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Subject: Comments in response to Hong Kong's public consultation on the introduction of a comprehensive competition law

The European Commission is following the development of a comprehensive competition law in Hong Kong with great interest, and is very impressed with the public consultation document, *"Promoting Competition – Maintaining our Economic Drive"*, of 6 November 2006. As a contribution to the consultation process, the EU wishes to present some general views in connection with various aspects of competition law and its enforcement.

Attached are comments made by our expert from the Competition Directorate-General (DG Competition) of the European Commission. Section 1 contains more general considerations regarding competition law and Section 2 contains more precise comments in reply to the three main issues raised in the 20 questions of the consultation document.

The EU believes that competition policy is an important attribute of any well-functioning market economy and encourages Hong Kong to adopt a comprehensive policy that will certainly improve the functioning of its market economy.

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Encl: Document from DG Competition (16 pages)

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Comments in reply to Hong Kong's public consultation on its project for the introduction of a comprehensive competition law

On 6 November 2006 the Hong Kong Government issued a discussion document entitled *"Promoting Competition – Maintaining our Economic Drive"* to seek the public's view on whether there is a need for a comprehensive cross-sector competition law in Hong Kong and, if so, what types of conduct such a law should prohibit and on the appropriate institutions to enforce it, if it were to be introduced.

Below you will find the comments of DG Competition of the European Commission. Section 1 contains more general considerations regarding competition law and Section 2 contains more precise comments in reply to the three main issues raised in the 20 questions for which the Hong Kong Government seeks comments:

1. GENERAL COMMENTS REGARDING THE DEVELOPMENT OF A COMPREHENSIVE COMPETITION LAW IN HONG KONG

The European Commission is following the development of a comprehensive competition law in Hong Kong with great interest. Competition policy is an important factor in ensuring consumer welfare. The EU believes that competition policy is an important attribute of any well-functioning market economy.

It therefore welcomes the initiatives to introduce a comprehensive competition law in Hong Kong and it is looking forward to seeing Hong Kong with a fully fledged competition regime in operation as a move forward to achieve the objective of enhancing economic efficiency, protecting free trade and thereby bringing benefits to consumers.

It is very impressed with the public consultation document, *"Promoting Competition – Maintaining our Economic Drive"*, of 6 November 2006 which raises 20 questions which are pertinent to raise for any jurisdiction that is debating the introduction of a competition law regime. Without going into detail with regard to each of the 20 questions, the EU nevertheless wish to present some general view with regard to various aspects of competition law and its enforcement:

1.1. Competition law in the global trading system

Competition law is a tool to help development, and an important potential lever to promote economic governance in the global trading system. With increasing globalisation more and more companies, mergers and cartels are international. This is making international cooperation on competition policy essential. It provides for a level playing field and legal certainty to the business community operating globally in national and international markets.

Anti-competitive practices affect the balance of access opportunities negotiated between WTO Members. They belong to the next barriers to trade in a liberalised world. The application of competition law contributes to creating accessible markets and to assuring the overall openness and stability of the trading system. Competition policy is clearly trade-related, and the application of competition law principles on markets will help level the playing field and promote equal conditions of competition for firms competing on international markets.

The EU is therefore very active both bi-laterally and multi-laterally with a view to establish a global co-operation on competition policy issues. The EU supports the development of competition policies along internationally accepted standards in

jurisdictions that do not yet have any. For example, a formal EU-China Competition Policy Dialogue was begun in 2004. It has as its primary objective the establishment of a permanent forum for consultation and transparency between China and the EU as well as technical assistance to China. These consultations have increased both sides' understanding and awareness of each other's approaches. The dialogue is at present focused on helping China in its process of developing the competition law and a competition authority.

1.2. Objectives of competition policy

The question about the objectives of competition policy is a fundamental issue that any developing competition regime needs to address at the very beginning of the development of a competition law and enforcement system. The general consensus between major jurisdictions is that the ultimate objective of competition policy should be limited to economic efficiency and consumer welfare. Competition in this context is not an end in itself, but a mean to achieve these objectives.

