Hong Kong General Chamber of Commerce
香港總商會 1861

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Helping Business since 1861

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Dear Eva

"Promoting Competition - Maintaining our Economic Drive"

Thank you for the opportunity to comment on the government public discussion document on the way forward for competition policy in Hong Kong. I am pleased to attach herewith the Chamber's response to the above document, which I hope the government will find useful.

The Chamber would be pleased to continue to be engaged in the ongoing deliberation on the way forward for competition policy in Hong Kong.

With best regards

Yours sincerely

Alex ~~Fong~~
CEO

Encl

"Promoting Competition – Maintaining our Economic Drive"
Response by the Hong Kong General Chamber of Commerce
(February 2007)

This paper sets out the response of the Hong Kong General Chamber of Commerce to the Government public discussion document entitled "Promoting Competition – Maintaining our Economic Drive". The Chamber's comments are formulated after consultation with the Chamber membership and the relevant committees of the Chamber.

General comments

The public discussion document is based on the June 2006 report of the Competition Policy Review Committee (CPRC), and consists mainly of a description of a new competition law proposed by the CPRC. Under the model proposed by the CPRC, a general competition law will be enacted to regulate seven types of restrictive practices (price-fixing, bid-rigging, market allocation, sales and production quotas, joint boycotts, unfair or discriminatory standards, and abuse of dominant position). The law will not apply to mergers and acquisitions. A regulatory authority with investigative powers will be established as enforcement agency.

Apart from the proposed competition law, however, there is little in the public discussion document to address other aspects of competition policy. We are concerned with such a narrow scope of discussion, which may reinforce a misunderstanding in the community that competition policy *is* competition law. A comprehensive and effective competition policy is often multi-faceted in nature. It has various components covering a broad range of economic, social, political and regulatory issues such as market liberalization, skilled labour, technological innovation and advancement, sustainable development and other concerns.

In the "Report of the Chamber Competition Policy Expert Group" of July 2005, the Chamber has examined the issue of competition law and concluded that it is "not a panacea to the competition problems to be addressed." There are many other aspects of public policy such as liberalization, corporatisation of public services, and promotion of the free market, which should be important issues to be addressed in a comprehensive competition policy.

With regard to competition law, while not ruling it out for the long term, the Chamber has not taken a position in our July 2005 Report. The Chamber Report states, "our view is that the case for a competition law is not yet compelling", and that if there were to be a general competition law, it should be a minimalist law with a simple enforcement structure. The Chamber report further states that "it is possible to strengthen current competition policy without going to the extreme of a competition law", and that "before considering a general competition law, some of the improvement measures...should first be implemented", hence the Chamber "do not advocate the immediate adoption of a competition law." Moreover, in view of the small and open nature of our economy, if there were to be a competition law, market structure should not be regulated (i.e. merger and acquisition control) but should be left to the market to decide.

In our current consultation on the public discussion document, we gather that our members' views are generally consistent with that of the Chamber's July 2005 Report. Some of the salient points raised by Chamber members include:

- Hong Kong is for the thirteenth year ranked as the world's freest economy by the Heritage Foundation. Instead of more laws and bigger bureaucracies, the most important safeguard of competition is our free market and pro-enterprise culture.
- Some of the allegedly competition problems are in fact challenges inherent to Hong Kong as a small and open city economy.
- The current administrative regime in competition regulation (i.e. through COMPAG, the Competition Policy Advisory Group) is not satisfactory. A suitable competition law may have the advantage of providing transparency and clarity. On the other hand, experience from elsewhere shows that strong competition legislation may turn out to be impediments to businesses.
- In reforming our competition policy, we should take a pragmatic and all-encompassing view to ensure that the policy would be efficacious. If there were to be a competition law, it has to tie in with various other aspects of the competition policy so as to attain the objective of competitiveness enhancement.
- If there were to be a competition law, the regulatory model which goes with the law should be as simple and realistic as possible to meet the needs of Hong Kong as a small and efficient economy. The model proposed by the CPRC (only regulating restrictive behaviour but not mergers and acquisitions,

small enforcement agency, civil remedies) is consistent with the minimalist approach advocated by the Chamber.

Whether or not a competition law will protect the competitive environment and promote competition relevant to the Hong Kong context will therefore depend on how the law is designed and drafted. In this regard the Chamber has identified three main concerns over a possible competition law, namely, its coverage, its application, and the need for safeguards.

