Consumer Council Submission
Government discussion document
Promoting Competition – Maintaining our Economic Drive

Executive Summary

The need for a law

1. The Consumer Council (the Council) strongly supports the enactment of a cross-sector competition law for Hong Kong. It is common practice for market economies around the world to have in place a basic set of rules, in the form of cross sector general competition laws, to protect the integrity of the free market system so as to facilitate economic efficiency and benefit consumer interest.

2. Enactment of a cross-sector competition law will not jeopardize Hong Kong's favourable business environment and should, instead, enhance its competitiveness. This is reinforced by the fact that according to the 2006 Heritage Foundation Country Competitiveness Rankings, the US has the highest ranking in competitiveness, but is also one of the earliest economies to have a cross-sector competition law. In the Foundation's survey, Ireland, a small economy similar to Hong Kong and the United Kingdom are ranked 5 like Hong Kong, while Australia and Singapore (which has recently enacted a cross sector competition law, ranked 7. These economies are considered by the Heritage Foundation to be among the world's most market-oriented jurisdictions and they have cross-sector competition laws. Clearly, competition laws are a factor in maintaining competitiveness and a successful economy.

3. The Government's discussion document notes that in unregulated sectors of the economy, in the absence of supporting legislation, COMPAG has been unable to determine the extent to which complaints of anticompetitive conduct might be justified.

4. It is clear that if Hong Kong had a cross-sector competition law with an appropriate competition authority that had investigative powers, similar to those existing in other comparable advanced economies, the authority would be in a position to obtain information that could establish the veracity of the allegations on anti-competitive conducts, one way or the other. In the absence of such a law and an authority, and its regulated information gathering powers the industry will continue to be subject to innuendo and uninformed opinion, as far as allegations of anti-competitive conduct is concerned.

5. A competition law is little different to any other law that acts as a deterrent to forms of behaviour that are considered at odds with accepted community standards and which law abiding citizens and corporations would naturally avoid breaching. The Council is aware of concerns expressed by some, that the introduction of a competition law will be burdensome due to compliance costs. However, as with any law that is in place, any law abiding citizen or corporation can reduce those costs to the minimal by not breaching the law in the first place.

Scope of the law

Cross-sector law

6. The Council does not support a sector specific approach and considers that such an approach is inconsistent with the objective of sound competition policy. Currently, in the absence of a cross-sector competition law in Hong Kong, collusive arrangements such as explicit agreements to set prices or share markets amongst competitors, which bring harm to consumer welfare and economic efficiency, are not illegal and are permissible in all markets except the telecommunications and broadcasting sectors, and bid rigging against public bodies. This is clearly a situation that needs to be remedied. The current sector-specific approach relies on various government agencies having responsibility for competition oversight of particular industries under their purview. Yet anti-competitive conduct could occur in any sector. Therefore, the various government agencies may be unable to respond quickly to convergence that takes place between different industries. Also, there are no strong grounds for targeting only certain individual sectors or industries for regulation.

Market conduct

7. The Council considers that the scope of the legislation should focus on market conduct. Anti-competitive conduct provisions in the new law should apply basic competition law principles, similar to those used in other jurisdictions, and in the Telecommunications Ordinance and Broadcasting Ordinance competition provisions, where there are general prohibitions against anti-competitive competitor agreements; and abuse of dominant market position. Such an approach serves to monitor and regulate the anti-competitive conducts that might arise in the marketplace. As anti-competitive market practices can rapidly evolve in the market causing harm to SMEs and consumer welfare, a prescriptive approach to prohibitions is not suitable because there will be no legal backing for the competition authority to act, even under critical circumstances. However, it is important for the competition authority to issue guidelines on how it addresses the general prohibitions, to satisfy the business community's need for certainty.

Market structure

8. In relation to market structure, the Council agrees that the proposed law should not seek to regulate 'natural monopolies' as government should maintain oversight to protect public interest through other regimes or through the Competition Policy Advisory Group, the continued existence of which is recommended by the Council even after the enactment of a cross-sector competition law and creation of a competition authority.

Reserve power

9. However, the Council considers it to be prudent for the Government to have in place a legislative 'reserve power' for oversight where a merger or acquisition might arise and have a detrimental effect on public interest. Government should be vested with the power to give directions to the competition authority to examine the matter and take remedial actions as appropriate for the circumstances; for example making divestiture orders or issuing injunctions to prevent the action from going ahead.

Exemptions

10. The Council also considers that the proposed law should have procedures for exempting parties, be they private entities or government agencies, from the application of the law, in limited circumstances, where it can be demonstrated that the conduct delivers an overall benefit to the public that outweighs the detriment to competition. This should provide a degree of comfort to some SMEs that have voiced concern at the introduction of the law, and their need to join with other SMEs to increase their competitiveness in the marketplace.

Regulatory framework of implementing competition law

11. It is usually the case in other similar advanced economies that a competition authority is an autonomous government body that is overseen by a board of members, with experience in commercial, legal and economic areas, and that it is supported by a body of investigative staff. The Council considers that a Hong Kong competition authority should be comprised of a full time chairman, and investigative staff, assisted by members of the community, with relevant experience, sitting as an advisory board; all appointed by the HKSAR Chief Executive.

12. With regard to the powers that the regulatory authority should have over allegations of anticompetitive conduct, Council considers that

    (a) the competition authority should itself have the power to adjudicate and hand down sanctions, rather than taking a matter through the courts, as is the practice in some other jurisdictions; and that

    (b) the competition authority's decisions should be subject to appeal on the merits of the competition authority's decision by a specialist competition appeals tribunal, constituted within the courts system.

Enforcement and other regulatory issues

Competition Authority to enforce law

13. Some SMEs were misinformed that the new competition law would put them under constant threat of big businesses bringing actions against them. This is hardly credible as SMEs by definition do not have the market power to abuse, and competition laws are structured around the prevention of abuse of dominant position. Hence there would be no justification for action against SMEs and they are more likely to be the beneficiaries of the law. Furthermore, the proposal before the public is that only the regulatory authority should have the power to conduct formal investigations; and the Council supports such a proposal to help minimise trivial, frivolous or malicious complaints. The right to private action should be limited so that it could be pursued only after the competition authority had made a decision that the conduct in questions constitutes an infringement of the competition law.

14. Nevertheless, the Council considers that in order to ensure that complaints are properly attended to, and that complainants' rights to justice are protected, certain organizations such as SME associations could be given special status to refer complaints to the competition authority. The authority would then be bound to follow set procedures and strict time limits in carrying out an investigation into a

complaint. The existence of designated complainants with the power to make super complaints would serve an important role in acting as public watchdogs, represent complainants who lack the capacity to pursue complaints to fruition, or are concerned to maintain confidentiality; and would serve a role as screening agents, sorting out frivolous complaints and collecting preliminary evidence or information to be put to the competition authority.

