05/02/2007 11:39

To <competition@edlb.gov.hk>
cc
bcc
Subject Written responses for Competition Policy Consultation

☐ Urgent ☐ Return receipt ☐ Sign ☐ Encrypt

Economic Development Branch (Division A)
Economic Development and Labour Bureau

Dear Sir/Madam,

Attached please find my written submission for the "Public Consultation on the Way forward for Competition Policy in Hong Kong". I would be grateful if you can kindly acknowledge receipt. In your have any enquiries please feel free to contact me through email at or by phone at

Yours sincerely,

Oliver Nip.

WRITTEN SUBMISSION

for

THE PUBLIC CONSULTATION ON THE WAY FORWARD FOR COMPETITION POLICY IN HONG KONG

by

OLIVER NIP

4 FEBURARY 2007

EXECUTIVE SUMMARY

1. This written submission considers the general framework of competition law that should be adopted in Hong Kong and addresses, *inter alia*, Question 2-6 of the Discussion Document.

2. When designing the general competition law framework, it has to be borne in mind that: (1) Hong Kong is a small and open economy, as such it is bound to be more concentrated; (2) Hong Kong has a traditional of non-interventionist market philosophy and (3) the new competition law has to be accepted be the business community.

3. In response to Key Question 2, the new competition law should extend to all sectors of the economy and the current sector specific approach should cease to be adopted.

4. In response to Key Questions 3, 4 and 5:

(1) the new competition law should contain general provisions prohibition anti-competitive agreements and conduct and should not be limited to those that are identified by the Discussion Document;

(2) enforcement should be focused on scrutinising anti-competitive agreements and abusive practices;

(3) structural regulations, particularly a merger control regime, should also be enacted but in a diluted form and only be used in limited circumstances;

(4) the European-UK tri-limb structure is a logical and systematic approach for a general competition law that Hong Kong can reference upon.

5. In response to Key Question 6,

(1) modern competition law enforcement is centred upon economic analysis on suspected anti-competitive conducts, hence the "purpose" or "effect" of those conducts, instead of the conducts themselves, should constitute infringement in the new competition law;

(2) it must be noted that adopting and analytical approach on a case-by-case basis may lead to uncertainty, hence the use of economic analysis has to be balanced with the want for legal certainty and opportunity for business undertakings to self-access their position. Provisions of certain legal presumptions and guidelines or operations manuals would be desirable;

(3) also, since economic analysis is every cases can be costly and inefficient, *per se* prohibition should be considered in certain explicit anti-competitive conducts.

1 INTRODUCTION

This paper submission is prepared in response to the Public Discussion Document on the way forward for Competition Policy in Hong Kong published by the Economic Development and Labour Bureau on November 2006. ("the Discussion Document") The author will addresses chiefly the issues raised in Chapter 3 of the Discussion Document. The paper is modified upon an academic research paper written by the author on a similar topic dated June 2006.

The author based his response on the assumption that a general competition law would be adopted across all sectors of the economy. A discussion on how the general competition regime can be fine-tuned and constructed may be much more fruitful than a general discussion on whether competition law should be adopted, since the law can be different depending on the circumstances of a particular jurisdiction. This paper serves as a preliminary attempt to discuss how the possible competition law regime in Hong Kong can be designed in light of the characteristics of the local economy and in the course of identifying these basic elements of the competition law, Key Questions 2 to 6 of the Discussion Document would be addressed accordingly would be addressed accordingly.

The paper is divided into two main parts. First certain characteristics of the Hong Kong economy would be highlighted, thereafter the author would analysis how the competition law regime can be constructed based on these characteristics and the Key Questions would be addressed accordingly.

2 CHARACTERISTICS OF THE HONG KONG ECONOMY

Enacting a general competition law in Hong Kong does not necessarily mean that the competition law regime of overseas jurisdictions would be wholly adopted in Hong Kong. In fact, while competition law in different jurisdictions is highly similar on the surface, they do differ greatly in detail, from the breadth, institutional design and enforcement mechanism and exception. This is simply no single formula.

