services or promote technical or economic progress
- consumers **must** receive a fair share of the resulting benefit
- the agreement **must not** contain unnecessary restrictions
- the agreement **must not** substantially eliminate competition in the relevant market.

Previously individual agreements could be notified to the European Commission for individual exemption but this was abolished in 2004. Such a notification system (that has been adopted by Singapore in its new competition law) was found to be very wasteful of agency resources. It also distracted the agency from pursuing more egregious anti-competitive conduct in that thousands of inoffensive agreements were notified by cautious lawyers which obliged the agency to process them. The UK and the EU abolished this system for these reasons. The lessening of the 'comfort zone' of lawyers and commercial clients was offset by more effective and efficient use of agency resources and the issuance of more detailed guidance and the wider use of 'block exemptions' for vertical agreements (distribution, exclusive purchasing, franchise, specialization). Updated block exemptions for research and development agreements, and technology transfer agreements also aided lawyers to proffer accurate advice. Special provisions exempting the activities of small and medium sized firms

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and de minimis provisions, also allowed lawyers to advise such firms on the legality of their restrictive agreements without the need to burden the enforcement authorities.

Hong Kong must not fall into the trap of wasting limited agency resources and must not adopt an out of date individual exemption system that will distract the new competition agency and provide little tangible benefit to the Hong Kong economy. The reformed EU system should be adopted. Singapore has made a mistake in copying an out of date and overly intrusive and bureaucratic system that the EU has now been repealed.

The abuse of dominance provisions, suggested above, adopt a middle course between form and a wholly economics-driven approach.

Turning to the question of 'natural monopolies', absolute exemption of actual or near perfect monopolies in Hong Kong such as posts, public transport, piped gas, electricity, water and sewerage services, and trade documentation services needs careful consideration on economic, legal and political grounds. The root question to be answered is - what substantial public interest is served by exempting such industries from the normal operation of market forces and the corrective effect of a general and neutral competition statute?

Whether to grant exemption from the law is a very serious matter especially when there is no specific and pro-competition regulatory scheme in operation as a substitute for the effect of the general competition law or to act as a proxy for a competitive market. This is particularly so where the monopoly is in private hands, not the public sector. At least public sector economic undertakings are subject to political accountability via Legislative Council but private firms are accountable only to their shareholders who naturally desire the highest possible return on their investment and a monopoly is the perfect way to achieve this.

In Hong Kong, the piped gas supply industry has no economic regulatory oversight. Electricity has the voluntary and ineffective Scheme of Control system that is not a pro-competition regime. By contrast, in the UK, for example, all utilities are subject to sector regulators that have a mandate to apply a pro-competition legal regime wherever possible and to prevent abuses of dominance.

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Hong Kong must not exempt monopolies without clear objective reasons for doing so in the public interest and utilities should be subject to pro-market, competition driven systems which also ensure reliability of supply.

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

Hong Kong is a small jurisdiction with little capacity to operate a general competition law system. Experience in other countries clearly demonstrates in a small market economy it is essential to ensure that best use is made of scarce qualified human resources, which is the element most vital to ensure the successful implementation of a new competition law regime. Fortunately, Hong Kong government has abundant financial resources and so, if suitably skilled personnel cannot be sourced locally, overseas talent can be imported, whilst locally trained staff are developed. However, it should be noted that the availability of such specialized expertise is limited.

Economies of scale and scope also apply and militate toward a single agency. This approach ensures that institutional knowledge is developed and retained, as is the specialized skill of appropriate case handling. These benefits only accrue as a result of a sufficient number of cases being processed by the same team of people. All sectors of the economy, including the new 'communications' sector (telecommunications and broadcasting) should be under the jurisdiction of a single authority, so as to reap the benefits and consistent investigation and adjudication. The existing OFTA competition branch should form the core of the new competition agency. This structure also avoids the vices of institutional infighting over jurisdiction or passing of responsibility for difficult or contentious cases. A one stop shop is by far the best option.

The single agency model incorporates both investigation and primary adjudication functions including power to order interim and final relief (cease and desist), to levy fines and director disqualification orders. This model has the benefit of speedy

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decision making, consistent application of remedies and lower cost. Perceived fairness in the process of investigation and adjudication is particularly important in a newly established authority to ensure public confidence in the new system.