Adoption of a competition law is, however, a political act. Therefore, it is natural that the debate on objectives is not limited to economic arguments, but includes also social and political considerations, which likewise play an important role in the initial discussions about the objective of a competition regime. However, usually the outcome of the political debate is - and I strongly believe that it should be - that social and political objectives are pursued by other instruments than competition policy. In the EU there are distinct instruments; industrial policy, protection of small and medium sized enterprises, employment, consumer protection or fight against inflation. Including these types of public interest objectives in a competition regime can open the way for arbitrary interpretations and raise a risk for conflicting objectives of a competition policy.

It is understandable that in a new competition regime fierce political debate may occur on its objectives, because - in the short run - maintenance of competition may conflict with other objectives such as employment and social cohesion. But, the perspective should not be on short run outcomes. In the medium or longer terms effective competition in an open market economy will be, by far, the better solution for employment and other positive social developments.

A single particular instrument - such as competition policy – cannot possibly serve to achieve several or all different economic and social policy goals. It is the totality of different policies that should ensure a better society with a proper balance between economic efficiency and social justice. This approach does not deny the need to co-ordinate different policies, but it does raise objections to the blurring of the focus of each individual policy.

It is essential to be clear on the objectives of competition policy from the outset. This is vital for legal certainty of companies that are subject to the competition rules. This also makes it easier for the general public to understand the purpose of competition policy.

Hence, a competition policy should not be overloaded with a multitude of objectives that may impair the true objective of a competition policy. For a competition policy the goal should remain to protect competition, to keep markets competitive, to achieve efficiency in the economy for the ultimate benefit of consumers.

1.3. The competition authority, its functions and relationship with sector regulators

Another key issue to be addressed at the outset is the establishment of the organisation that will implement the competition law. It is of outmost importance to create a competition authority that would be both effective and credible in implementing its tasks. A number of basic requirements are relevant in this respect:

First and foremost, a competition authority must be *independent*. A competition authority needs to be explicitly entrusted with independently enforcing competition law in individual cases and be able to independently set its law enforcement objectives.

In most jurisdictions competition authorities enjoy a large degree of independence from the government. In this context, independence primarily means that other branches of government are not allowed to intervene in the decision making process in individual cases. Furthermore, in many countries the members of the competition authority are not designated by the government but by other political bodies (Parliament, Government etc.). While the governments and parliaments act in the legislative role, they should not interfere in the daily execution by the competition authority of its tasks.

Also, when the state is involved in economic activity - and it has an interest in the economic results of such activity - it should not have any influence on the decisions of the competition authority concerning such economic activities. Ultimately, independence of the authority depends on whether the government subscribes to the competition principles and gives its political support for competition policy, including that it provides sufficient resources for effective enforcement.

The second condition is the *non-discriminatory application of the competition law*. The Competition authority should apply competition rules equally to all undertakings irrespective of their origin or status. Also, the same rules should apply to all undertakings and - while it is acknowledged that no two situations are exactly the same - decisions of the authority should always be consistent.

The third condition for a competition policy to be effective is that business - as well as other parts of the government - understands the rules. To achieve this, *competition law and policy should be transparent and implementation should be predictable*. The authority should demonstrate transparency both with regard to its decisions and its policy lines. An essential requirement is that the decisions of the authority are published so that the general public has easy access to those. The publication of policy lines in notices and guidelines increases clarity and legal certainty. This is the approach that the European Commission has taken and it has proven to be effective.

Fourthly, it is necessary that the competition authority can respect due process guarantees, i.e. *procedural fairness*. The rights of defence of the parties must be observed. This applies from the moment when the first acts of investigation are undertaken by the authority and throughout every subsequent stage of the procedure when the final decision is adopted. For instance, it would be appropriate that once all the investigation material has been gathered and the competition authority has formed its opinion, a statement of objections is presented to the firms so that they can reply to and comment on these objections.

The fifth essential condition is the *capability to protect confidential information*. The competition authority will acquire a lot of confidential business information when carrying out its tasks. It is necessary that it also protects such information from being

divulged to third parties. Disclosure of confidential business information can significantly harm a person or undertaking.