There is a few factors that should be fully considered when drafting the general competition law provisions in Hong Kong. First, what is required for small, open, export-oriented service economy which already faces severe international competition may well be different from that of a large and relatively self-sufficient economy. The traditional

non-interventionalist approach of the Hong Kong Government to private businesses should also be taken into account. The acceptance of the business community should also be taken into account when formulating the competition law regime so that little-compliance burden will be imposed on law-abiding business enterprises.

2.1 Smallness and Openness

Being a small and open economy is in fact the classic reason to justify the non-existence of a general competition law in Hong Kong. It has been suggested by the Government,[1] the business community,[2] and the academics,[3] that Hong Kong is facing so much external competition and businesses in Hong Kong are bound to be competitive and any attempt to conduct anti-competitive practices would be futile. An open economy means that foreign goods and services can easily enter the territory to undermine domestic collusive or abusive behaviour. To some extent this is a true reflection of the Hong Kong economy, however, a more accurate statement should be that it is only the traded sectors that are extremely competitive.[4] There are many industries in Hong Kong that are, for one reason or another, non-tradable, or not fully-tradable, because of the nature of the products themselves (e.g. property industry) or because they are related to local services that can only be provided in Hong Kong (e.g. driver tutors, solicitors etc.). These industries would not be benefited by the liberation of goods and services trade and "an open economy" in itself would not be the proper justification for non-existence of competition policy in these sectors.

Even if the economy in general is open and competitive it does not mean that a general competition law would be unnecessary. The adjustment process through the entry of international competitors may take time and anti-competitive behaviour may be able to restrict market competition in the short-to-medium-run. Gal has suggested that in such cases competition law is highly relevant so as to accelerate and aid the process of restoration of the market back to a competitive one.[5] Another implication for competition law is that, existing or potential external competitors, which can be difficult to observe,

---

[1] Mark Williams *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge: Cambridge University Press, 2005) pp 236 – 237; Mark Williams "Seeds of its own destruction: Hong Kong's Dysfunctional Competition Policy" Journal of Business Law (Jan 2006) pp 52-73, 53.

[2] see as an illustration in SCMP, *Ccompetition Law Critics Betrays Their Entrenched Interests* (29 Sept 2005), also SCMP, *Make Hong Kong the Cartel Capital of the World*, (18 August 2003) for a criticism against that stance of business community.

[3] Ibid. See also Market Williams 2005 (n 1) Ch 7.

[4] Mark Williams 2006 (n 1) p 53.

[5] Michal S. Gal, *Competition Policy for Small Market Economies* (Cambridge: Harvard University Press, 2003) Ch 2.

must be taken into account while determining whether a firm is engaging in anti-competitive practice.

On the other hand, a small economy is bound to be more concentrated. There is less demand for the same goods or services in a smaller economy, yet in most cases, the minimal effective scale and the minimum size that a firm have to acquire for it to be efficient, would be the same across different economies regardless of the economies' size. This would mean that less number of firms is required to provide for a particular good or service efficiently in a small economy than its larger counterpart.[6] For example, it maybe the case for Hong Kong that only two supermarket chains can effectively satisfy all the demand for supermarket services, while in a larger economy more supermarket chains can operate efficiently together. If this fact is probably acknowledged, this would mean that it is extremely dangerous to infer anti-competitive behaviour or structure from *prima facie* evidence of concentration, since concentration may be a natural phenomenon in a small economy and it is beneficial for the economy to be efficient. As discussed below, the inherent tendency for the small economy to be concentrated would have implications on the emphasis of enforcement.