Power to obtain information

15. Access to information in investigating allegations of anti-competitive conduct is crucial and the Council considers that the competition authority should have the power to obtain documents, examine witnesses under oath; and require the production of relevant information to assist in the proper examination of alleged anticompetitive conduct. To safeguard these powers strong sanctions should be brought to bear on any persons who act so as to frustrate the legitimate actions of the competition authority and its staff, and intimidate witnesses, such as 'whistleblowers'. By the same token, there should be stringent confidentiality provisions governing the actions of the staff of the competition authority in preserving confidentiality of information given to them, including the identity of witnesses, where confidentiality is sought.

Leniency programme

16. Furthermore, the Council strongly supports the use of a leniency programme by the competition authority as a means of encouraging cartel participants to disclose the existence and activities of cartels, and receive immunity (if certain conditions are met) from action in relation to the cartel. This is a common method used in other competition law jurisdictions by competition authorities as a means of obtaining evidence on cartel activities.

Civil penalty

17. The Council considers that breaches of the competition provisions of the new law should only be considered as civil infringements. As an investigative and decision making body, the competition authority is not in a position to be able to convict persons of a criminal offence. Criminal prosecution is a matter that should be left to the court system. Therefore, any orders that the competition authority makes in regard to what it considers to be breaches of the competition provisions in the law, would have to be treated under civil law, and made subject to review on the merits through the recommended competition appeals tribunal. (The recommendation that persons who frustrate the lawful actions of the authority in performing its tasks, or who intimidate witnesses, should be found guilty of a criminal offence does not conflict with the above recommendation, because the actions of interference and intimidation would be prosecuted in a court of law and have similarities with other criminal offences in the wider community.)

18. As a basic rule, the Council considers that monetary penalties should be commensurate with the economic benefits that have accrued from the breach, and also at a level that acts as a deterrent. In addition, the Council believes as a matter of principle that the right of action for damages following a successful action for anticompetitive conduct should exist for aggrieved persons.

Sector regulator and competition authority

19. Although the future competition authority is to have jurisdiction over all aspects of the economy (with the exception of natural monopolies), the current sectoral regulators, such as OFTA and the Broadcasting Authority (or the future Communications Authority), have accumulated considerable specialized expertise on their respective industries. Therefore, the Council proposes that the sectoral regulators retain their current role of enforcing sector-specific competition laws. The future competition authority is to exercise concurrent jurisdiction with the sectoral regulators. In light of their expertise, during the initial stages of enforcement of the cross-sector competition law, the future competition authority will, through administrative arrangement, defer to the sectoral regulators until such time as may be appropriate in the future.

Continuing Competition Policy Oversight

20. Notwithstanding the creation of a cross sector competition law, and a competition authority to administer that law, the Council considers that it is important to appreciate that there will still be a need for competition policy oversight by Government to implement a continual process of review in new policy formulation and in reviewing current policies. For example, opening up the energy sector in Hong Kong to competition. The Council suggests that the Competition Policy Advisory Group, or a newly constituted body, should exist to take charge of such an important function.

21. This body should also shoulder the responsibility of public education on the benefits to the economy of a competition law. The urgent need for education is brought about due to the many distorted messages that have been circulated in the community, concerning the concept of a competition law in general, as well as the proposals put forward by the government discussion document. There is a need to enhance proper understanding of a competition law by members of the public, the private sector, including SMEs and big corporations, and professionals.

22. This body should also be tasked to look at manpower planning, training and continuing education in this sphere.

Consumer Council
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Introduction

1. The Consumer Council (the Council) strongly supports the enactment of a cross-sector competition law for Hong Kong. It is common practice for market economies around the world to have in place a basic set of rules, in the form of cross sector general competition laws, to protect the integrity of the free market system so as to facilitate economic efficiency and benefit consumer interest.

2. This submission sets out the Council's responses to the specific questions as categorized into four areas in the discussion document.
   (a) The need for a cross-sector competition law;
   (b) The scope of the new competition law;
   (c) Regulatory framework of implementing competition law; and
   (d) Important issues of enforcing the competition law.

The need for a cross-sector competition law

Questions 1 & 2 - Does Hong Kong need a new competition law? and should any new competition law extend to all sectors of the economy or should it only target a limited number of sectors, leaving the remaining sectors purely to administrative oversight?

3. The current sector-specific approach to enacting competition law has so far resulted in the development of a regulatory framework for competition in the broadcasting and telecommunications sectors that prohibits anti-competitive conduct and abuse of dominant position. There are also prohibitions against bid rigging, but only against public bodies, in the *Prevention of Bribery Ordinance*. The telecommunications and broadcasting provisions can be described as successful implementation of competition law, bringing about consumer benefits in those sectors. In other sectors of the economy, in the absence of supporting competition legislation, questions arise as to whether the economy is working at optimal competitive levels.

4. The current sector-specific approach relies on various government agencies having responsibility for competition oversight of particular industries under their control. However, competition exists in markets, not in clearly defined economic sectors that mimic bureaucratic divisions of responsibility. The various government agencies may therefore be unable to respond quickly to convergence that takes place between different industries.

5. While the Government's Competition Policy Advisory Group (COMPAG) is in a position to co-ordinate the activities of the various Government bureaux and agencies on competition related matters, and is making a valuable contribution to promoting competition, it is only an advisory committee. Moreover, because COMPAG is not an enforcement body, it has been unable to determine the extent to

which complaints of anti-competitive conduct might be justified and cannot settle on whether the practices of the subject of complaints are anti-competitive.

6. There are some very large and powerful businesses that have involvement across different sectors of the economy, through horizontal and vertical integration. It may be difficult for the various government agencies to monitor market conduct and obtain an overall view as to how those businesses influence competitive activity between different economic sectors. For example, bundling arrangements involving various products that affect competition in one or more different markets.

7. Leaving aside the possibility that not all Government agencies might actually have the skills necessary to undertake antitrust analysis, this fragmented approach replicates resources required to investigate, research and analyse allegations of anti-competitive conduct across the broad spectrum of government. This is both costly and inefficient.

8. Moreover, regardless of economic sector, anticompetitive practices such as collusive practices allow market players to exert market power they would not otherwise have, and artificially restrict competitive choices, increase prices and lower quality of service, thereby reducing economic welfare. Accordingly, they should be prohibited by law in any jurisdiction that pursues a free market competition policy. Currently, in the absence of a cross-sector competition law, collusive arrangements such as explicit agreements to set prices or share markets amongst competitors is not illegal and is permissible in all markets except the telecommunications and broadcasting sectors, and bid rigging against public bodies. This is clearly a situation that needs to be remedied.

9. Hong Kong is not a large economy. Many sectors characterised by significant economies of scale are dominated by a small number of firms. Although the dominance of certain sectors by a small number of companies is not anti-competitive per se, collusion is the more likely with the smaller number of companies in the market thus making Hong Kong more vulnerable to anti-competitive abuse. There is a practical need for competition safeguards for a small economy like Hong Kong.