The sixth condition is a *capability to decide quickly*. To increase the legal certainty for undertakings, it would be advisable to develop clear and swift procedures for decision-making of the competition authority.

Finally, it is recommended to have one *single authority and one substantive law dealing with competition matters in all sectors of the economy*. In EU we have only one competition agency at the European level and an efficient division of work with the EU Member States competition authorities. The EU also only has only one set of laws that apply to agreements or practices that have an effect on trade between EU Member States or to mergers and acquisitions with Community dimension. In our view, a system with one single authority and one substantive competition law dealing with competition matters concerning all sectors of economy reduce the risk of inconsistencies, increases efficiency of enforcement, reduces red tape for companies and provides them with more legal certainty.

1.4. Prohibition of anti-competitive agreements and practices

A solid competition regime should have rules concerning anti-competitive agreements between two or more firms which restrict competition, however, subject to some limited exceptions. Article 81 of the EC Treaty[1] prohibits all restrictive agreements between undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. This provision covers a wide variety of behaviours. The most obvious example of an illegal conduct infringing Article 81 is a cartel between competitors (which may involve price-fixing or market sharing). Experience shows that restrictions can assume many shapes and forms. A draft competition law should not make an exhaustive list. This leaves scope for dealing with types of restrictions that does not fit neatly into one of the pre-defined categories of restrictions.

The second step of an analysis under Article 81 is to determine whether the agreement produces positive economic effects and to assess whether these positive economic effects outweigh the anti-competitive effects pursuant to Article 81(3)[2]. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency

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1 The Treaty establishing the European Economic Community was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. It has been amended several times, most notably by the Treaty on the European Union (signed in Maastricht on 7 which changed the name of the European Economic Community to the European Community and the Treaty of Amsterdam (signed on 2 October 1997) which amended and renumbered the EC Treaty. The Treaty of Nice (signed on 26 February 2001) merged the Treaty on the European Union and the EC Treaty into one consolidated version.

2 The application of the exception rule of Article 81(3) is subject to four cumulative conditions, two positive and two negative:

(a) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress,

(b) Consumers must receive a fair share of the resulting benefits,

(c) The restrictions must be indispensable to the attainment of these objectives, and

(d) The agreement must not afford the parties the possibility of substantially eliminating competition.

gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of a product or creating a new product.

When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals. This is precisely the analytical framework that is reflected in Article 81(1) and Article 81(3), which expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition.

Cartels never produce pro-competitive effects that allow for them to comply with Article 81. They are illegal secret agreements concluded between competitors the aim of which is - in coordination – to fix or increase prices, restrict supply by limiting sales or production capacities, and/or divide up markets or consumers. Cartels shield their participants from competition. This allows the participants to charge higher prices and to remove the pressure on them to improve the products they sell or find more efficient ways in which to produce them. Their customers (companies and consumers) end up paying higher prices for lower quality and narrower choice. This also adversely affects the competitiveness of the economy as a whole. The fight against cartels is therefore one of the priorities of the Commission in its enforcement policy.

The European Commission enjoys a number of investigative powers to that end (*e.g.* inspection in business and non business premises, written requests for information, *etc*).

The Commission may also impose fines on undertakings that violate EU competition rules. Fines of up to 10% of their worldwide turnover may be imposed on the guilty parties. It is important to set the level of the fines at a level where they act as a deterrent for companies considering to potentially infringing the competition rules.

Any firm or individual that has suffered damage due to the existence of a cartel can seek compensation before a court in a Member State of the European Union. Compensations awarded by national courts are different from fines imposed by the Commission. While action for damages before a court also acts as a deterrent, its main purpose is to compensate victims of anti-competitive behaviour or to secure compensation for damage suffered.

The EU had a *notification system* until May 2004 where companies could apply for an exemption pursuant to Article 81(3). The notification system was replaced by a directly applicable exemption system where there is no longer any prior approval by the competition authority. It is now up to companies themselves to ascertain that they comply with the competition rules. The Commission has accordingly issued a great number of guidelines and notices explaining the application and interpretation of the EC competition rules. Moving to such a system was possible due to the long experience in Europe and a vast jurisprudence of the EU Courts for 40 years.