Concerns about abuse of power or lack of transparency or deficiencies in due process can be overcome with appropriate institutional design and internal working procedures. This is the model currently adopted in both the current telecommunications and broadcasting regimes. It has been in operation for many years without any significant complaint of arbitrary use of power or abuse of process or the excessive imposition of penalties. OFTA has not been an oppressive bureaucratic engine. The results of OTFA's competition work are positive. A vibrant competitive sector has been created and hugely benefited Hong Kong businesses and consumers when compared with the vertically integrated monopoly that HK Telecom enjoyed prior to market opening a decade ago.

A competition tribunal would also be needed and should have exclusive jurisdiction to hear appeals on fact or law from decisions of the agency. The tribunal would also hear and determine stand alone or 'follow on' private action (ones brought by private parties after the agency had completed an investigation and found a breach of the law) limited to injunction/cease and desist orders. Appeal from the Competition Tribunal would be to the Court of Appeal on a point of law, with further appeal possible to the Court of Final Appeal.

The alternative model is a prosecutorial system, whereby the agency is an investigator/prosecutor that receives complaints, investigates them and then prosecutes cases before a competition tribunal or the ordinary courts. This is neither appropriate nor desirable for the following reasons. Such a system would involve greater cost and delay; necessitate a much larger cohort of agency lawyers and the involvement of outside advocates. This would inevitably increase case handling costs and also potentially expose condemned firms to a greater liability to pay the costs of the prosecution as well as any fine. This would also involve greater delay in disposing of cases or obtaining urgent interim relief. Using the ordinary courts would be disastrous as this would merely increase the burden of the civil courts, where delays can be long. A further major problem is that none of the current Hong Kong judiciary has any experience in adjudicating competition law disputes. These cases are highly technical and involve weighing economic, rather than legal arguments in many cases. This is alien to traditionally trained common lawyers and judges.

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Thus, we propose the adoption of a single agency model with full investigatory and adjudicatory powers, subject to appropriate institutional design and clear and public procedures for case handling. A substantially second best alternative would be to give investigation and prosecutorial power to the agency to bring cases to a specialist and expert competition tribunal. Use of the ordinary courts as the primary tribunal is inappropriate.

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?

The architecture of the enforcement agency must firstly ensure its independence, both from government and from vested interests. For reasons of transparency and to ensure maximum integrity. The current OFTA model of a single person as Director General of Telecommunications, who alone constitutes the Telecommunications Authority and has sole authority to implement the Ordinance including the competition provisions should not be followed. Collective responsibility from an 'active enforcement' policy and for major investigatory, adjudicatory and penalty decisions is to be preferred to the concentration of power in a single individual. Concentrating substantial power over the Hong Kong economy in the hands of a single individual would be inappropriate and risky.

Consequently, we proposed that the agency be in the form of a statutory authority, independent of the civil service and government but funded from general public revenue. Crucially the agency should be accountable to the Legislative Council, not to a government bureau. This ensures its independence, given that government itself has substantial economic interests and the avoidance of even a suggestion of a conflict of interest is to the better choice.

Overall management, strategic direction and important investigatory, adjudicatory and penalty decisions should be entrusted to a corporate board of 5 persons, who are independent of government and industry but who must have a competition law or competition/regulatory or economics or industrial organization background. A Chief Executive Officer (CEO) who would head the agency and the corporate board.

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Adequate resources are essential if the agency is to function effectively. An establishment of 50-60 staff, including the board, would be required with approximately 15-20 lawyers and 15-20 economists. Not all these would be new posts as some current staff from the OFTA competition branch and other relevant government departments might be transferred. The size of the suggested establishment is derived from international comparisons. For example, the Irish Competition Authority has a staff of 46, the country has 4 million people with GDP per capita of US$41,000 (PPP); Israel's competition authority has 68 employees and the country has a population of 6.3 million and GDP of US$25,000 per capita and the newly established Singapore Competition Authority similar staffing levels pro rata, with 4.4million population with a GDP per capita of US$28,500.

