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cc '

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Subject Response to Competition Policy Consultation

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Dear Sirs,

As a convener of the Competition Policy task force of the Hong Kong Federation of Women Lawyers, I am submitting herewith the Federation's response on its behalf.

Yours sincerely,
Winnie Yeung

Winnie Yeung

Via facsimile and e-mail
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From: Hong Kong Federation of Women Lawyers

**Re: Response Document to the Public Consultation on Competition Policy for Hong Kong 2007
Digital 21 Strategy consultation**

Date: February 5, 2007

Hong Kong has taken important steps to review its competition policy in relation to regulatory regimes developed around the world. Given that there are different voices on what shape the competition law in Hong Kong should take, rather than responding to the specific questions set forth in the government's consultation document, this discussion paper sets out a series of general principles and recommendations for how the Hong Kong government might best establish its initial policy objectives and institutional mechanisms in a set of particularly critical areas.

The Goals of Competition Law Policy and Enforcement

As an initial matter, it bears emphasis that the goal of modern competition policy is to promote the interests of consumers, not the welfare of individual companies that are unable to effectively compete in the global marketplace. The policy should be designed to protect free, fair and contestable markets rather than the welfare of any individual participant in the marketplace. Starting with a blank slate, the Government would be encouraged bring Hong Kong's competition law policy into step with leading-edge thinking about how competition policy can best serve the welfare of Hong Kong's community in a liberalized and dynamic economy.

A well functioning competitive marketplace is one that will generate greater output and variety of choices for consumers at steadily lower costs. Often, achieving this benefit for consumers requires that successful and innovative firms be allowed to grow and capture greater market share at the expense of weaker, less efficient firms that fail to innovate or invest in modernizing their infrastructure. Competition policy should not seek to pick winners and losers in this competition between companies, or seek to protect less efficient and less innovative firms from potential failure and exit from the market. Instead, it should focus on whether particular conduct is more likely, taking all factors into account, to promote long term efficiency and consumer welfare in the form of lower prices, increased output and innovation in products and services.

By taking a more flexible, fact-specific approach to applying competition law principles, and explicitly aiming to maximize consumer welfare and market efficiency, primarily based on the free operation of competitive forces over the long term, the Government would soundly eschew specific near-term, market-structural objectives that might not best serve Hong Kong's consumers in any given market context.

This is particularly true with respect to so-called “dynamic” markets. Dynamic markets are often identified by rapid innovation, high sunk costs and low marginal costs, strong network effects, greater reliance on intangible rights (*e.g.*, patents or copyrights) than tangible assets (*e.g.*, warehouses and factories) and, most importantly, intense competition based more on product features than price. Competition in dynamic markets is often a “winner-takes-all” battle in which firms rapidly obtain high market share but nonetheless continually face fierce competitive constraints from new entrants and disruptive innovations in related but distinct markets. Where markets are dynamic in this sense, it is critical that competition regulators intervene only where absolutely necessary and take care not to impose traditional notions of price and output competition on participants. As noted in a recent summary of a report commissioned by the UK’s Office of Fair Trading,

[T]here can be serious costs to [competition-based regulatory] intervention [in dynamic markets], and unintended consequences can often be the result. Therefore, the *competition authorities should only intervene in dynamically competitive markets where the potential for anti-competitive harm is large and the potential benefits from intervention are great.* This is probably a good principle for competition policy in general. It is even more appropriate for dynamic markets where effects of intervention are likely to be particularly difficult to predict.¹

Although competition regulation of dynamic markets presents unique issues, the goal of competition enforcement in such markets, just as in more traditional markets, is to promote consumer welfare and efficiency.

Conclusion

Should the Hong Kong government ultimately determine it is necessary to modify the existing regulatory regime, we are hopeful that this paper will assist the Administration in formulating an appropriately balanced competition policy. If the public consensus were to move forward with a competition law, whether cross-sector or sector specific, it would be advisable for the government to quickly develop a leading institution that plays a crucial role in supporting the continuing liberalization of the Hong Kong economy, ensuring the development of free, fair and contestable markets through wise and carefully selective intervention to prevent anticompetitive conduct while ensuring the long term welfare of Hong Kong consumers.

HONG KONG FEDERATION OF WOMEN LAWYERS

¹ Robert C. Lind and Paul Muysert, *Innovation and Competition Policy: Challenges for the New Millennium*, 24(2) E.C.L.R. 87, 88 (2003).