Firstly, in terms of coverage, it is important to prescribe that the competition law must not cover regulation of market structure, i.e. mergers and acquisitions, but must be limited only to regulation of clearly-defined anti-competitive behaviours.

- It is a legitimate business objective to grow one's business, and the efficiencies from economies of scale bring benefits to consumers as well. For a small economy like Hong Kong, therefore, it is not unusual to find market concentration in some sectors of the economy, as the natural outcome of market competition. Thus "market dominance" per se must not be a cause for regulation.
- In view of the open nature of our economy, it is not always easy, but critically important, to rightly understand and define what "the market" is for many sectors facing international competition. Many apparently "big Hong Kong companies" are competing in the global market place where they are in fact only small players in "the (Hong Kong) market". One should take into account of global market dynamics and reality when devising Hong Kong's competition policy instead of using the local market as the basis of judgment.
- If a competition law were to be enacted along the lines suggested by the CPRC, government should take extra care to explain clearly to the public and the business sector the objectives of the competition law (i.e. to regulate behaviours, not market structure), and how the law complements other economic, social and political elements of the competition policy. It is also important to avoid creating the wrong impression of having a law which reduces the attractiveness of the overall business environment of Hong Kong.

Secondly, the "minimalist principle" should also apply with regard to institutional structure and enforcement. The regulator should be a small organisation with a simple structure. The regulatory approach should be passive and light-handed, with the

regulator acting on complaints rather than be a pro-active enforcer. Industry cooperation and self-regulation should be the norm.

Thirdly, there should be strong safeguards to prevent the law from growing bigger in future.

- In addition to the usual process of consultation and debate on the bill, the Administration should conduct a regulatory impact assessment before enacting the law. This assessment can be conducted through surveys, interviews, focus group discussion and/or consultation with the industry and public. The scope of this assessment may cover where the impact may fall (business, public, community or other sectors), the full range of potential impacts (eg. economic, social, political, etc.) and the relationship of this law with other components of the competition policy. After the law comes into force, a similar assessment should be mandated for every change to the law.
- Another safeguard is to place the Competition Authority within a broader pro-competition policy framework, e.g. some form of competition policy advisory committee to monitor the overall development of competition policy, and if necessary to act as a check and balance against possible abuse of the Competition Authority.

In conclusion, the Chamber is only prepared to consider supporting a competition law if the law is well designed against the minimalist approach as discussed in the preceding paragraphs, and if there are enough safeguards to address business concerns and to ensure that it will be pro-market and business-friendly. It must be emphasized more that even if a competition law came into force, it should be part of a broader policy to promote competition, not the be-all and end-all of competition policy.

Specific response

The Chamber's specific response to the twenty questions posed in the public discussion document is as follows.

Question 1 Does Hong Kong need a new competition law?

The Chamber is prepared to consider a competition law if the law is well-designed in accordance with the minimalist approach, there are enough safeguards to address business concerns and more importantly, it is considered in the broader context of a

comprehensive and effective competition policy with clear strategic goals. However, it must be recognized that competition law is not the panacea to competition problems, and even with a competition law, we would still need a pro-market, business-friendly and all-embracing competition policy.

Question 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?

If there were to be formal laws, a general competition law would be preferred to avoid picking on particular sectors and having different standards and multiple authorities.

Question 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?

The competition law should cover only specific and well-defined types of anti-competitive conduct. It should not cover mergers and acquisitions. Due to the small market size of Hong Kong, market concentration may be inherent for many sectors, even for SMEs. The law must not be used to harass honest companies trying to maintain their market share. Thus "market dominance" per se should not be a cause for investigation. In addition, the lack of a clear definition of "market" and/or "dominance" in the public discussion document is a major concern. Defining "market" should take into account of the nature of Hong Kong as an "open market" - its openness to the cross-border or global market. In many sectors, Hong Kong's market is becoming engulfed with the Mainland market in complex ways that compound problems of defining the market. This casts doubt on the relevance or effectiveness of any local legislation and raises questions about the possible need to "converge" legislation with that on the Mainland.

Question 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?

In order not to burden the law with detailed description of anti-competitive behaviours, the legal text should be simple and general and the details can be specified in guidelines to be promulgated by the regulatory authority. The regulatory body should work

closely with trade and industry associations in developing such guidelines and codes of practice.

