A Response to: A Public Discussion Document on the Way Forward for Competition Policy in Hong Kong – Promoting Competition – Maintaining our Economic Drive

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Individual Submission (via email & fax:)

First of all, I applaud the comprehensive work by the government in putting together the public discussion document, and the progress it has made in bringing forth a much needed update to Hong Kong's competition policy. I also express great appreciation for the opportunity to express my opinion within the well thought framework for consultation. That being said, I look forward to the government treating the comments received from this consultation not simply as a simple poll, but a true solicitation of important ideas from the public at large that are relevant for the legislation and implementation of an appropriate competition policy for Hong Kong.

Competition by Business Innovation is a Core Competence of Hong Kong

Before I provide my responses based on the discussion document, I would like to point out a few observations and opinions with regards to promotion of competition in the marketplace:

- Lowering prices alone does not itself represent the benefits of competition, rather increase in value of offerings is an even more important indicator;
- Education of the market on the competitive policy, what it entails, its intents and benefits to the society as a whole must be an integral and important mandate for the regulatory authority; and,
- The competition policy must be sensitive to avoid the frustration of business innovation which represents a core competency of Hong Kong.

The discussion document quotes a 1998 World Bank and OECD paper saying that competition, "forces firms to become efficient and to offer a greater choice of products and services at lower prices." Rather than defining it simply as "at lower prices", perhaps it should be better characterized as providing better value. My personal experience and opinion has found that price competition alone may not be most beneficial for consumers, and that the essence of competition should not be measured against simply lower prices. Providing better value, including a higher cost-benefit ratio to the customer, would be a more appropriate characterization for the intent of promoting competition. This is an important element that the government should take to heart in devising our competition policy and even more importantly in the implementation, education and enforcement which follows.

Speaking of which, the market education aspect of the competition policy was not articulated with much emphasis in the discussion document. While the document mentioned in many instances the anxiety of SMEs in their ability to compete with more aggressive tactics and the worry of "anti-competitive" litigation by better capitalized competitors, little discussion was placed on the importance of market education. Many of these fears could be mitigated by broader market education. Even market leaders and dominant players should not be overly concerned because the competition policy is not intended to curb their ability to exercise their

economies of scale, but rather to regulate abusive behavior that is detrimental to the public at large. Of course, the mitigation against these anxieties must be supported by competition policy and corresponding legislation that is clear, enforceable and comprehensive. The anticipated competition regulatory authority must take on proactive market education about guidelines and to actually promote lively competition rather than hamper business model and marketing innovations.

The Hong Kong economy is well regarded as one of the freest markets to do business in, and our competition policy must not thwart that. Furthermore, I believe that one of the core competences of Hong Kong is its creativity in business innovation. These include business model innovations, sales and promotion innovations, pricing and bundling innovations, cross-sector leveraging innovations as well as many other trading and exchange innovations. The sharp eye for opportunity, leverage and pivot are hallmarks of the Hong Kong businessman.

Not only is this extremely important to remember and uphold, I believe it will also be an important element of competitive advantage for Hong Kong as we move into the networked economy brought by the proliferation of the Internet as a communication and commerce platform. Business innovation is the area of innovation that Hong Kong can thrive in. New legislation crafted for the competition policy must try to avoid inadvertently frustrating the vitality of Hong Kong's competitive edge in the networked knowledge economy.

Twenty Key Questions:

The Need for a New Competition Law

1. Does Hong Kong Need a New Competition Law?

Yes. The economy in Hong Kong has matured to include large conglomerates that could realistically and effectively adversely influence the marketplace with abusive maneuvers. Ensuring a free market is important, but as experienced in many economies around the world, excessive dominance is conducive to abusive behaviors by the dominant player. It is not the dominance that requires curbing but abusive conduct. The industrial structure of Hong Kong is at a point where new competition law could enhance constructive competition.

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 purely to administrative oversight?

Yes. The law should describe an overall environment in Hong Kong for promoting constructive competition. Specific laws for target sectors could continue to be drafted to augment the general competition law. For example, the current laws for the telecommunications and broadcasting industry could continue. Specific laws for other industries may also be useful in the future. Nevertheless, an overarching law allows for a consistent understanding of a constructive competitive business environment for Hong Kong, including both consumers and producers.