2.2 Non-intervening approach to the economy

Hong Kong has consistently boosted itself as the freest economy in Hong Kong and is one of the best places for doing businesses. Zero tariffs, low tax regime with minimal Government presence in the economy are the chief reasons for Hong Kong to capture the freest economy title for more than one decade.[7] The Government also constantly stressed, at least in the colonial era, that the *laissez-faire* policy and a non-interventionist approach is the key to the economic success of Hong Kong, and the economy works best by letting the invisible hand of the market to self-adjust and self-regulate. With this overtone that is firmly ingrained in many people mind, few would consider there is a need for a general competition law for the whole economy, as this would amount to an extra layer of bureaucracy on the free economy. Perhaps the unawareness of the issue, the lack of the sense of urgency together with the apparent success of the sector-specific competition law regime adds up together resulting in a very slow and unenthusiastic debate on the adaptation of general competition law over the years.

---

[6] Ibid. pp 51-53.

[7] Fraser Institute, *Economic Freedom of the World 2005 Report*, archived at www.freetheworld.com, Heritage Foundation, *Heritage Foundation Index of Economic Freedom*, archived at www.heritage.org. See also HKSAR Government, *Hong Kong Ranked World's Freest Economy for 12th Consecutive Year* (Press Release, 4 Jan 2006).

On the other hand, there is report that the competitiveness ranking has been dropping[8] and there is concern from the international community that the non-existence of competition law is an anomaly of Hong Kong's business environment. It has been suggested that while Hong Kong's economy is undoubtedly free by international standard, it does not mean that competition is fair in the market since "free economy" indicator only measures the extent of Government intervention but not the extent of anti-competitive practices in the market.[9] Hence despite being the freest economy, a general competition law is necessary for Hong Kong to retain true competitiveness. at Also, since the business community are used to the non-interventionist policy, it is necessary to enact a competition law that is effective yet confers a minimal compliance burden for businesses. It is also important to make sure a clear message of the value of competition law is made known to the public and it is not seen as a layer of bureaucracy.

2.3 Receptivity of the Business Community

It is essential that the new competition law can win public support, especially from the business community, since the adaptation of a general competition law would pose an additional burden to them and they should be property consulted. Practically, any new competition legislation cannot be passed without the general support of the business community.

Besides the general feeling that there is no urgent need for a general competition law, the biggest concern for the business community is perhaps the compliance time and cost that carries with the adaptation of a general competition law. It would be the most unfortunate if the introduction of a law that aims at promoting economic efficiency through competition leads to inefficiency because of the compliance and monitoring costs involved in it. On this note, it should be borne in mind that a majority of business in Hong Kong is only small to medium enterprises which may not have little resources to devote in complying with the competition law code. It is important to draft the competition law in Hong Kong in such a way that compliance and enforcing time and cost can be minimised while it can remain effective.

3 THE SECTOR SPECIFIC APPROACH

---

[8] World Economic Forum, *Global Competition Report 2005-06*, archived at www.weforum.org. Hong Kong dropped from no.21 in 04-05 to no.28.

[9] Mark Williams 2006 (n 1) p 54.

It is mentioned in the Discussion Document that there is opinion in the community that the sector specific approach should be continued since it is well understood by business and consumers;[10] moreover, since each sector has its own characteristics, a single, across-the-board piece of legislation is undesirable.[11] As demonstrated below, however, it can be shown that the "structural defect" of the sector specific approach clearly outweigh any perceived benefit over a general competition law.

3.1 Rationale behind the sector specific approach

Besides a competition policy statement, currently there is a statutory competition regime in two specific sectors of the economy, i.e. the telecommunications and broadcasting markets has been enacted. It has been commented that the contradiction between these two lines of policies reflects that there is no clear rationale or justification underlying the Government's competition policy.[12] It has also been suggested that the anti-competitive provisions in the regulatory regime of those two sectors is enacted for quite a different reason; they were enacted in order to secure successful liberalisation of the two sectors and ensure that new entrants introduced by the Government through the grant of new licenses can compete fairly with existing gurus.[13] As such, it is doubtful whether the sector-specific approach is desirable for sectors without a licensing regime and/or a regulator.