1.5. Abuses by dominant companies

A solid competition regime should also have rules concerning the abuse of monopoly power. In the EU this is laid down in Article 82 of the EC Treaty, which deals with unilateral conduct by an enterprise with market power that restricts competition on the market. This is for example the case for predatory pricing aiming at eliminating competitors from the market.

Analysing abuses of dominant positions is challenging both for new and mature Competition Authorities because it involves complex economic analysis. Competition Authorities should therefore be cautious about intervening in the functioning of markets unless there is clear evidence that they are not functioning well. It is far too easy to get the analysis wrong in these types of cases. Therefore we would advice for any new competition regime to approach this type of cases with a particular caution.

The international community of competition agencies are still debating on the analysis of abuse cases. DG Competition is conduction an internal reflection on the policy underlying our legal provisions on abuse of dominance, and the way in which we should enforce that policy. In December 2005 the Commission published a Staff Discussion Paper which raises various points on exclusionary abuses for discussion with third parties. The Commission is currently reflecting carefully on the comments received from the public and on the issues at stake, to determine the best way to move forward with the review. Further steps should be announced in 2007. In the US the two Competition agencies, DoJ and FTC are organising a series of hearings on Unilateral Conduct. Also the OECD has consecrated in the recent past a considerable amount of time to discussions on these issues and will continue to do so in the near future. Moreover, the International Competition Network is now tackling this area, after having concentrated for years on questions relating to merger control and action against hard core cartels.

In the EU, market power is the central criterion on finding of a dominant market position. The existence of a dominant position in a particular market is normally inferred from a variety of factors. Main factors used in the EU are: (i) market position of the allegedly dominant firm; (ii) market position of competitors; (iii) strength of buyers and their ability to sponsor new competition on the market; and (iv) barriers to entry. These factors guide the market analysis which is required in abuse of dominance cases. At the same time they are sufficiently flexible to accommodate the extensive heterogeneity of individual cases.

As for the various forms of abuses - on the basis of our ongoing reflection in this field - we consider that the focus should clearly be on protection of competition for the ultimate benefit of consumers. As for the competitive harm, one should take into account not only short term harm, but also medium and long term harm – even though those are inherently more difficult to predict. Often the medium or long term effects are those that ultimately count. A competition authority needs also to take into account that the same type of conduct can have efficiency enhancing as well as competition restricting or eliminating effects.

1.6. Control of mergers and acquisitions

While companies combining forces through mergers can expand markets and bring benefits to the economy, some combinations may reduce competition. Combining the activities of different companies may allow the companies, for example, to develop new products more efficiently or to reduce production or distribution costs. Through their increased efficiency, the market becomes more competitive and consumers benefit from higher-quality goods at fairer prices. However, some mergers may reduce competition in a market, usually by creating or strengthening a dominant player. This is likely to harm consumers through higher prices, reduced choice or less innovation. Increased competition within the European single market and globalisation are among the factors which make it attractive for companies to join forces. Such reorganisations are welcome to the extent that they do not impede competition and are capable of increasing the competitiveness of industry.

The objective of examining proposed mergers is to prevent harmful effects on competition. Mergers going beyond the national borders of any one Member State are examined at European level. This allows companies trading in different EU Member States to obtain clearance for their mergers in one go.

If the annual turnover of the combined businesses exceeds specified thresholds in terms of global and European sales[3], the proposed merger must be notified to the European Commission, which must examine it. Below these thresholds, the national competition authorities in the EU Member States may review the merger. These rules apply to all mergers no matter where in the world the merging companies have their registered office, headquarters, activities or production facilities. This is so because even mergers between companies based outside the European Union may affect markets in the EU if the companies do business in the EU.