Furthermore, cross-sector activities are common and beneficial for consumers if constructive competition between alliances or company groups is maintained. Destructive competition,

collusion or abusive conducts however may constrict consumer choice and hurt the overall competitiveness of Hong Kong in the global economy.

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

Market structures should play a significant role in the determination of violation and punitive measures. Because the competition regulatory authority must make judgment, at least to a certain extent, of the seriousness of a suspected infringement, the availability of market structure information will be important. Monopolies or near monopolies that are not engaged in abusive, anti-competitive behaviors, should not be persecuted or inhibited by the law, but should fall under special monitoring and regulatory measures by the regulatory authority. While emergence of market structure within an industry or among the economy as a whole should not in and of itself be an infringement, the law must stipulate a framework of monitory and regulatory enforceable axioms to proactively ensure (rather than reactively) that abusive and anti-competitive conduct is not being carried out.

Nevertheless, the new competition law should focus on the specific types of anti-competitive conduct, with monitory requirements given to dominant players based on market structure (both for a specific industry, in groups of industries or the economy as a whole). Mergers and acquisitions to these effects should also be monitored. The authority should have ability to investigate proposed mergers and acquisitions that in itself may be an abusive and anti-competitive to the marketplace. Further discussion on the topic of "purpose" is included in Question 6.

Special exemptions for SMEs engaged in industries characterized by one or a few dominant players (Effective Monopolistic or Effective Oligopolistic structure[1]) should also be provided. Further discussion on the topic is included in Question 7.

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?

The new competition law should set out a general prohibition against anti-competitive conduct with clear examples of such conduct. A comprehensive guideline based on up-to-date information and realities of the marketplace must be maintained by the regulatory authority. Further discussion included in Question 5.

5. 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

[1] Effective Monopolistic Structure is used in this document to define a market structure that is characterized by having one extremely dominant player and several (or many) significantly smaller players. Similarly, Effective Oligopolistic Structure is used in this document to describe a market structure characterized by having a few extremely dominant players and many other significantly smaller players. This is to be distinguished from "monopolistic competition".

should the legislation be supported by the issue of guidelines by the regulatory authority?

As mentioned in Question 4 above, the new competition law should set out a general prohibition, which is augmented by a comprehensive guideline maintained by the regulatory authority. While it is impossible to predict the future, having a general structure allows for the ability of curbing and bringing to justice abusive behaviors that are newly created. At the same time, clear guidelines must be maintained to avoid uncertainties in the marketplace which could thwart business innovation and lively competition. Only infringements that fall under the then current guidelines could be adjudicated by the regulatory authority. Suspected infringements that fall outside of the guidelines must be determined through the judiciary system. Further discussion on this is included in Question 8.

Furthermore, whenever the guideline is updated, time-based exemptions must be included to the effect that such update should not prejudice the legal rights of suspected violators to bring the matter to resolution within the judiciary system, rather than under the regulatory authority. More specifically, if an activity has been started and ongoing upon the update of the guideline, such activity, if suspected to be infringing on the new guideline must still be considered to fall outside of the guidelines and be determined through the judiciary. Further discussion of this is included in Question 7 with regards to exemptions.

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?

The "purpose" of a conduct, that is, the intent of the violator, as well as the "effect" should be taken into account with regards to the punitive measures sanctioned. For example, if a violator is determined to have engaged in willful infringement, different level of penalties should be levied (such as in the case of repeated infringements). Abusive conduct on its own however should be regarded as sufficient in determining that an infringement has taken place. Unintentional infringement however should have the opportunity of being forgiven to the extent that the record of infringement is expunged if no further violation is found after a given period. Such forgiveness should also extend to the dismissal of civil claims for damages against the infringer.

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?

Exemptions and exclusions may apply to several scenarios:

a) Activities engaged prior to the legislation and have ceased
b) Activities engaged prior to the legislation and is ongoing
c) Updates to the guidelines maintained by the regulatory authority
d) Specific industry circumstances
e) Specific business activities
f) SME exemptions

For (a), exemptions should apply to all suspected infringements. More specifically, the legislation should not be retroactive and prior activities should be grandfathered. For (b), a given grace period should be provided. As described in Question 5, when the guidelines containing specific types of anti-competitive conduct is updated by the regulatory authority, special exemptions should be provided. The structure of (c) should follow from (a) and (b).