Other matters need to be mentioned here:

First, the agency must have a strong competition advocacy role to government, industry and the public. It should have a statutory entitlement to be consulted on all regulatory/licencing issues decided by government that could have a competition effect. The agency advice to government on such matters should be made public with a public government explanation should be given if the advice is not heeded. Advocacy to society generally, including industrial sectors, is necessary to explain what the law can and cannot do; this is essential to gain public and industry confidence and to manage expectations.

Second, the agency should have jurisdiction over any activity that has an anticompetitive effect on a market in Hong Kong, irrespective of the location or domicile of the malefactor. This is common practice internationally. Without this provision international cartels could continue to prey on Hong Kong consumers. The abuse of dominance definition should follow the Singapore example given the structural similarities between the two economies. Dominance in a Hong Kong market or dominance 'elsewhere' should be sanctionable given that most of Hong Kong's goods are imported. Dominance in a regional or national market out of Hong Kong could have important anticompetitive effects in Hong Kong. There might be complications of enforcement but such a power is justified and needed.

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Third, the agency should have the ability to co-operate with foreign and mainland competition authorities on all matters including international harmonization of substantive law, case enforcement, collaboration and information sharing.

10. In order to help minimize 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?

Private rights of action are seen as essential to allow a wronged business or consumer to defend and protect their legitimate interests in most overseas jurisdictions. The USA and increasingly the EU have recognized the great importance of private actions in ensuring greater compliance with the law. The competition agency will never have sufficient resources to pursue every legitimate complaint. Private rights of action supplement public enforcement. Cases may be brought to a specialist competition tribunal, or in some places to the ordinary courts.

Fears of excessive litigation are unfounded. Common law jurisdictions such as Australia, UK and Ireland have not seen huge growth in private competition suits. The 'loser pays the winners legal costs' rule and the high cost of litigation itself will reduce demand. The United States is a special case due to the absence of a 'loser pays the winners legal costs' principle, the existence of jury trial in civil cases, contingency fees where lawyers get a share of damages, the easy availability of punitive damages and the statutory award of treble damages to successful plaintiffs; all these factors are peculiar to America and encourage private litigation but none of them would apply in Hong Kong.

Vexatious litigation is effectively controlled by the rules of court, whereby a court or tribunal has the ability to dismiss unmeritorious claims at an initial stage. SMEs should have no rational concern about this issue as the tribunal or court would be able to reject unmeritorious claims. In fact, SMEs would receive a protective benefit from private enforcement as they are more likely to be the victims of abuse of dominance, than perpetrators of competition offences.

In the Hong Kong context, private rights of action already exist in the competition provisions found in the telecommunications and broadcasting ordinances. In the seven

years since their enactment there has only been a single private enforcement case that sought an injunction in a television dispute. The clear evidence is of a lack of private actions, not a superfluity.

Consequently, the fear of extensive private litigation on competition issues is highly unlikely. In view of these arguments we propose that a private right of action be included in the new legislation and that jurisdiction be given solely to the new competition tribunal. However, in view of the concern of various parties, we further propose that the only remedy available be injunctive relief. This compromise allows a wronged firm or consumer to prevent further harm to their interests, incorporates the 'loser pays the winners costs' principle, so making private litigation potentially costly and so relatively unattractive, whilst ensuring that the rights of market participants are protected, should the competition agency choose or not be able to assist the victim.

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

In order to be effective, the agency would need investigatory power to:

- demand information and documents from those reasonably suspected of involvement in anticompetitive practices;
- inspect and copy records;
- interrogate potential participants;
- enter any premises and vehicles with or without force and to search and seize evidence with a warrant issued by a magistrate or possibly a judge; and
- act on information from foreign/mainland competition agencies to assist their investigations, subject to there being a causal nexus with a Hong Kong market.

It should be noted that most of these powers already exist in the telecommunications and broadcasting ordinances.

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

Yes. Refusal to cooperate should be seen in the same light as perverting the course of justice or interfering or providing untruthful or misleading information that obstructs an agency in the execution of its public duty. Such conduct is already a crime if police or customs investigations are concerned as it is in relation to many other statutory investigatory obligations including OFTA.

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?

Firstly, the law should impose a duty of confidentiality with criminal sanctions for breach, on all officers of the competition agency in relation to the execution of their duty. Confidential information from complainants or from the subjects of investigations should be strictly protected. Any damages suffered by a firm as a result of unlawful disclosure would also open the authority and the officer to claims for damages.