As for the legal standard for determining whether a merger should be authorised or not, all proposed mergers notified to the Commission are examined to see if they would significantly impede effective competition in the EU.[4] If they do not, they are approved unconditionally. If they do, and no commitments aimed at removing the impediment are proposed by the merging firms, they must be prohibited to protect businesses and consumers from higher prices or a more limited choice of goods or services. Proposed mergers may be prohibited, for example, if the merging parties are major competitors or if the merger would otherwise significantly weaken effective competition in the market, in particular by creating or strengthening a dominant player.

However, not all mergers which significantly impede competition are prohibited. Even if the European Commission finds that a proposed merger could distort competition, the parties may commit to taking action to try to correct this likely effect. They may commit, for example, to sell part of the combined business or to license technology to another market player. If the European Commission is satisfied that the commitments would maintain or restore competition in the market, thereby protecting consumer interests, it gives conditional clearance for the merger to go ahead. It then monitors whether the merging companies fulfil their commitments and may intervene if they do not.

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3 Mergers: Commission launches public consultation on consolidated guidance concerning jurisdiction in merger control :

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1273&format=HTML&aged=0&language=EN&guiLanguage=en

According to Article 2 of the Merger Regulation: "*A concentration has a Community dimension where:*

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million..."

4 Previously our test was based on finding creation or strengthening of a dominant position. The new test in the EU has not brought about any substantial change and dominance is still the most important criterion. In fact, under the former dominance test, the Commission was already following an "effects-based approach" which is now formally and directly the standard under the new test. An emphasis is put on the likely effects flowing from mergers, and in particular on possible "non-coordinated effects".

1.7. Public restraints to competition

Intervention of public authorities in the economy is sometimes necessary and justified in order to correct market failures or ensure the provision of public goods and services. There are, however, types of intervention that could distort competition. The authors of the EC Treaty, back in 1957, recognised that public restraints to competition would constitute the single most important obstacle to the establishment of a functioning common market in Europe. That is why they set out the "four freedoms" – to combat obstacles to cross-border trade resulting from State legislation and regulation. These freedoms are the free movement of goods, persons, services and capital.

The authors of the EC Treaty also made sure that the Treaty provides tools to tackle State measures that have a direct impact on competition between undertakings and the Commission has the necessary powers to tackle such measures[5]. As a result, there are a number of ways in which distortions of competition resulting from national legislation or from the actions of public authorities can be tackled under the EC Treaty:

- the general antitrust provisions,[6] which are applicable to all undertakings - public and private alike;

- control of public subsidies to the business (so called State aid control[7]);

- prohibition on EU Member States from implementing or maintaining in force measures, in connection with public undertakings and undertakings to which it has granted special or exclusive rights, which are contrary to the competition rules; and

- obligation on EU Member States not to distort competition by compelling the conclusion of or facilitating anti-competitive agreements or practices between undertakings.

It would be a great loss for any competition system if measures to tackle public restraints of competition would not be taken at the same time when private restraints to competition are legislated. Without provisions prohibiting these types of public restraints of competition, competition law is likely to cover only a minor part of the practices that appreciably eliminate or restrict competition.

At that time in the EU reliance on the market and on free and undistorted competition did not seem evident at all. Those that had the courage to implement the market economy were in the early days faced with scepticism from almost all political parties and a large part of the population. At that time, many people, who were lacking the most basic products, simply could not believe that their needs could be catered for without the state or state-run bodies organising the economy, fixing prices etc.

Not too many years ago it seemed to be an eternal truth in Europe that telecommunication services could best be provided by one public operator per country. Since then, liberalisation of the telecommunication markets throughout Europe has led to an

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5 This task is assigned to the Commission by virtue of Article 3(g), read with Article 211, of the EC Treaty.

6 Articles 81 to 86 of the EC Treaty.

7 Articles 87 and 88 of the EC Treaty.

unprecedented increase in the quality and variety of services combined with an equally unprecedented decrease in prices for the consumer. Hundreds of new companies have entered the market and since the beginning of 1998 thousands of new jobs have been created. All this thanks to the policy that has taken major steps in removing public restraints to competition.