Scenario (d) is concerned with specific industries which may in fact provide public benefits that outweigh harm. In order to obtain exemption however, entry barriers must also be taken into consideration, abusive barriers of entries should not be exempted. Certain limitations to new entrants may be exempted for nascent industries or industries in critical conditions. Abusive limitations however should continue to be prohibited. For example, a new entrant that can demonstrate that it could in fact enhance the industry should not be unreasonably blocked by abusive behaviors by existing players. Limitations that lend itself to exemptions are reasonable standards, best practices and other guidelines developed by the industry in good faith. Exemptions given for (d) must be subjected to periodic revision and sunset provisions where appropriate.

Scenario (e) may provide temporary exemptions to activities to be conducted by a firm or group of firms that may otherwise infringe on the then current guidelines, but do result in public benefits that outweigh its harm. Exemptions granted must be limited by time and must sunset upon the ending of the period. Extensions to exemptions should be treated as a new exemption request.

Finally, specific exemptions should be specified in the competition law to protect and enhance the competitive position of SMEs where an Effective Monopolistic or Effective Oligopolistic market structure (i.e. where the market is characterized as having one or a few dominant players and many significantly smaller players).

Exemptions for scenarios (a), (b), (c) and (f) should be incorporated in the new competition law. Exemptions for scenario (d) should require the development of subsidiary legislation, with provisions for obtaining temporary exemptions once the subsidiary legislation procedures are underway. Depending on the anticipated effects of the activity for which an exemption is requested for, exemptions for scenario (e) may be granted by the regulatory authority (if effects are deemed small), or by the judiciary.

The Regulatory Framework for Competition Law

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?

A mixture between all three models is required. Different model must be used for different types of activities of the regulatory authority.

For infringements with smaller effects and resulting and lower penalties, Model 1: power to investigate and adjudicate, should be delegated to the regulatory authority, with appeals brought to the courts or a specially appointed appeal board (or specialist tribunal). Model 1 affords for an efficient and effective administration and enforcement of the competition policy for smaller scale issues.

For infringements involving criminal offense, more extensive effects or resulting in higher penalties, Model 2: should be used, where the suspected cases of anti-competitive conduct is brought to the courts directly. This ensures a separation of function of the regulator and the adjudication for higher impact cases.

For the granting of exemptions as described in Question 7, Model 3: where a specialist tribunal is called upon, should be used. This includes the granting of temporary exemptions for scenario (d) and minor exemptions for scenario (e). Furthermore, the development and update of the guidelines should be established via the use of specialist tribunal. The reason for this arrangement is that it allows for the regulatory authority to obtain the latest information from the industry which would be impossible for itself to maintain up-to-date internally by the authority itself.

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?

Having a separate board to oversee the regulatory authority is a good idea. This ensures check-and-balance as well as continued input from the society to the authority.

However, without clear specification of how the board is constituted, the suggested "two-tier" structure based on a "management" board is worrisome. The anxiety is around the makeup of the "management" board and its potential bias towards the industry. It was not clear in the consultation document what the constitution of the "management" board would look like. Furthermore, a removed "management" board may not be effective if all adjudications and investigations do pass its agenda. At the same time, if it is only consulted on high level aspects it loses its function as a check-and-balance with the regulatory authority executive, while retaining the responsibility in the face of the public.

Rather than a structure calling for a "management" board, I believe an "advisory" board would be more appropriate. This puts the onus on the authority to stand as a responsible independent authority but yet places a clear check-and-balance on its operations by requiring its transparency and disclosure to the advisory board. The advisory board at the same time could retain its independence to the public without the unrealistic responsibility of attending every investigation and adjudication (i.e. as implied by a "management" board).

Enforcement and Other Regulatory Issues

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?

Yes. Nevertheless, this should not prevent or prejudice the ability of third-parties seeking judicial process towards serious infringements. For example, if a complaint was regarded as trivial, frivolous or malicious by the regulatory authority, this should not prevent or prejudice the complainant from seeking litigation process through judiciary against an alleged infringer.

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

Formal powers of investigation as suggested by the CPRC should be delegated to the regulatory authority.

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

Failure to co-operate with formal investigations that involve a warrant issued by the court should be made a criminal offence. Such infringements must not be determined by the competition regulatory authority itself but must be brought before the judiciary.

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?

