Response to Consultation of "Promoting Competition – Maintaining our Economic Drive"

Individual Submission

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Firstly, I would like to congratulate the team who was involved in compilation of the consultation paper. On the content it has concise, sufficient and fair presentation of background information, with clearly phased key questions in the beginning of each section. On the presentation, the consultation paper is packaged with attractive colour, written in friendly English and neatly tabulated in place where comparison is made. This is the best and most comfortable government consultation paper I have ever read. Thank you.

I found the 20 key questions a good structure to reveal my response so I follow it as below. But I want to add one point regarding effectiveness and success of the framework for competition. The human factor is a key. Similar to the ICAC, the education and promotion efforts must be included in the launch of the framework. It is through continuous education that people can assimilate the value of fair competition and know how to protect their rights. So I would say resources must be allocated to awareness promotion via the community

The Need for a New Competition Law

1. Does Hong Kong Need a New Competition Law?

Sure. In order to mitigate possible unfair competition which allows a player to dominate the market and control the price/quality of product or services, the Competition Law is essential.

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?

The Competition Law should be a general law and not sector specific laws. This can guarantee a universal coverage. Individual sector specialties should be handled as exceptions.

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 include the regulation of market structure as well as specific conducts which are intrusive to free competition.

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 to allow the competitive law to develop with time, it should state general prohibition against anti-competitive conduct rather than specific type of anti-competitive conducts. The example can be given but the common law cases are the powerful tools to make the law more comprehensive in the long run. The wisdom of the court can make the judgment case by case.

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?

It should include additional types of conduct which will grow by time. So I propose to set out general principles rather than categories in Question 4.

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?

This can be dealt with the principle of common law in which an offense requires, *mens rea (the mental element)* and *actus reus (the conduct element)*. This should also apply to competition law if the charge is a criminal one.

In case where a failure to act (for example, to provide relevant information relating to the business which is the standard practice) should be prosecuted, they should be stated in competition law as omissions which can be prosecuted without the need for a "purpose". (This will be echoed in Question 11.)

For conducts which will give arise to civil case, if that is a negligence, we do not need to have a "purpose".

In all other cases, a "purpose" should be required.

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 principles for application of exclusions and exemptions should be stated in the body of the law. Here are some of the principles.

a. interest of public policy or general consumer benefits
b. specific categories stated in the law where exemptions apply
c. no retrospective effect for acts occurred before the enactment of the law or could not be reversed at the time when the law is enacted.

The scope of application of exclusions and exemptions should be restrictive, like time bar, to ensure that in general conditions, the competition law is operative.

These exclusions and exemptions, and the updates should be passed by Legco.

The Competitive Authority should be granted statutory power to handle cases of applications for exclusion and exemptions as provided by the Competition Law. These applications must be publicized; hearing must be opened to interested parties and the ruling must be publicized with rationale.

There should be an appeal mechanism with an independent arbitration tribunal or the court, which is in line with Question 8.

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?

The adjudication should be separated from the enforcement so option one should be ruled out. Firstly, this will promote a better image of Hong Kong as a fair competition platform which in turn can attract more overseas business, Secondly, an all-in-one Competition Authority will grow to such a huge organization that its administration power may be too influential to the decision of the adjudication.

The lower the burden of the court, there should be a Competition Tribunal to handle the cases. There should be an appeal mechanism to the court to resolve. For cases within a small sum as prescribed by the law, they should be adjudicated in the tribunal without appeal except for judicial review.

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?

The regulatory body should better be a two-tiered structure. The consultation paper did not state the formation of the management board which is very critical. I suggest it is formed by industry neutral persons. They should be advisory rather than management orientated.

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?

Sure.

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

Formal power as stated in paragraph 114 are acceptable

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

Sure, but as usual it is ruled by the court.

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?

A classification similar to that of Competition Commission of Singapore can be adopted.

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?

It is better to migrate the current sector specific regulatory frameworks (telecomm & broadcasting) to a generalized framework in the long run. But noting the maturity of the current sector regulatory bodies, it is advised to set up a road map with time frame for this to happen. Under a general framework, the legislation, adjudication and enforcement effort can be streamlined, and fairness is more visible.

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

It has to be considered case by case. In general, anti-competitive conducts are regarded as civil matters. Repetition of same conducts within a certain period of time could be regarded as criminal and induce a fine but not imprisonment. Failure in cooperating with investigators of cases and misrepresentation should be regarded as more severe criminal offense which could induce imprisonment. If the Competition Law has no power to prosecute, the Competition Authority could become a toothless tiger.

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

I have no strong comment on this question , but looking at the practicality aspect, a leniency program can help the enforcement of the law.

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

Of course, this works for civil cases already. Following the same rule, the orders and injunctions (cease and desist) should be granted by court (which could be *in parte* or *ex parte*.) Complaining party should undertake the loss of respondent arising from the cease and desist if the case falls, in much the same way as in civil case.

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 is totally inadvisable to allow a regulator to reach settlement agreement with parties suspected of anti-competitive conduct. The neutrality of the regulator is undermined.

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

Or course 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?

One useful way to reduce hostile litigant is to limit the right to private action after the adjudication of the complaint.

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