The liberalisation experience of recent years at European level is a striking example of how the courage to rely on market forces is still needed today. It is also fresh evidence that the market mechanism is the most efficient way to meet the demand of consumers for goods and services and will bring companies to increase productivity, to expand output, to innovate and to create jobs. As we see from the European example, particularly during economic transitions or times of reform, the benefits of an open market cannot be fully realised unless public restraints to competition are removed.

2. SPECIFIC COMMENTS TO THE THREE ISSUES RAISED VIA THE 20 QUESTIONS TO THE PUBLIC

2.1. The need for a new competition law - considerations

The **need for a new competition law** is illustrated by the recent history of the European Union. It provides "living proof" that a general comprehensive competition law is the best tool to secure benefits such as increased innovation, lower prices, consumer benefits and a stronger economy. A key for the success in this area is the institutional framework with a central body promoting sound competition principles and competition policy across the economy on the basis of a solid legislation providing adequate powers of investigation. Competition policy must be incorporated into the broader economic policy framework. This is what has been done in Europe where competition policy is viewed as one of the cornerstones of government economic framework along with monetary, fiscal and trade policies.

Competition law must **extend to all sectors of the economy** in order to ensure a coherent approach. Leaving certain sectors outside the scope of a competition law is likely to create imbalances as the oversight of a sector by a specific administration is likely to develop its own dynamics without due regard to competition principles. This easily risks being sub-optimal for the development of the sector and for the society as a whole.

Sectoral regulators are often entrusted with additional policy objections other than competition. This is likely to blur the individual objectives and a single administrative authority cannot possibly serve to achieve several or all different economic and social policy goals. It is the totality of different policies – as advocated by different authorities - that ensure a better society with a proper balance between economic efficiency and social justice.

It is the EU experience that **competition law should cover all types of anti-competitive conduct including the regulation of market structures**. The Directorate-General for Competition of the European Commission is entrusted with the enforcement of legislation relevant for anti-trust, mergers and state aids which permits it to coherently deal with all relevant parameters for protecting competition, keep markets competitive, achieve efficiency in the economy for the ultimate benefit of consumers.

A competition law should <u>not</u> define in detail the specific types of conduct to be covered. Experience shows that restrictions can assume many shapes and forms. A draft competition law should not make an exhaustive list. This leaves scope for dealing with

types of restrictions that does not fit neatly into one of the pre-defined categories of restrictions. However, competition law and policy should be transparent and implementation should be predictable. The authority should demonstrate transparency both with regard to its decisions and its policy lines. An essential requirement is that the decisions of the authority are published so that the general public has easy access to those. The publication of policy lines in notices and guidelines increases clarity and legal certainty. This is the approach that the European Commission has taken and it has proven to be effective.

While the EU does not operate with ***per se*** **prohibitions**, in the EU the analysis of a restriction depends on whether it is a restriction of competition is **by object or by effect**. Article 81(1) of the EC Treaty applies to agreements which have as their object or effect the prevention, restriction or distortion of competition. In some cases the nature of cooperation indicates from the outset the applicability of Article 81(1), *e.g.* agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers. These agreements are presumed to have negative market effects. It is therefore not necessary to examine their actual effects on competition and the market in order to establish that they fall within Article 81(1). If the object of the agreements is not that of restricting competition, it is necessary to examine the market effect to ascertain whether there is a restriction of competition caught by the prohibition in Article 81(1).

The assessment of restrictions by object and effect under Article 81(1) is only one side of the analysis. The other side, which is reflected in Article 81(3), is the assessment of the positive economic effects of restrictive agreements. Article 81(3) of the Treaty sets out an **exemption rule**, which provides a defence to undertakings against a finding of an infringement of Article 81(1) of the Treaty. Agreements, decisions of associations of undertakings and concerted practices caught by Article 81(1) which satisfy the conditions of Article 81(3) are valid and enforceable and no prior decision to that effect being required. The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals. This analytical framework is reflected in Article 81(1) and Article 81(3). The latter provision expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition.

2.2. The regulatory framework for competition law - options

A key issue to be addressed is the establishment of the organisation that will implement the competition law. It is of outmost importance to create a competition authority that would be both effective and credible in implementing its tasks.