Question 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 should the legislation be supported by the issue of guidelines by the regulatory authority? (price-fixing, bid-rigging, market allocation, sales and production quotas, joint boycotts, unfair or discriminatory standards, and, abuse of dominant position)*

The law should be limited in application. The seven categories of conduct as suggested are reasonable and there is no need to extend to other types of conducts. We encourage the development of guidelines and Codes of Practice by trade and industry associations in conjunction with the regulatory authority.

Question 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?*

To give businesses more safeguards, both purpose and effect should be taken into account when determining whether a particular anti-competitive conduct constitute an infringement. When examining if the conduct in question has infringed the competition law, one should reckon that many Hong Kong entities have business operations or activities overseas and are competing in a global market place. It would be practical and fair to evaluate the purpose and/or effect in this context.

Question 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?*

The law should apply to all sectors, including those in the public sector, although we do not rule out the need for exclusions or exemptions of some or all aspects of the law for some sectors when circumstances so warrant, for example, sectors which are already regulated under other laws (such as utility sectors or government-owned corporations). There may also be sectors for which regulatory harmonization is needed in implementing the competition law.

Question 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? The options are -

- *Option One: A single authority with power to investigate and adjudicate*
- *Option Two: Separation of enforcement and adjudication*
- *Option Three: Adjudication by a specialist tribunal*

In addressing the issue of institutional structure, a balance needs to be struck between, on the one hand, the preference for a simple enforcement structure, and on the other hand, the need for check and balance to ensure that the Competition Authority's powers are not abused. In line with the principle of "the simpler the better", we are inclined towards supporting Option One, i.e. a single authority with power to investigate and adjudicate, although we remain open-minded about other possibilities.

Question 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?

We do not have a specific view over the structure of the regulator other than that the minimalist principle should apply. If the issue is about checks and balance, the Chamber's view is that some form of advisory committee may be needed under the broader competition policy framework to monitor the overall development and implementation of competition policy, of which the administration of competition law is only one part. This committee should work towards ensuring that the functioning of the competition law should be compatible with other elements and overall strategic goals of the competition policy.

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?

We agree that only the competition authority should have the power of investigation and prosecution, to provide another safeguard for SMEs against frivolous complaints.

Question 11 What formal powers of investigate should a regulatory authority have under any competition law?

The competition authority should have the power to request for information. The powers currently conferred on the ICAC can be used as a reference but the power of the Competition Authority should not be bigger than that of the ICAC.

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

The principle is that only civil liabilities should apply. Action by the regulator in itself creates public pressure for the company under investigation; this coupled with civil sanctions would be enough to ensure compliance. Even in other jurisdictions with competition laws attracting criminal offence, the actual penalty is usually only financial. Hong Kong does not need to go "over the top" by legislating criminal sanctions into the competition law.

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?

There should be legal provisions in the law to provide assurance over confidentiality of information provided to the Competition Authority. Efforts should be made to balance the needs of maintaining confidentiality and making appropriate disclosure.

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?

To have a general competition authority alongside the existing competition authorities in broadcasting and telecommunications may create problems of regulatory harmony. How this is to be tackled has to be subject to careful study, bearing in mind that the broadcasting and telecommunications regimes are in the process of being merged.

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

As stated above, only civil liabilities should apply, and the penalty should be proportional to the offence.

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

The Chamber does not have a strong view on this issue, although we recognize that a leniency programme offers some protection for infringing businesses which come forward, and it may help in the law's enforcement.

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

We would support cease and desist order as it provides more flexibility for both the regulator and the regulated. However it would be practical to bear in mind that since many Hong Kong businesses operate in a cross-border, regional or global market place, some of the activities that are the subject of a "cease and desist" order may possibly be beyond the direct or immediate control of the regulated party. International co-ordination of competition policies and their implementation would be required to make such orders effective.

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 anti-competitive conduct?

It would be reasonable for the authority to have the power to reach settlement with the potentially guilty party to provide flexibility and enable efficiency.

Questions 19 & 20 Should any new competition law allow parties to make civil claims for damages arising from anti-competitive conduct by another party? 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?

It is logical to allow civil claims to follow. However, we will only support this if SME's concern over frivolous complaints can be allayed. Thus the right of private action should be limited until the regulator has made a decision. Moreover, there should be a promotion and assistance programme to help SMEs deal with the new law.