10. Price fixing agreements can be sustained through reaching consensus amongst participants, and having a mechanism within the agreement to detect deviations and punish such deviations. Given that Hong Kong is a very small place, people have a close business relationship, and companies have regular and frequent business orders amongst themselves; this also facilitates an environment for collusion. The prospect of losing large regular orders would keep participants inside the collusive framework. Frequency of orders and close contact also means there can be close monitoring for deviations by cartel participants against agreed collusive agreements.

11. Some commentators have suggested that there are no anti-competition cases in most sectors, and that complaints are only concentrated in some sectors; leading to the need only for sector specific mechanisms to address most concerns. However, while overseas experience demonstrates that cartel activity is prevalent in some areas, notably homogenous products with little product differentiation, such as building materials, cartels have been identified in various economic sectors. For example, the international vitamin cartels, the auction house cartel between Sotheby's and Christie's, and the Danish building heating pipe cartel. Competition

authorities have found that the cartels are tight organizations, their activities mostly held in secret and that it is almost impossible to uncover those activities without formal investigation power.

12. Hong Kong's economy currently enjoys high economic growth and some commentators have expressed the concern that enacting a cross-sector competition law might jeopardize a favourable business environment and affect competitiveness. However, according to a recent report of the World Competitiveness Centre, the US has the highest ranking in competitiveness, but it is also one of the earliest economies to have a cross-sector competition law. Given the success of the law in other advanced economies, and since the proven objective of such a law is to enhance economic efficiency through safeguarding the market place, it is believed a similar law in Hong Kong will bring long term benefits and will improve Hong Kong's overall competitiveness. It is instructive to note that in the 2006 Heritage Foundation Country Competitiveness Rankings, the United States is reported as the only country that scores in the top 10 for the 9 rankings. Moreover, the report notes:

"A review of the rankings shows a clear pattern. The nations that appear most frequently have low levels of taxes, spending, and regulation. The United States is on top (9 of 9), but the other nations that show up most frequently—Singapore (7), Australia (7), Switzerland (6), Denmark (6), Hong Kong (5), Ireland (5) and the United Kingdom (5) are generally considered among the world's most market-oriented jurisdictions."[1]

13. All of these countries, with the exception of Hong Kong (which is amongst the lower ranked countries in this select group) have competition law regimes. This is solid evidence that a cross sector competition law will only enhance competitiveness in an economy rather than impeding it.

14. The Government's discussion document notes at paragraph 26 that *".... in other [unregulated] sectors of the economy, in the absence of supporting legislation, COMPAG has been unable to determine the extent to which complaints of anticompetitive conduct might be justified. This not only results in an unsatisfactory outcome for complainants, but can also leave a question mark against the practices of companies that have been the subject of complaints, even though these companies may not have engaged in anticompetitive conduct."*

15. The Council has received complaints from various parties concerned with alleged anti-competitive conduct in the past. It has exchanged correspondence and held meetings with related parties in attempts to establish the veracity of the allegations. The allegations have ranged from attempts to induce resale price maintenance, cartel and refusals to supply. Not being an investigative body with powers to obtain information, the Council can only conclude at best that there is anecdotal evidence.

16. If Hong Kong had a competition law with an appropriate competition authority that had investigative powers, similar to those existing in other comparable advanced economies, the authority could activate its information collecting powers, where the necessary prima facie evidence and therefore "reason to believe" or "reason to suspect" has emerged.

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[1] See http://www.heritage.org/Research/Budget/bg1929.cfm

17. In these circumstances, the authority would be in a better position to obtain information that could establish the veracity of the allegations on the anti-competitive conducts, one way or the other, to a higher standard of proof. In the absence of such a law and an authority, and its regulated information gathering powers, the industry will continue to be subject to innuendo and uninformed opinion, as far as allegations of anti-competitive conduct is concerned.

18. A cross-sector competition law establishes boundaries between what constitutes acceptable and unacceptable market conduct, and subject to keeping within those boundaries, market participants are free to arrange their affairs as they see fit. Competition law simply allows the basic principles of fair market conduct to operate freely, and evolve with the natural flow of the market. It does this without the need for intervention by Government in drafting specific rules on a needs basis that inevitably addresses a problem after it has occurred. Instead, through the substantial penalties that can apply, it acts as a deterrent, in a way that enforces a discipline on market participants, encouraging them to avoid anti-competitive behaviour. In this respect a competition law is little different to any other law that acts as a deterrent to forms of behaviour that are considered at odds with accepted community standards and which law abiding citizens and corporations would naturally avoid breaching. The Council is aware of concerns expressed by some, that the introduction of a competition law will be burdensome due to compliance costs. However, as with any law that is in place, any law abiding citizen or corporation can reduced those costs to the minimal by not breaching the law in the first place.

19. As it is stated in the Government discussion paper, anti-competitive conduct could occur in any sector, there are no strong grounds for targeting only certain individual sectors or industries for regulation. A sector-specific competition law may let firms sustain their market power through anti-competitive practices in unregulated sectors, which in turn give them a competitive advantage in their businesses in regulated sectors, unsettling the general desire to have a level-playing field.

20. The Council therefore does not support a sector specific approach and considers that such an approach is inconsistent with the objective of sound competition policy.

Scope of the cross-sector competition law

Question 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?

21. There are three principal areas of interest for most competition law systems: monopoly, cartels and mergers. The concern with the potential anti-competitive consequences of a monopoly situation is the unifying link between the three issues. Cartels and mergers between competitors in effect achieve a monopoly position, dominate the market, and are thereby in a position to exploit their position.

22. Structural factors, such as cross-ownership, a high market concentration, and links amongst competitors, can prove as equally anticompetitive as competitor agreements. It is argued that if a company has participation in a competitor, even

without controlling it, the scope for collusion will be enhanced. By sitting on the board of directors of a rival firm, competitors will find it easier to coordinate and exchange information on pricing and marketing policies. With cross-ownership, the incentive to compete in the market place might be reduced. High concentrations of market share between few competitors will also increase the risk of collusion.

23. In relation to market structure, the Council agrees that the proposed law should not seek to regulate 'natural monopolies' as government should maintain oversight to protect public interest through other regimes or through the Competition Policy Advisory Committee (COMPAG) - the continued existence of which is recommended by the Council even after the enactment of a cross-sector competition law and creation of a competition authority. (Para. 105 refers)

24. In many jurisdictions that have a cross-sector competition law, there is oversight of mergers and acquisitions in the marketplace that give rise to competition concerns. The Council recognises that Government intervention in the process of mergers and acquisitions in the marketplace is a sensitive issue. The mergers and acquisitions provisions in the *Telecommunications Ordinance* were only inserted many years after the initial laws governing anticompetitive agreements and abuse of dominant market position were introduced. A similar cautious approach could be utilised in the introduction of a cross sector competition law.