3.1 The telecommunications competition regime

Moreover, there is structural defect in a sector specific approach and it is weaker than it appears to be.[14]For the purpose of this submission paper, the author will only discuss and analysed the competition regime under the Telecommunications Ordinance,[15] since it is more extensive than its counterpart in the Broadcasting Ordinance.[16]

---

[10] Paragraph 51 of the Discussion Document.
[11] Paragraph 52 of the Discussion Document.
[12] See generally the critique in Mark Williams 2005 (n 1) pp 301-302.
[13] Angeline Lee, "Convergence in Telecom, Broadcasting and IT: A Comparative Analysis of Regulatory Approaches in Malyasia, Hong Kong and Singapore" (2001) *5 Singapore Journal of International and Comparative Law* 674 - 694, 688.
[14] See Mark Williams 2005 (n 1) p 336.
[15] ss.7I-7N,7P s.35A, ss.32N-R and s.36C of the Telecommunications Ordinance (Laws of Hong Kong, Cap.106). See Mark Williams 2005 (n 1) p 317.
[16] ss. 13-16, 25, 26 and 28 of the Boardcasting Ordinance (Laws of Hong Kong Cap. 562).

The competition regime in the Telecommunications Ordinance essentially follows the tri-limb structure of the EC and UK,[17] came into force since June 2000[18] and the amendment in July 2003 (came into force in July 2004) further introduced a merger control regime and an appeal channel to the regime.[19] The regime is comprehensive and is highly analogous to that of the developed countries, particularly that of the UK and the European Community. The regime is enforced by the sectoral regulator, Office of the Telecommunications Authority (OFTA). Deducing from the limited reasoned decisions that the OFTA has published, the regime can be fairly said as effective in promoting competition in the telecommunications market.

However, the competition regime can be enforced only against licensees of the OFTA but not non-licensees and this is demonstrated by the Banyan Garden case.[20] In this case a property manager (a subsidiary of Cheung Kong group), only allowed Hutchison Telecommunications (the licensee subject to Telecommunications Ordinance competition regulation) to provide services to the residents of Banyan Garden (a property development of Cheung Kong Group), to the exclusion of other competitors. OFTA concluded that since the party that conducted the questionable business practice is a non-licensee,[21] the case is outside their jurisdiction. This case vividly demonstrated that the sector specific approach can be easily circumvented since such a competition law regime can only imposed sanctions against those licensees that came under the scheme of control.

3.3 Response to Key Question 2

Based on the above discussion, in response to Question 2 of the Discussion Document, it is submitted that the current sector specific approach on competition law lacks justification and can be easily circumvented. Any new competition law should extend to all sectors of the economy.

4 BUILDING UP THE GENERAL COMPETITION LAW

4.1 An overview of the tri-limb structure

[17] See Mark Williams 2005 (n 1) p 317.
[18] ss 7K and 7L of the Telecommunications Ordinance (n 15).
[19] s 7P of the Telecommunications Ordinance (n 15).
[20] Office of the Telecommunications Authority, *Complaints about Arrangements for the Provision of Telephone and Internet Access Services at Banyan Garden Estate* (Case T261/03, July 2004), Archived at www.ofta.gov.hk/en/c_bd/completed-cases/t261_03.pdf.
[21] Hutchison, the licensee, is acting passively throughout.

Although the Discussion Document listed out specifically various anti-competitive practices and conducts for consideration, most jurisdictions adopted general competition provisions in a "tri-limb" structure. This structure is stemmed from European Community Law (EC Law) and has been replicated in common law jurisdictions like the UK and Singapore. The tri-limb structure has the advantage of being more coherent and logical than the provisions in other jurisdictions, this is particularly so when contrasted with the piecemeal development of the United States Antitrust Law.[22] The following discussion is based chiefly on European Law, with reference to United States Antitrust Law to be made when necessary.

