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Federation of Hong Kong Industries
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香港工業總會
FHKI

1 February 2007

Hon. Stephen Ip, GBS, JP
Secretary for Economic Development and Labour
Government Secretariat
Room 815, West Wing, Central Government Offices
Lower Albert Road
Central
Hong Kong

Dear Stephen,

Public Consultation on the Way Forward for Competition Policy in Hong Kong

The Federation of Hong Kong Industries would like to offer the following views on the above consultation for your consideration.

Preamble

As a staunch supporter of fair competition, FHKI recognises that ensuring a level playing field is of critical importance in sustaining our economic progress and prosperity. In view of the international character of our economy, we agree that it is advisable for the Government to maintain an effective competition regime so as to boost the confidence of local and overseas investors in Hong Kong as a choice place to conduct business.

To promote fair competition, we find that the current sector-specific approach taken by the Government is suitable for Hong Kong and serves the purpose well. The telecommunications industry is a case in point. Through a properly designed regulatory regime, local consumers have over the years enjoyed immense benefits from the healthy competition among the industry players. This successful case testifies to the advantage of using a sector-specific approach to guard against anti-competitive activities.

Given the small scale of our economy, where intensive competition exists in most economic sectors, we do not consider it necessary or desirable to introduce a cross-sector competition law. We are concerned that enacting such a law would impose hefty compliance burden on SMEs to the detriment of their competitiveness vis-à-vis large corporations. This would not only defeat the aim of the law, but might also

stifle Hong Kong's entrepreneurial spirit. Other demerits of a cross-sector competition law are elaborated below.

Demerits of a Cross-sector Competition Law

1. Lack of flexibility to deal with sector-specific anti-competitive business practices

First and foremost, every economic sector is unique in one way or another. The types of anti-competitive practices that warrant regulation and the means of regulation vary considerably, depending on the nature of respective sectors in question and the environment in which they operate. It is unlikely for a comprehensive competition law to be able to deal with all facets of anti-competition matters across different industries and economic sectors.

The experience of economies which have enacted a comprehensive competition law shows that, in its actual implementation, many exemptions would have to be given to specific sectors in consideration of public interest. For instance, in the United States, the Federal Government and its subordinate organisations, some specified practices of agricultural co-operatives, the insurance industry, airlines and shipping companies are exempted from such laws. In Singapore, practically all utility services and industries of strategic importance are excluded from its competition law. This brings into question as to whether a cross sector law is the best solution when a wide spectrum of industries is not covered by the legislation.

Until today, some anti-competitive practices, such as substantial restriction of competition and abuse of dominant market position, do not have a concrete definition that is recognised internationally. Since the respective circumstances and needs of each industry are different, criteria to define a particular anti-competitive practice relevant to one industry may not be to another. A competition law enacted to apply across the board to all industries is unlikely to be able to address different and sometimes conflicting criteria and circumstances fairly and effectively.

2. Vulnerability of SMEs to competition lawsuits

Contrary to the popular belief that introducing a cross-sector competition law would benefit SMEs, there is evidence that the law would provide a convenient avenue for large corporations to sue their smaller counterparts for anti-competition. Since many SMEs cannot afford to pay the huge legal costs involved, not to mention the time and energy required of management in such lawsuits, large corporations could eliminate competitors in the courtrooms without having to compete with them in the marketplace.

3. High enforcement costs

The administrative costs associated with the introduction of a competition law are also a cause for concern. The administration of a cross-sector competition law requires expertise and a large organisation to support its enforcement. The establishment of such a bureaucracy will inevitably pose another financial burden on society.

Tackling Anti-Competition through a Sector-specific Approach

In our view, a cross-sector competition law is not the most efficient or effective way to ensure fair competition. As a better way to achieve this aim, one feasible option is for the Government to extend the regulatory model of the telecommunications industry with appropriate modifications to sectors that are prone to anti-competition. It may also consider stipulating pro-competition conditions when issuing the business licences in such sectors or issuing codes of practice for self-regulation as additional means of promoting competition.

Under such a sector-specific approach, the number of sectors that will become subject to regulation may increase over time. The current setup of the Competition Policy Advisory Group may not be adequate to deal with the related policing and regulation work. To strengthen its capability, there appears to be a need to expand and improve its composition and structure. For instance, its membership should be widened to reflect full representation from business, professionals, economists as well as general consumers. It should also be provided with the necessary authority and facilities to conduct investigations on complaints about alleged anti-competitive acts.

Conclusion

To conclude, we believe that anti-competitive practices needed to be analysed thoroughly in their particular context to ascertain whether they restrict market access or contestability, and whether they are calculated to gain monopolistic power or just aim to raise efficiency. In our view, restricting certain forms of business activities or practices across the board in a blanket manner by legislation is unnecessary and may risk undermining Hong Kong's free and open trade policy, and ultimately its competitiveness.

It is hardly likely for a cross-sector competition law to solve competition-related problems in all industries and sectors. Worse still, murky and conflicting case laws will create a great deal of uncertainty for companies. In addition, setting up a related law enforcement agency will impose substantial financial burden on both the Government and society. As Hong Kong's business environment is open and highly competitive, anti-competitive activities are rare occurrences that do not merit a cross-sector competition law. We feel that sector-specific rules and self-regulatory codes are more effective ways to stamp out anti-competitive acts in Hong Kong.

For many years, Hong Kong has been rated by many world renowned entities, such as the American Heritage Foundation and the Cato Institute, as the world's freest economy. This status is the pride and strength of Hong Kong. When considering the way forward for Hong Kong's competition policy, we must ensure that our position will not be encumbered by unnecessary or ineffective legislations.

Yours sincerely,

Kenneth Ting
Chairman