25. The possibility that a merger or acquisition in a sensitive economic sector, which might have detrimental effect on public interest, could give rise to widespread public concern. Accordingly, the Council suggests that it would be prudent for the Government to have in place a legislative 'reserve power' given to the appropriate Policy Secretary in cases which concern an overriding public interest. The 'reserve power' should allow the Policy Secretary to give a direction to the competition authority to examine a merger or acquisition that has taken place, or is about to take place. If the effect or likely effect is proven, then the Policy Secretary (acting on the findings of the competition authority) might direct the competition authority to take the matter before an appropriate body (the competition appeals tribunal noted further on in this submission) seeking a direction for the companies to divest their interests, or seeking an injunction preventing a merger or acquisition from taking place.

26. There should also be clear criteria to guide the Minister's actions, for example, the processes involved in initiating an investigation by the competition authority, and the scope of subsequent remedial action that can be sought by the competition authority.

27. Such an approach would enable the Government to institute safeguards in matters which involve an overriding public interest. Whilst it is generally the case that competition authorities in other jurisdictions are given a large degree of autonomy, reserve powers for Government Policy Secretaries, enabling the giving of directions to competition authorities, is an approach used in some jurisdictions regarding a number of competition issues. These powers reflect the fact that various socio political concerns can arise which require some government involvement.

Questions 4 & 5 - Should a new competition law define in detail the specific types of

anticompetitive conduct to be covered, or should it simply set out a general prohibition against anticompetitive conduct with examples of such conduct? and

Should a new competition law aim to address only the seven types of conduct identified by the CPRC, or should additional types of conduct also be included and should the legislation be supported by the issue of guidelines by the regulatory authority?

28. The competitive process can be substantially lessened through a range of marketplace conduct, which should be taken to task in order to protect the public interest. Allegations of marketplace conduct that has anticompetitive effect often involve terms such as 'cartel' 'exclusive dealing' 'predatory pricing' 'resale price maintenance' 'abuse of dominant position' etc, noted as the 'seven types of conduct' in the discussion document. In order to allow an appropriate degree of flexibility in administration of the basic prohibitions, the Council does not recommend legislative prohibitions should attempt to notate a full list of prohibited conduct.

29. The Council considers that anti-competitive conduct provisions in the new law should apply basic competition law principles, similar to those used in other jurisdictions, where there are general prohibitions against

    (a) anti-competitive competitor agreements; and

    (b) the abuse of dominant market position.

30. Such an approach serves to monitor and regulate the anti-competitive conducts that might arise in the marketplace. As anti-competitive market practices can rapidly evolve in the market causing harm to SMEs and consumer welfare, a prescriptive approach to prohibitions is not suitable because there will be no legal backing for the competition authority to act, even under critical circumstances.

31. The inevitable consequence of a prescriptive approach is that the Government will be reacting to deficiencies by amending the law when problems arise. As a result of the time lags inherent, it is possible that anti-competitive market structures could arise that will become difficult or impossible to unravel. The solution to this is that the law should have a general prohibition against anti-competitive conduct to provide a general competition safety net.

32. It should be noted that the Council's concern is not the regulation of business activities but the issue of ensuring there are adequate competitive safeguards. Competition works within economic markets, and markets are a function of the creative endeavours of entrepreneurs, and the patterns of purchasing behaviour by consumers. They are constantly evolving and require a regulatory framework that is equally flexible.

33. Notwithstanding its view that general prohibitions, rather than detailed prescriptive prohibitions should be used, the Council shares the concerns of stakeholders that there is a need for a clear understanding of the specific types of conduct prohibited by the new competition law. A common approach used in other jurisdictions, and also adopted in the Hong Kong telecommunications and broadcasting sectors is to set out a general prohibition against anti-competitive conduct and to supplement this

with guidelines and regular commentaries by the competition authority.

34. The Council therefore prefers the approach of using a general prohibition enhanced through the issuing of guidelines and commentaries by the competition authority.

Question 6 – In determining whether a particular anticompetitive 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?

35. The CPRC suggested that in determining whether a particular type of anti-competitive conduct constitutes an infringement of competition law, the "purpose" or effect" of the conduct in distorting market operation and lessening competition should be taken into account. The Government discussion document notes that there are two approaches in drafting the law, i.e.

    (a) a 'per se' rule, in that certain practices should be considered to be violations of competition law per se, and that the very fact of engaging the prescribed practice should constitute an infringement; or

    (b) a 'purpose or effect' rule, in that to constitute an infringement, the conduct must not only be shown to have taken place, but must also be shown to have the "purpose" or "effect" of preventing, restricting or distorting competition.

36. As noted above, there are various forms of marketplace conduct that can have a detrimental effect on competition. However, in many cases, whether or not competitor agreements are detrimental need to be carefully scrutinized. For example, supply and distribution agreements will often involve exclusionary provisions where supply might be refused to certain parties, or price discrimination will be practised between different parties. In most cases such practices merely reflect the manifestations of economic efficiency, such as taking advantage of economies of scale, or a business strategy that requires exclusivity to be granted in order that parties will be able to devote a high level of service for one particular product. As such these are commercially reasonable and should therefore be completely lawful. Where action should be taken depends on the

    (a) the presence of market power or dominant market position;

    (b) the exact definition of the market in question; and

    (c) whether damage is being inflicted to the competitive process in that market, not simply damage to inefficient competitors.

37. In these circumstances, a 'purpose or effect' test as to whether there has been anticompetitive detriment in the conduct under question would seem to be more appropriate than a per se approach.

38. In many jurisdictions, the *per se* rule usually applies to conduct such as a cartel price fixing agreements, where there is no need to show economic harm or the lessening of competition. It is argued that such agreements or practices, because of their

pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal, without the need for elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

39. A per se rule may save costs of enforcement because it removes the requirement to demonstrate and lead evidence that an arrangement is harmful to competition. There is almost unanimous condemnation of cartels, especially those engaged in price fixing and bid-rigging, because no expert has satisfactorily established that consumers will benefit from price fixing and bid-rigging. In the US there is another approach to the consideration of anti-competitive agreements other than cartel agreements, making the agreements subject to the 'rule of reason' in order to determine whether the agreements are 'reasonable' or 'unreasonable'. The application of the rule of reason is complex and requires a detailed economic analysis of the restraint, market structure and market conditions to assess its likely pro- and anti-competitive effects. This inevitably has increased the complexity of antitrust litigation and reduced its uncertainty and predictability.

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

41. The reason behind is that while some conduct might on the face of it appear to be anticompetitive, on closer examination it is not. In these circumstances, the onus would rest on the competition authority to prove that there has been or is likely to be a substantial lessening of competition.