It is recommended to have one **single authority dealing with competition matters in all sectors of the economy**. In EU we have only one competition agency at the European level and an efficient division of work with the EU Member States competition authorities. The EU also only has only one set of laws that apply to agreements or practices that have an effect on trade between EU Member States or to mergers and

acquisitions with Community dimension. In our view, a system with one single authority and one substantive competition law dealing with competition matters concerning all sectors of economy reduce the risk of inconsistencies, increases efficiency of enforcement, reduces red tape for companies and provides them with more legal certainty.

A competition authority must be *independent*. A competition authority needs to be explicitly entrusted with independently enforcing competition law in individual cases and be able to independently set its law enforcement objectives. In this context, independence primarily means that other branches of government are not allowed to intervene in the decision making process in individual cases.

Moreover, when the state is involved in economic activity - and it has an interest in the economic results of such activity - it should not have any influence on the decisions of the competition authority concerning such economic activities. Ultimately, independence of the authority depends on whether the government subscribes to the competition principles and gives its political support for competition policy, including that it provides sufficient resources for effective enforcement.

It is essential to ensure **procedural fairness** in the broad sense of the concept. Guarantee the rights of the parties to be heard and to make their points, swift and quick procedures, transparency of the decisions, judicial review etc. The rights of defence of the parties must be observed. This applies from the moment when the first acts of investigation are undertaken by the authority and throughout every subsequent stage of the procedure when the final decision is adopted. For instance, it would be appropriate that once all the investigation material has been gathered and the competition authority has formed its opinion, a statement of objections is presented to the firms so that they can reply to and comment on these objections.

When infringements of the competition law will result to high sanctions, it is also necessary to ensure full preservation of parties' **defence** rights during the administrative process and afterwards a **judicial review** in the Tribunals. In the EU, once the investigation material has been gathered and the Commission has formed an opinion, a statement of objections is presented to the undertakings concerned. They are thereafter given an opportunity to comment both in writing and orally on these objections. In this context, they are given **access to** the Commission investigation **file** in order to enable their effective exercise of the rights of defence against the objections brought forward by the Commission. The right of access to the file does not extend to confidential information and internal documents of the Commission.

If the Commission considers it necessary, it may also hear other natural or legal persons, including complainants. Applications to be heard on the part of such persons shall, where they show sufficient interest, be granted. The Commission will inform them in writing of the nature and subject matter of the procedure and shall set a time limit within which they may make known their views. Such third parties do not have any right to have access to the Commission investigation file.

2.3. Enforcement and other regulatory issues

Complaints are an important source of information for a competition authority. The European Commission therefore encourages citizens and firms to inform about suspected infringements of competition rules. There are two ways to do this. Citizens, natural or

legal persons who can show a legitimate interest, may lodge a formal complaint, which must fulfil certain requirements and using a complaint form.[8] Correspondence to the Commission that does not comply with the requirements laid down will be considered by the Commission as market information that, where it is useful, can lead to an own-initiative investigation.

Persons who wish to inform the Commission of suspected infringements of Articles 81 and 82 of the EC Treaty without revealing their identity to the undertakings concerned may do so. The Commission is bound to respect an informant's request for anonymity. This special arrangement enables undertakings or citizens to provide market information to the Commission informally and to prompt the Commission to take action.

The European Commission is not obliged to treat all complaints and may reject them if a case does not display sufficient Community interest to justify (further) investigation, the Commission can reject the complaint.[9]

A competition authority needs appropriate **formal powers of investigation** to detect infringements of the competition rules. The powers of investigation and duties of the undertakings that are subject to the investigation are essential elements to be defined for proper enforcement of the law. The investigation powers of the European Commission can be summarised as follows:

- Requests for information to undertakings and associations of undertakings;
- Statements by any natural or legal person;
- Inspections of undertakings and associations of undertakings;
- Inspections of other than business premises, including the houses of directors, managers and other members of staff of the undertaking or association. Requires prior authorisation of a national court.