The tri-limb competition law has the following provisions:

a) Prohibition against anti-competitive agreements;[23]
b) Prohibition against abuse of dominant position;[24] and
c) A merger control regime.[25]

4.1.1 Prohibition against anti-competitive agreements

Anti-competitive agreements are agreements formed between business enterprises in order to increase price or to restrict output, so as to rip monopolistic profit through maintaining a non-competitive market environment. Such provision would encompass all of the 7 types of anti-competitive agreements mentioned in the Discussion Document include cartels, price-fixing or output-fixing agreements, bid-rigging and collective boycott. Recognising the terms of such agreements can have infinite variations and can be difficult to proof in evidence, the prohibition is sometimes drafted widely so that

[22] The major United States antitrust statutes include the Sherman Act 1890 15 USC ? -7 and Clayton Act 1914, 15 USC ? 2-27; 29? 2-53,

[23] See Article 81 of the Treaty establishing the European Community (EC Treaty); s.2 of the UK Competition Act 1998 and s.34 of the Singapore Competition Act 2004. The provisions in the three jurisdiction are similar in substance. ? of the Sherman Act (n 22) has the similar effect but is drafted differently

[24] Article 82 of the EC Treaty, s.18 of the UK Act 1998 and s.47 of the Singapore Act 2004. The provisions in the three jurisdiction are similar in substance. ? of the Sherman Act (n 22) has the similar effect but is drafted differently.

[25] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between undertakings (the EC Merger Regulation), EC Official Journal L24, 29 January 2004; Part 3 of the UK Enterprise Act 2002; Part III Division 4 of the Singapore Competition Act.

concerted practices or other forms collusive behaviour, short of a formal agreement, would be suffice for the purposes of the prohibition.[26]

4.1.2 Prohibition against abuse of dominant position

The second limb of competition law is prohibition against abuse of dominant position. This prohibition prevents businesses that have sufficient market power from engaging unilaterally in exclusionary practices against actual or potential competitors in order to maintain their dominant position or in exploitative practices that is to detrimental to consumer welfare. In order determine whether a business is in "a dominant position",[27] firstly the relevant market have to be identified based on the concept of "interchangeability".[28] The product, geographical and (in appropriate cases) temporal boundaries of the market would be formed.[29] Then the business would be assessed to determine whether it is dominant, i.e. whether is has the ability to act independently in that particular market previously identified so that it is prohibited by performing abusive acts.[30]

Examples of abusive practices include predatory behaviour against competitors, restriction of supply, discriminatory pricing and bundling or tie-in agreements. It is believed that exclusive behaviours that seek to exclude actual or potential competitors are more damaging to the economy than exploitative practices that targets consumers.

4.1.3 Merger Control Regime

Finally, competition law in many jurisdictions also contains a merger control regime so that merger and acquisitions activities that would lead to anti-competitive outcome would be scrutinized. Mergers for the purpose of merger control regime does not only cover typical horizontal mergers, wherever the transaction brings previously independent businesses to come under some form of common control, that transaction would also

---

[26] Art 81(1) of the EC Treaty, s.2(1) of the UK Act 1998 and s.34(1) of Singapore Act 2004 is identical in this aspect and defined agreements as "agreements between undertakings, decisions by associations of undertakings and concerted practices".

[27] Art 82 of the EC Treaty, s.18(1) of UK Act 1998, s.47(1) of Singapore Act 2004.

[28] *Continental Can*, Case 6/72 [1973] ECR 215, [1973] CMLR 199; *United Brands v Commission*, Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429.

[29] Richard Whish, *Competition Law* (5th Edn, Oxford: OUP, 2003) p 37.

[30] Alison Jones and Brenda Sufrin , *EC Competition Law: Text Cases and Materials* (Oxford: OUP, 2001) p 260, see also Case 85/76 *Hoffmann – La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211.

warrant scrutiny from a competition law perspective.[31] The threshold for intervention is slightly different from one jurisdiction to another and one popular test is whether the merger would be resulted in "substantial lessening or competition".[32] When this test is satisfied, counter-balancing arguments, usually on efficiency grounds, would be taken into account in evaluating whether the merger would ultimately be approved or not.