42. In formulating a test for analysing market conduct, consistency in wording is critical for a common set of legislative precedents to eventually evolve. In substance, this is to provide for a satisfactory level of certainty for business as to what standards are expected from them. The issue of uniformity of wording in law is particularly critical for businesses so they know under what conditions a conduct which comes under scrutiny may be construed as anti-competitive.

43. Allegations of abuse of dominant position (sometimes referred to as 'misuse of market power') would also fall within this category. For example, challenging conduct such as a retailer inducing a supplier to engage in resale price maintenance against the retailer's competitors would require proving the requisite element of 'market power', and that the conduct has the purpose or effect or likely effect of substantially lessening competition in a market.

44. Having regard to the need for consistency, the Council suggests that the wording used in those existing competition law provisions in the Telecommunications and Broadcasting Ordinances that have precedents in established competition law jurisdictions, and which rely on proving 'purpose' or 'effect' should be used; given that legal precedents have already been established and there is some business familiarity with the terms.

Question 7 - Should the competition law provide for exclusions and exemptions from the law, and if so, in what circumstances should they apply?

45. The Council considers that the proposed law should have provision for exempting parties from the application of the law, in limited circumstance. The Council notes that some competition law jurisdictions (for example Singapore) provide for blanket exemptions for government entities from the reach of their competition laws. The Council does not consider that such blanket exemptions are appropriate.

46. The Council considers that all commercial activities should come within the ambit of a competition law regardless of institution nature, be they private entities or government agencies, likewise the principle for exemption. A government agency that is engaging in trade or commerce as a market participant, competing with other goods or service providers, should come within the purview but a government agency that is merely administering a policy (notwithstanding the effect of that policy on the economy) should not come under the ambit of a competition law. For example, the conduct of various government agencies in releasing land for development, setting conditions for use, and selling leases for defined purposes in pursuance of government policy, should not come under a competition law. The reason being that there is no competitive market involving such conduct, and the policies being implemented are serving the public interest through the function of government. Nonetheless, the formulation of government policies should still go through a competition analysis to ensure that the implications of any policy with regard to market competition has been assessed. (The Council discusses this aspect further in the section at the end of this submission headed 'Continuing Competition Policy Oversight').

47. However, a government agency that buys and sells properties in the market for residential properties, in competition with other buyers and sellers, should come under the ambit of a law. In circumstances where the government decides that a government agency that is engaging in trade or commerce should be exempted from the application of a competition law, then the case for exemption should be examined on a 'case by case' basis.

48. It is increasingly common for competition laws in other jurisdictions to provide for specific exemptions/authorisations where it can be demonstrated that market conduct that is at potential risk of breaching the law, should be exempted on the basis that it delivers a benefit to the public that outweighs the potential anticompetitive effect. For example, some potentially anticompetitive conduct could be exempted if it has the result of protecting the environment, or serving another important social goal.

49. The Council support exemptions along these public benefit lines, but considers that the exemptions should have time limits imposed, and a power should be available for the competition authority to revoke the exemption if the public benefit goals are not met.

50. The Council also considers that some indication as to what might constitute a 'public benefit' should be given in the law, to provide some degree of direction for market participants.

51. For example, under EU law, any agreement must satisfy the four conditions in Article 81(3) in order to benefit from an exemption i.e.

    (a) improve the production or distribution of goods or promote technical or economic progress; and
    (b) consumers must receive a fair share of the resulting benefits; and
    (c) the agreement must not contain restrictions which are not indispensable to the attainment of the objectives in (a);and
    (d) it must not substantially eliminate competition.

52. In The Council's Good Citizen Guide II – Rules, under its fair competition rules, public benefits suggested by the Council, for exemption from the application of competition rules, are as follows:

    (a) Expansion of employment or prevention of unemployment in efficient industries;
    (b) Economic development, e.g. through encouraging research and capital investment in industries that would not be achieved without the subject agreement;
    (c) Continuity of an essential service that cannot be achieved without the agreement;
    (d) Improvement in the quality and safety of products and services; and
    (e) Supply of better information to consumers and business to permit informed choices in their dealings.

53. In early January 2007, the Council organized an SME forum to gauge feedback on the government discussion document. Over 120 representatives and their associations who attended the forum indicated general support for a cross-sector competition law. The Council has also been made aware of concerns that some small businesses have with the introduction of such a law. As noted in the discussion document, it would rarely be the case for an SME to come under scrutiny of a competition law, given that such a law is concerned primarily with market power, and its misuse. By definition, SMEs would not have market power, and would be the beneficiaries of a competition law, as it would give a large degree of protection against the actions of more powerful corporate entities.

54. However, another area of apprehension for SMEs is that concerning collective endeavours. These concerns can be addressed through the application of an exemption process, as is found in other competition law jurisdictions.

55. Another example, the Australian Competition and Consumer Commission (ACCC) administers authorisation provisions under the *Trade Practices Act* and has issued a paper outlining its approach in administering the authorisation provisions, called 'Authorising and Notifying Collective Bargaining and Boycotts'. In that paper, the ACCC sets out its position on granting authorisations to collective action by competitors even where there is a concern that the collective action could be detrimental to competition, but a public benefit will arise that outweighs the detriment to competition. In the Overview of that paper there are references to concerns of SMEs in Australia and the response by the Government to make the authorisation provisions easier for SMEs to use.

56. The Council considers that similar provisions in Hong Kong competition law should

be introduced and guidelines should be issued by the competition authority on how it will apply the provisions in relation to SMEs. Moreover, the Government could also consider other provisions in the Australian *Trade Practices Act* that can be specifically used by SMEs when they are subjected to unconscionable conduct in business transactions by large and powerful corporations. Section 51AC of the *Trade Practices Act* is particularly useful because it gives SMEs protection against unconscionable conduct by large powerful corporations in business transactions, in the same way that consumers are also protected from unconscionable conduct.[2]

Block Exemption vs Case by Case

57. It is understood that the notification of an agreement to the authority is an important step in the procedure of individual exemption. However, this procedure would no doubt increase the workload burden of the authority at its inception, which would prefer to devote its resources to educating the public about the new law and to investigate serious anti-competitive cases; rather than examine applications for individual exemption.

58. Overseas experience shows that competition authorities can control their exemption workload through block exemptions. Block exemptions differ from 'case by case' basis in that they exempt a class of agreements or conduct automatically without formal intervention and approval from the authority. In the EU, block exemptions have been adopted for certain vertical agreements, specialisations, research and development, and technology transfers.

59. The Council considers that it is more important for the new competition authority, at its inception, to focus on enforcing the new law rather than examining applications for exemptions. A block exemption procedure should therefore be allowed. Block exemptions should outline which agreements fall within the provision, and a clear indication of the terms in the subject agreements which are exempted, and those, if any, which are not exempted.

60. As with normal exemptions, block exemptions should have time limits set for review, and with the straightforward ability to have exemption easily revoked where there has been a material change of circumstances that indicates the exemption is no longer warranted.