In carrying out the inspections, the persons authorised by the Commission to conduct the inspection are empowered:

- to enter any premises, land and means of transport of undertakings and associations of undertakings;
- to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- to take or obtain in any form copies of or extracts from such books or records;
- to seal any business premises and books or records for the period and to the extent necessary for the inspection;

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8 The complaint form ("Form C") is available on the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. Official Journal L 123, 27.04.2004, p.18-24 (see the form on the last page "Annex"). Information on how the Commission handles complaints is available on the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, Official Journal C 101, 27/04/2004 p. 65-77.

9 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Text with EEA relevance) Official Journal C 101 , 27/04/2004 P. 0065 - 0077

- to ask any representative or member of staff of the undertaking or association for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

In the EU system, the investigation powers and the duties and the core rights of the parties are thus spelled out in legislation. In addition, the EC Courts case-law provides for guidance on the procedural rights of the parties most notably on the legal professional privilege and right for non-self-incrimination. It should, however, be stressed that as in EU there are no criminal sanctions the rights of the parties are not as extensive as in criminal proceedings.

Following on the experience of the United States in this field, the Commission in 1996 adopted for the first time a l**eniency** policy providing for immunity or reduction from fines for companies that help it in the detection and prosecution of cartels. Secret cartels are the most serious violation of competition rules since they invariably result in higher prices. Whether they take the form of price-fixing or market-sharing agreements, the allocation of production quotas or the rigging of bids, they harm industry and consumers. Such illicit behaviour makes raw materials and components more expensive and, in the long term, leads to a loss of competitiveness and reduced employment. That is why they are expressly prohibited in Article 81 of the Treaty. Therefore the detection, prohibition and punishment of cartels is one of the highest priorities of the Commission in the field of competition policy. The greatest challenge in the fight against hard-core cartels is to penetrate their cloak of secrecy and counter the increasingly sophisticated means at the companies' disposal to conceal collusive behaviour. Following the introduction of a leniency policy it greatly contributed to the adoption in 2001 of 10 cartel decisions in which 56 companies were fined a total of €1 836 million, a record figure compared with any other previous year, larger even than the total amount of fines imposed in the whole preceding period, i.e. between the creation of the EC and the year 2000

An essential condition for the good functioning of a competition authority is the **capability to protect confidential information**. The competition authority will acquire a lot of confidential business information when carrying out its tasks. It is necessary that it also protects such information from being divulged to third parties. Disclosure of confidential business information can significantly harm a person or undertaking.

On the other hand **access to the file** is an important procedural step in all contentious antitrust and merger cases. It allows the companies or organisations that receive Statements of Objections (i.e. the explanation as to why the authority has reached the preliminary view that the addressees may have broken the competition rules) to see all of the evidence, whether it is incriminating or exonerating, is in the authority's file. A party can then understand the facts which led the authority to send a Statement of Objections, and draw the Commission's attention to elements of the file which the party believes have not been given sufficient weight. This is a fundamental procedural safeguard which ensures the rights of defence of companies.

The European Commission grants access to the file only to addressees of a Statement of Objections. However, a separate right, granting limited access to specific documents on the file to complainants in antitrust cases and other involved parties in merger cases is recognised. These rights are dealt with separately as their scope, nature and timing are different from the right of access to file given to addressees of a Statement of Objections.

The "*Commission file*" includes all documents that are part of the specific procedure on which the Statement of Objections has been based. The Notice identifies the types of documents that are accessible and those that are not. Only two types of information are

not accessible: "internal documents" and "business secrets and other confidential information".

The levels **of penalty** that any competition regime should apply should take into account that deterrence is a very important factor in a solid competition system. Sanctions are, however, only one part of the deterrence. What is also needed is to have high probability for detection of the infringements. To ensure that, it is important to pay particular attention to the powers and resources of the competition authority. In EU law a distinction is made between an overall cap and the calculation of the fine in individual cases. There is a 10% cap which is based on the world-wide turnover of the undertaking in all products and all markets. Inside this limit fines are calculated in light of various factors including turnover in the relevant market. Further details on calculation of fines are provided in specific published EU guidelines.