Secondly, where reports are to be published, the confidential and sensitive parts might be blanked out, where appropriate.

Thirdly, the law should protect 'whistle' blowers with a guarantee of confidentiality. The ordinance should also protect their employment status or provide a statutory remedy for loss of income and damages if they are dismissed by an employer that has engaged in unlawful practices that they have disclosed to the authorities.

14. Should the existing sector specific regulations that also have a competition role continue to play such a role if a cross-sector competition regulatory authority were to be established?

No. As stated above, all competition enforcement should be centralized in one authority for the reasons given previously.

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

We propose that penalties for breach of the competition law should attract civil penalties levied by the agency at a level to recoup extra competitive profits, deter the offender from re-offending and be exemplary to other possible law breakers. Fines should not be so high as to bankrupt the malefactor, as this might actually worsen competition in the relevant market by destroying a competitor. However, fines must be set at a punitive level to ensure compliance with the law and to deter infractions. A maximum of 10% of related turnover of the whole economic entity, rather than the turnover of a subsidiary should be included in the legislation. Possibly world-wide turnover might be substituted for Hong Kong related turnover, as in the EU. It should be stressed that the 10% is a maximum; almost all fines would be at a much lower level, as has been the case in other jurisdictions such as the EU and USA.

In addition to fines, individual penalties must be adopted to make the regime work. Financial penalties are passed on to shareholders in reduced dividends or to consumers in higher prices, in less than fully competitive markets. Penalties on individual managers or directors are needed as in the market misconduct regime under the Securities and Futures Ordinance. Disqualification of a director involved in competition offenses would act as a powerful deterrent to repeat offences by the same firm and would also signal the danger of breaking the law to other potential offenders. This will act proxy for criminal sanctions, especially in hard core cartel cases, where many jurisdictions have or are in the process of enacting a criminal penalty regime to toughen anti-cartel enforcement. However, criminal prosecution is difficult for reasons of the higher standard of proof required and the additional complexity of jury trials in a technical and complex area. We do not recommend a criminal penalty regime for these reasons.

Thus, substantial fines levied on firms coupled with disqualification of errant directors would prove to be a powerful and workable system that would ensure appropriate enforcement and compliance with the law.

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16. Should any new competition law include a leniency programme?

Yes. Best international practice, as exemplified by the International Competition Network, clearly shows that this is a vital weapon in the battle against cartels.

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

Yes. See above.

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?

Yes. A negotiated settlement in appropriate cases is always preferable to a full investigatory and adjudicatory process, as long as a satisfactory settlement that protects competition is achieved and the wrong doer is brought back into compliance. This must be discretionary and used only in cases where a remedy is also achieved for customers or competitors damaged by the anti-competitive practice. Settlements with no admission of liability might compromise the rights of third parties. Agreements for leniency might also have this effect and must be considered carefully if third party claims might be compromised or affected. Immunity from public enforcement should not protect a wrong doer from private claims but this might reduce the attractiveness of any leniency programme. However, if private enforcement is limited to 'cease and desist' injunctions, this objection is overcome. These issues need careful evaluation and discussion before guidelines on settlements or a leniency programme are rolled out by the agency. Public consultation should be undertaken before guidelines are finalized.

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

Yes but limited to injunctive relief. See above.

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?

Compliance with a modern competition regime is necessary for any Hong Kong based transnational company and for other international firms. They should have no problem and little cost in devising a Hong Kong compliance regime.

As for SMEs, many of them might be exempted from the competition regime on terms such as those found in the EU block exemptions in relation to anticompetitive agreements. As SMEs are unlikely to have a dominant position in the markets in which they operate, so that part of the law would not affect them. Merger control would similarly not affect the SME sector. Thus the SME sector's concerns are not justified. SMEs have much to gain from a competition law and should be net beneficiaries, not victims.

Conclusion

The Civic Party concludes this paper with the wish that the government will accept our recommendations for a comprehensive new ordinance with a clear legislative objective, a logical and coherent structure, comprehensive coverage and an appropriate enforcement mechanism. We encourage the government to swiftly bring forward a bill to the Legislative Council for further consideration as soon as possible.

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