Regulatory framework of implementing competition law

Questions 8 & 9 - Which would be the most suitable option for the enforcement of a new competition law in Hong Kong? and
Regardless of the option you 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?

61. The Council notes that competition law jurisdictions around the world vary in their approach to bringing proceedings under a competition law. These can range

[2] More information on how this applies can be obtained from the ACCC's website www.accc.gov.au under the heading 'Business Rights and Obligations' on the site's front page.

between giving the competition authority the power to investigate and apply penalty in some cases, to a competition authority being required to bring an action before the general court system, on the same basis as a private citizen who also has a legal right to bring proceedings. The manner in which cases are heard, and rights of appeal that are made available also vary to different degrees.

62. It is usually the case in other similar advanced economies that a competition authority is an autonomous government body that is overseen by a board of members, with experience in commercial, legal and economic areas, and that it is supported by a body of investigative staff. The Council considers that a Hong Kong competition authority should have a similar composition in that the authority should be comprised of a full time chairman assisted by members of the community, with relevant experience, sitting as an advisory board; all appointed by the HKSAR Chief Executive.

63. The Council considers that the role of the authority's investigative staff should be (under direction) to:

(a) undertake research and conduct investigations into allegations of anticompetitive conduct;
(b) assess the economic effects of allegedly anticompetitive market conduct and its impact on the public interest;
(c) provide guidance for business and the general public on the application of the law;
(d) examine the application of individual exemptions; and
(e) where considered necessary, take action against the conduct.

64. A number of options have been discussed as to what power the regulatory authority should have over allegations of anticompetitive conduct. Given the experience in existing competition law provisions in the telecommunications sector, and the familiarity that has arisen with that model, the Council considers that

(a) the competition authority should itself have the power to adjudicate and hand down sanctions, rather than taking a matter through the courts, as is the practice in some other jurisdictions; and that

(b) the competition authority's decisions should be subject to appeal on the merits of the competition authority's decision by a specialist competition appeals tribunal, constituted within the courts system.

65. The Council recommends that the existing *Telecommunications (Competition Provisions) Appeal Board* is a useful precedent that can be applied in these circumstances. Accordingly, the competition appeals tribunal should be comprised of a judge from within the relevant court system, and other experienced lay persons to assist in determining the economic issues at hand. In the interests of bringing proceedings to a speedy resolution, and acknowledging the specialist nature of the tribunal, it is not envisaged that appeals on the merits of decisions by the tribunal should be made available. However, the right to challenge the legality of the tribunal's decisions through judicial review should exist.

Enforcement and other regulatory issues

Question 10 - In order to help minimise trivial, frivolous or malicious complaints, should any new competition law provide that only the regulatory authority has the power to conduct formal investigations into possible anti-competitive conduct?

66. The Council considers that the competition authority should have the sole power to enforce the law. The Council recognises that there is a concern that frivolous or malicious complaints could arise if the new competition law provided for the right of private action. The right of private action opens up the possibility that some market participants could use threats of legal action under the competition law to subvert the legitimate commercial activities of their competitors.

67. It is considered that the competition authority would be best placed to exercise discretion as to what circumstances require action to be taken in order to help minimise trivial, frivolous or malicious complaints. In many circumstances (judging from overseas experience) disputes raising competition issues may be resolved merely through the competition authority providing its opinion on the matter and making its intentions known to the parties; without the need to resort to legal action. In any event, if the option of creating a competition authority, with power to enforce the provisions subject to appeal to a competition appeals tribunal is taken, as suggested above, a right of private action would not arise. The right to private action should be limited so that it could be pursued only after the competition authority had made a decision that the conduct in questions constitutes an infringement of the competition law.

68. In order to ensure that complaints are properly attended to, and that complainants' rights to justice are protected, the Council considers that certain organizations could be given special status to refer complaints to the competition authority. The authority would then be bound to follow set procedures and strict time limits in carrying out an investigation into a complaint.

69. For example, in the United Kingdom, the Secretary of State for Trade and Industry is able to designate certain bodies which represent consumers to make 'super-complaints'. Super-complaints can be made to the Office of Fair Trading (OFT) by a designated consumer body when that body thinks that a feature, or combination of features of a market appears to be significantly harming the interests of consumers. The OFT is then required to consider the evidence submitted and undertake whatever work is necessary to establish the extent of the alleged problems.

70. The OFT must then publish a response within 90 days from the day after which the super-complaint was received stating what action, if any, it proposes to take in response to the complaint and giving the reasons behind its decision. A similar procedure could be developed for Hong Kong, where certain organizations, for example, organizations representing small businesses, could be designated as suitable for referring complaints to the competition authority, thereby placing the competition authority under an obligation to follow certain transparent procedures and time limits in considering the complaint.

71. The Council considers the existence of designated complainants with the power to make super complaints would serve three important roles. Firstly they would act as public watchdogs, imposing a discipline on the competition authority. Secondly, they would represent complainants who lack the capacity to pursue complaints to fruition, or are concerned to maintain confidentiality for fear of reprisal by those parties complained against. Thirdly, they would serve a role as screening agents, sorting out frivolous complaints and collecting preliminary evidence or information to be put to the competition authority.

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

72. Access to information in investigating allegations of anti-competitive conduct is crucial. Therefore, the Council considers that the competition authority should have the following powers:

(a) to require the production of relevant information to assist in the proper examination of alleged anticompetitive conduct; and
(b) to examine witnesses under oath
(c) to obtain information through search warrant for documents, or by oral examination of witnesses under oath;

73. The examination of witnesses would need to be undertaken in a formal process by senior staff members of the competition authority, appointed by the chief executive of the competition authority for specific instances where it is considered necessary to undertake an examination. It is not envisaged that the power should be used arbitrarily by staff. Investigative staff in competition authorities in other similar advanced economies are not given similar powers to that of police officers, such as the power to arrest suspects. The Council does not envisage that staff of a Hong Kong competition authority should have such similar powers.

74. The extent of a competition authority's legislative powers are meaningless unless it is adequately staffed and resourced. The Council stresses therefore that the competition authority should be given sufficient resources to use its powers of investigation and adequate resources to fund legal challenges where parties seek a review of the authority's decisions before the competition appeals tribunal.

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

75. The Council considers that the strongest sanctions should be brought to bear on any persons who act so as to frustrate the legitimate actions of the competition authority and its staff. Criminal sanctions are commonly used in other competition law jurisdictions to punish persons who frustrate the actions of a competition authority, by refusing to provide information, destroying evidence or intimidating witnesses[3].. Moreover, a precedent exists in Hong Kong through Section 184 of the Securities

[3] See for example, the provisions in Part XII of the Australian Trade Practices Act, regarding offences committed through failing to attend as a witness, furnish information, intimidation etc.

and Futures Ordinance and Section 36D of the Telecommunication Ordinance, which provides that a person who, without reasonable excuse fails to give assistance to an investigation commits an offence and is liable to a fine or imprisonment. Such harsh measures are necessary in order to safeguard the lawful actions of investigative staff of government authorities, and to protect those complainants, such as consumers and SMES who come forward to assist the authority in its task.