Appropriate disclosure to an identified audience for the purpose of taking forward an investigation is reasonable. Enforceable confidentiality agreement with the audience for the disclosure must be established before the disclosure is acted upon. Should a disclosure result in significant damages to the alleged infringer, the alleged may request for the regulatory authority to obtain consent from the court (or judge) before acting upon the disclosure. Nevertheless, such request must not be abused. If such right for request is found to have been abusive, such request should be considered a failure to co-operate that could be determined to be a criminal offense, as described in Question 12.

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?

A timetable for the merging of the specific regulators into the cross-sector competition regulatory authority should be established. Existing sector specific regulators should continue to play a role, and its functions should not diminish. As mentioned in Question 2, new specific legislations for specific industries may be introduced as well. The cross-sector competition regulatory authority must have an architecture that can absorb the existing sector specific regulators without affecting its expertise, as well as the ability to handle new sector specific legislations as they arise.

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

Different levels of penalty should be designed for different levels of "effect" of an infringement as well as for whether "purpose" (i.e. willful infringement) is established. Level of penalty should correlate with the "effect" of an infringement. Only civil infringements should be allocated for lower impact violations. Such infringements may be adjudicated by the regulatory authority. Higher impact infringement, especially where willful infringement is established may include criminal liabilities. Such infringements must be brought to the courts.

Furthermore, the structure of penalties, especially for fines and the allocation of their usage should be developed. For example, fines for an infringement could be used to subsidize the other players in an industry on market or innovation development. This will not only put the fines to good use, it will create additional incentive against infringement as the infringer is aware that its fines may be used for industry competitors.

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

Leniency program should be extended to higher impact infringements, including infringements that may result in criminal liabilities.

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

Yes. At the same time however, such "cease and desist" orders should not prevent or prejudice against the appeal of the alleged infringer. Furthermore, the alleged infringer should also have an avenue to see to obtain from the courts a temporary injunction to the cease and desist with appropriate guarantee escrow deposit. This arrangement allows for business innovation to continue in face of high stakes competition, such as global competition, in case a mistake has been made by the regulatory authority, until a full judicial process is complete.

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?

For issues involving lower impact, especially with regards to public interest, such binding settlement is acceptable. However, in the case of higher impact infringements, as well as infringements that may involve criminal liabilities, such settlement should not be allowed. Furthermore, if the infringement had brought significant harm to the public, such settlement should not be allowed, and the case must be brought through the judicial system.

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

Yes.

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?

First of all, a core mandate of the regulatory authority must include market education to clearly explain to SMEs the purpose, intents and framework of the new competition law. Furthermore, as described in Question 7, for certain industries where the market structure could be characterized as an Effective Monopolistic or Effective Oligopolistic structure, special exemptions should be extended to SMEs to avoid such onerous legal burden as a result of civil claims.

Furthermore, such civil claims must not be sought until an infringement is determined and appeal has been deemed unsuccessful or the appeal period has expired.

The combination of the arrangement for allowing the regulatory authority to investigate and adjudicate (as described in Question 8) as well as to seek settlement (as described in Question 18) provides the regulatory authority the ability to resolve infringements involving SMEs in a relatively more expedient and cost effective manner.

Finally, the forgiveness option as described in Question 6 may help to alleviate anxiety by SMEs who worry they may unintentionally infringed upon the competition policy.

Summary:

I would like to express my appreciation again for the opportunity to provide my opinions. I believe that the discussion with regards to a revision of the competition policy for Hong Kong is mature and that there is urgency in moving towards meaningful legislation to promote fair competition in Hong Kong's free market.

A few important issues remain which will require more extensive discussions:

- Structure, authority delegation and governance of the anticipated competition regulatory authority.
- Appropriate constitution of a special tribunal, advisory board and other committees that would oversee and assist in the governance of and adjudication by the regulatory authority, including an appeals framework.
- Comprehensive penalty framework, including levels of punitive measures, forgiveness, leniency, exemptions and the allocation of usage of fines obtained.

Last but not least, I urge that a comprehensive public education program be prepared in conjunction with the drafting of the legislature to alleviate concerns, especially from SMEs and conglomerates operating in Hong Kong. Their thorough understanding of the benefits of a new fair competition law in Hong Kong is paramount to the economy. The continued promotion of business innovation must be maintained to ensure vibrant and lively competition and the competitiveness of Hong Kong's enterprises locally, regionally and globally.

I look forward to a next round of consultation that would include draft legislature, timetable, and details regarding the establishment of a competition regulatory authority.