4.1.4 A tri-limb structure for Hong Kong ?

The Discussion Document raised questions on what type of conducts should be prohibited by the new competition law, whether abusive practices by dominance firms should be prohibited and whether control on monopoly or merger and acquisitions should be imposed, if at all. From the above it can be seen that the three limbs in European competition law are inter-related with each other to ensure that the competition law regime can function effectively. Hence, the discussion below is based upon the tri-limb structure and will proceed to consider whether the structure should be adopted and how such a structure should be modified in light of the circumstances of the Hong Kong economy.

4. 2 Behaviour-based enforcement

4.2.1 Implication of Concentration

A small open economy is bound to be more concentrated and has fewer players in one market. Concentration is usually an inevitable result stemming from the want of efficiency and this has important consequence on how the competition law could be enforced in a small economy. This paper would further explore this issue from two perspectives. First, what is the relevance of concentration in relation to anti-competitive conducts? Secondly, how (if at all) should structural problems in the market be tackled?

4.2.2 Concerted practices vs tacit collusion

Detection of anti-competitive agreements is particularly difficult when there are only a few players in the market. First, it may be easier for firms to agree among themselves without resorting to a formal cartel agreement by engaging in more subtle forms of agreement with each other that can be difficult to detect. A solution to the above problem

[31] Richard Whish (n 78) pp 779-780.
[32] Michal S. Gal (n 5) p 206.

is to define anti-competitive agreements broad enough to capture more subtle forms of agreements; this would also have benefit that less evidence would be required to proof the existence of collusive behaviour or anti-competitive agreements,[33] then it would be easier to bring offenders to justice.

For example, collusive behaviour is defined in European Law as "agreements between undertakings, decisions by associations of undertakings and *concerted practices*" (emphasis added).[34] Concerted practices, in particular, lie in the boundaries between what is parallel behaviour and "collusive practices". It has been defined by the European Court of Justice as "a mental consensus whereby practical cooperation is *knowingly* substituted for competition". The consensus need not be achieved verbally and it can come about by direct or indirect contact between the parties.[35] By expanding the meaning of anti-competitive agreements, constitution and decisions of a trade association or a professional practice,[36] informal contacts between the parties, [37] and in extreme situation, on the basis of conduct only, [38] would all fall within the ambit of prohibition against anti-competitive agreement. However, as explained below, if the circumstantial evidence is capable of being explained by other means, circumstantial evidence alone cannot be used to infer collusive behaviour.[39]

Secondly, very often what appears to be *prima facie* collusive behaviour, for example when prices of the same goods or services offered by different competitors are adjusted at roughly the same time, can be entirely innocent behaviours which can be explained by looking into the concentrated market structure. This is known as *tacit collusion*, where competitors enjoy the benefits of an oligopolistic market structure, through increasing price or restricting output, but without entering into an agreement with the competitors.[40] For example, banks when setting the best lending rate may, without any agreement among themselves, follow the rate of the leading bank, even if it is set

---

[33] These are the questions raised by Keith N. Hylton in *Antitrust Law - Economic Theory and Common Law Evolution* (Cambridge: CUP, 2003) p 74.
[34] Art 81(1) in the Treaty of Rome (Treaty establishing the European Community), hereinafter the EC Treaty.
[35] Richard Whish (n 78) p 100 referring to the cases of *ICI v Commission* (*Dyestuffs* case) Case 48/69, [1972] ECR 619, [1972]CMLR 557; *Suiker Unie v Commission* (*Sugar Cartel* case) Case 40/73, [1975] ECR 1663, [1976] 1 CMLR 295/
[36] *Re Nuovo CEGAM OJ* [1984] L 99/29, [1984] 2CMLR 484. See generally Richard Whish (n 78) pp92-102.
[37] *ICI v Commission* (*Dyestuffs* case), Cases 48/69, [1972] ECR 619, [1972] CMLR 557.
[38] *Soda-ash/Solvay* OJ[1991] L 152/1
[39] *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* Cases 29/83 and 30/82 [1984] ECR 1679, [1985] 1 CMLR 688.
[40] Richard Whish (n 78) p 508.