76. The Council considers therefore, that at the very least, criminal sanctions should apply against persons who fail to cooperate with the competition authority when using its lawful powers.

Question 13 - How might a competition regulatory authority deal with the disclosure of information that comes to its knowledge having regard to the need to protect various categories of confidential information on the one hand, and the need to make appropriate disclosure in order to take forward an investigation when the circumstances so require?

77. The Council considers that this is an important issue that goes to the heart of public confidence in the operation of a competition authority. As a matter of principle, all staff and members of the competition authority should be bound by general confidentiality clauses in either their terms of employment or appointment. Moreover, specific legislative measures should be introduced in relation to confidential information provided to the competition authority, for example in the course of exercising its information gathering powers; and provisions governing the maintenance of confidentiality to protect the identity of 'whistle blowers' who provide information to the competition authority. Sanctions against breaches of the confidentiality provisions in relation to these matters, where the necessary element of intent to commit a criminal offence has been proven, should be on level terms with the sanctions that apply against persons who frustrate the legitimate actions of the competition authority to use its lawful powers; noted above.

78. The Council considers that the provisions in Singapore competition law, noted in the discussion document, which provide a basis upon which confidentiality can be given by the competition authority and which are similar to those existing in other competition law jurisdictions, can serve a useful model for Hong Kong to follow.

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

79. The Council understands that the role of competition authorities is to administer laws primarily intended to safeguard competition by preventing companies from lessening competition through collusion or eliminating competitors, by means other than offering superior products to consumers. As such they have a reactive role, and only take action on an ad hoc basis. Regulatory authorities with competition functions are typically public bodies created by governments to regulate and license market participants in public utilities markets or infrastructure industries because of a concern that left to their own devices the participants would not adequately serve the public interest.

80. The Council notes that the existing Hong Kong regulatory authorities with similar powers to the envisaged competition authority are first and foremost, licensing bodies. Therefore, the market participants that the Telecommunications and Broadcasting Authorities regulate are licensees, and adherence to competition rules by those licensees are enforced as licence conditions. Accordingly, the current regulators would need to continue in existence for as long as the Government desires both sectors' market participants to be licensed.

81. As noted earlier, the Council suggests that the prohibitions against anticompetitive conduct should mirror as much as possible the current provisions found in the competition provisions of the Telecommunications and Broadcasting Ordinances. If this is the case, then there will be consistency across the economy in the application of competition policy, as far as law is concerned, if the current regulators maintain their competition enforcement function. The fact that separate authorities might exist to administer competition provisions will only cause concern if there is inconsistency in the application of the legislative provisions, or there is a problem with regulatory overlap.

82. There are precedents for telecommunications and broadcasting regulators to have a competition role and to co exist with general competition authorities in some other competition law jurisdictions; for example, the UK, US and Canada. The way in which problems are avoided in terms of regulatory overlap, or inconsistency in application of laws is through 'memorandums of understanding' between the different authorities. In Hong Kong, the Government could take the formal step of requiring each regulatory authority to enter into such arrangements with the general competition authority. It should also provide some oversight as to what is expected in the arrangements; given that it would presumably have certain socio political objectives inherent in its policy to maintain licensing for certain economic sectors, that it would want to preserve.

83. The Council therefore favours the option of retaining the current competition oversight role by the existing telecommunications and broadcasting regulators. Importantly, it would most likely be the case that at its inception, the general competition authority would have a large enough workload without having the added responsibility of also undertaking the competition work of the two existing regulators.

Question 15 - Should breaches of any new law be considered criminal or civil infringements and what levels of penalty would be suitable?

84. The Council considers that breaches of the competition provisions of the new law should only be considered as civil infringements. As an investigative and decision making body, the competition authority is not in a position to be able to convict persons of a criminal offence. Criminal prosecution is a matter that should be left to the court system. Therefore, any orders that the competition authority makes in regard to what it considers to be breaches of the competition provisions in the law, would have to be treated under civil law, and made subject to review on the merits through the recommended competition appeals tribunal. (The recommendation that persons who frustrate the lawful actions of the authority in performing its tasks, or who intimidate witnesses, should be found guilty of a criminal offence does not

conflict with the above recommendation, because the actions of interference and intimidation would be prosecuted in a court of law and have similarities with other criminal offences in the wider community.)

85. While it is a fact that Hong Kong has already made a precedent in using criminal law provisions in competition matters, through Sections 6 and 7 of the *Prevention of Bribery Ordinance* which make the practice of bid rigging for tenders and auctions called by public bodies a criminal offence, these offences are prosecuted before a court of law, and the decision as to whether a person is guilty or not is not made by the agency that undertakes the investigation; i.e., the ICAC.

86. An appropriate range of civil remedies should be made available to the competition authority, enabling it to issue orders (subject to appeal to the competition appeals tribunal recommended above, and subject to review after a reasonable period after enactment of the cross-sector competition law) to:

    (a) prevent the conduct from continuing;
    (b) provide for restitution; and
    (c) secure pecuniary penalty, where it can be proven that there was intent to engage in anticompetitive conduct;

87. As a basic rule, the Council considers that monetary penalties should be commensurate with the economic benefits that have accrued from the breach, and also at a level that acts as a deterrent. If only fixed monetary penalties are applied, the amount of penalty that can be imposed might not always be a deterrent, given that market participants could trade off the threat of a maximum monetary fine with the commercial returns that could be achieved through the prohibited conduct (such as a price fixing). The Council considers therefore, that the pecuniary penalties to be imposed should not only act as a deterrent but also include provision for recovery of damages to injured parties based on the financial detriment experienced as a result of the prohibited conduct.

Question 16 - Should any new competition law include a leniency programme

88. The Council notes that a feature of court cases against cartels in competition law jurisdictions overseas has been the policy of using of leniency programs by competition authorities as a tool to extract evidence on cartels. Typically, these provide for immunity from prosecution or reduced fines for cartel participants if they cooperate in exposing the cartel and securing a conviction. There is a first mover advantage for any 'whistle blowers', although cartel members who were the instigators of the cartel would in all likelihood be denied access to the leniency provisions.

89. The Council supports such a policy. However, rather than incorporating a leniency program in the law, the Council suggests that the proposed competition authority should only be required to set out in detail within a certain time after its inception its formal policy in relation to leniency for whistle blowers in relation to cartel activity. This would allow the authority some flexibility in how it constructs and administers the programme, depending on the market circumstances that exist from time to time.

90. The existence of a leniency program, and the widespread knowledge of the program in the marketplace could well have the effect of dismantling any cartels that are in existence, without the direct intervention of the competition authority. This could arise merely through the apprehension that such a program would bring about for cartel participants, who could not be certain whether or not a cartel member may choose to expose the cartel, in an attempt to escape the possibility of ultimate exposure and penalty.

Question 17 - Should any new competition regulator be empowered to issue orders to 'cease and desist' from anticompetitive conduct?

91. It is envisaged that if the Council's suggestion as to enforcement powers of the competition authority is taken on board, as noted above, then powers to issue orders to 'cease and desist' would form part of the overall power of the competition authority.

92. If a competition authority was required to seek orders from a court, and has no power to issue orders itself, the time lag between the competition authority's decision to institute legal proceedings based on its prima facie concern, and the final decision on whether the alleged conduct is anti-competitive is made by the courts or other judicial/adjudicative body, then the competitive positions of the party or parties affected by the conduct could be permanently altered. For example, through market exits or loss of market share. Once these changes have occurred, it is unlikely that such changes could be reversed, and any success of the authority through the legal process would be hollow.

93. Accordingly, the Council considers that the competition authority must be in a position where it can act quickly so as to prevent conduct from continuing, until the matter is finally settled, i.e. all avenues of appeal have been made to the proposed competition appeals tribunal.

94. In jurisdictions where competition authorities are required to seek orders from courts in relation to anticompetitive conduct, they often seek interim injunctions from the court to prevent the targeted conduct from continuing. In effect, giving the competition authority a 'cease and desist' power would be giving it the power to issue interim injunctions.

95. The Council therefore suggests that the law should provide that where the competition authority has a prima facie concern on an alleged conduct or agreement that will lead to substantial lessening of competition, the authority should have interim injunctive powers, so as to issue orders to "cease and desist" from anti-competitive conduct, until a final ruling on the case has been made, should the party the subject of the order seek a review in the competition appeals tribunal.

Question 18 - As an alternative to formal proceedings, might any new competition regulator have the authority to reach a binding settlement with parties suspected of anticompetitive conduct?

96. It would be expected that a competition authority would as a matter of course seek to have a settlement with a market participant, to avoid formal proceedings. This is

commonly the case with competition authorities in other jurisdictions. If there are provisions setting out legal requirements for 'settlement' then this suggests that the 'settlement' would then become a formal legal procedure, and subject to appeal; possibly negating any benefits that would seem to arise from entering into a 'settlement'.

97. Whether or not there are formal settlement procedures outlined in the law, the Council believes that any settlements to avoid legal proceedings reached between the competition authority and any firm, or person considered by the authority to be in breach of the law, should involve an ongoing compliance program. Such a program should ensure that the firm, its directors and employees are all aware of the existence of the competition law and steps are in place within the corporate structure to ensure that the spirit of the law is observed.

98. The Council therefore recommends that a compliance programme should include at least the following features:

    (a) effective communication to all staff through a policy statement that compliance with competition law is a core value of the organization;
    (b) senior management should be knowledgeable about, and keen to conform to, competition rules and discipline any breaches;
    (c) an established education programme to update management on current competition law developments;
    (d) a system of reporting on compliance with competition law;
    (e) a satisfactory policy on record-keeping to ensure the retention of relevant documentation.

Questions 19 & 20 - Should the law allow civil claims and how can the legal burdens of SMEs be lessened

99. The Council believes as a matter of principle that the right of action for damages following a successful action for anticompetitive conduct should exist.

100. As noted in the Government's discussion document, if the competition authority has the sole power to make orders (as recommended by the Council) then it will also be able to take into account the ramifications of those orders on the rights of affected parties, and obligations of those considered in breach of the law. This will undoubtedly play an important role in the preliminary discussions that a competition authority will hold with market participants, when discussing the resolution of a matter. It is expected that the competition authority would not take action against any party for a breach of the competition provisions, without first raising it with the party or parties. In these circumstances, the competition authority is in a position to inform the party or parties involved that they have the option to stop engaging in the conduct. In these circumstances there would be no further action and it follows that there would not be any grounds for other parties to seek redress or compensation. Those informed by the competition authority that they are engaging in anticompetitive conduct are then in a position where they can accept this 'warning' and desist, or continue with the conduct if they so choose, and accept the consequences.

101. It might also be the case that the subject of redress for affected persons could be raised at this stage, and arrangements made to provide some form of reasonable restitution as a means of avoiding a legal case, while at the same time ensuring that the market participants do not face an excessively onerous legal burden. In any event, the Council believes that following a finding by the competition authority that a firm has breached the competition law, civil claims after that verdict has been made (and reviewed by the competition appeals tribunal if felt necessary by the breaching party) should be allowed to be considered in a court of law, in the same way that civil claims for compensation can be made by aggrieved parties in regard to damages arising from other breaches of law.

Continuing Competition Policy Oversight

102. The introduction of a competition law should be seen as only one part of an overall commitment towards optimising the benefits that competition can bring to consumer welfare.

103. The United Nations Conference on Trade and Development (UNCTAD) stresses that competition is an "enabling technology" which underpins a variety of policy initiatives and that the components of competition policy may include:

(a) an initial commitment to a policy of reducing or eliminating government ownership and controls;

(b) determining the pace at which liberalisation is to be introduced, including the identification of sectors where continuing government ownership or statutory controls might be justified on public policy grounds, for instance to protect vulnerable social groups;

(c) in the field of external trade, the reduction or elimination of quantitative controls;

(d) where privatisation occurs in utilities that enjoy a natural or de facto monopoly, the creation of regulatory structures that will ensure a proper balance between the interests of operator and consumer while allowing scope for the introduction of competition wherever appropriate;

(e) the adoption or reinforcement of measures (i) to protect the consumer against "unfair" trading practices by enterprises and (ii) to set and enforce standards for goods and services that all suppliers must observe;

(f) the adoption or reinforcement of measures to prevent enterprises from undermining, through misuse of their market power and the erection of private barriers, the competitive rivalry between enterprises which delivers to consumers the full benefits of markets once they are liberalised and freely functioning.

104. It should be noted that Hong Kong has successfully proceeded through many of the above steps. However, while we can take pride in the achievements we have made to date, the Council considers that it is important to appreciate that even with the creation of a cross sector competition law, and a competition authority to administer that law, there will still be a need for competition policy oversight by Government to implement a continual process of review in new policy formulation and in reviewing

current policies. For example, opening up the energy sector in Hong Kong to competition. The Council suggests that the Competition Policy Advisory Group, or a newly constituted body, should exist to take charge of such an important function.

105. This body should also shoulder the responsibility of public education on the benefits to the economy of a competition law. The urgent need for education is brought about due to the many distorted messages that have been circulated in the community, concerning the concept of a competition law in general, as well as the proposals put forward by the government discussion document. There is a need to enhance proper understanding of a competition law by members of the public, the private sector, including SMEs and big corporations, and professionals.

106. This body should also be tasked to look at manpower planning, training and continuing education in this sphere.

Consumer Council
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