above the equilibrium level, in order to preserve peace in the market. This is indeed a problem faced by competition authorities worldwide regardless of the size of the economy; it is often difficult to prove the existence of cartel in a oligopolistic market and the situation is particularly difficult in cases of small economies since a concentrated economy means that there is more oligopolistic industries.

It can be seem therefore in a small economy like Hong Kong, with fewer players in the market, anti-competitive agreements would often be more subtle and difficult to deduct, and on the other hand, there is only a fine line to be drawn between subtle forms of anti-competitive behaviour and tacit collusion arising as a result of the market structure.

One implication is that in order to deal with collusive behaviours satisfactorily, the legal provisions has to be drafted board enough to cover the varying circumstances in which anti-competitive agreements make be entered into between firms. Covering merely the explicit anti-competitive behaviours as suggested by the Discussion Document is clearly inadequate.

It is also important to confer on to the Commission full investigative power, particularly the power to obtain information and the power to enter, search and seize documents (under search warrant).[41] Adequate investigative power is essential so as to increase the charges that a cartel can be detected. Repeated experience in Hong Kong has shown that, without adequate investigatory power, it is impossible to track down a suspected cartel.[42] Other solutions include introducing a leniency programme to encourage whistleblowers that come forward and produce evidence of cartel activity. For example, under the leniency scheme of the EC,[43] if a firm co-operates with the EC and report the cartel to the EC, it may obtain a substantial reduction from the hefty fine.[44]

4.2.3 Tackling Dominant Firms

A more concentrated market would mean that not only oligopolistic market structure is a common phenomenon; there would be more incidents of quasi-monopolies or monopolies. It is important to provide a strong and clear message to dominant firms that they cannot

[41] See Alison Jones and Brenda Sufrin (n 30) p 677 and Ronny Tong *Fair Competition is our Livelihood – a Study on Competition Policies and Competition Laws Work Report No.2*, (May 2006) [5.3].
[42] The Consumer Council, the COMPAG nor the independent consultants appointed by the Government have never concluded that a cartel existed, since the lack of investigatory power means that there can be no evidence other than prima facie evidence of collusion.
[43] Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4.
[44] Alison Jones and Brenda Sufrin (n 30) p 680.

conduct abusive behaviour, especially when it would be undesirable for a small economy to regulate the structure of the industry. The aim for prohibition against abuse of dominate position should be aim at prohibiting firms from artificially raise the barriers of entry through various exclusionary practices.[45] In a small and open economy in Hong Kong, as long as barriers of entry to an industry is not kept artificially high, vibrant competition forces within the economy as well as forces of international trade can be left to discipline the monopoly power (which may emerge from time to time) and it is unnecessary for the law to serve multiple goals and to confer a straitjacket on dominant firms on what they are allowed to do.[46]

Exclusive practices are practices than aim at driving out actual or potential competition by using its market power and in a small economy, these practices should be put under strict scrutiny. Particularly blameworthy may be types of behaviour that are designed to drive out emergent competitors through the use of abusive competition. For example, it was noted that when Ad-m@rt was launched in 1999, there were complaints that suppliers to the two supermarket chains were required to enter into exclusive supply agreements and not to supply to Ad-m@rt.[47] Such practice, coupled with sufficient market power, would significantly distort the competitive force in the market by eliminating emergent competitors at the outset.

Other exclusive behaviour, which also have an exploitative agreements may include tying of products, for example, by selling compulsory maintenance service contract together with a machinery (e.g. photocopier, passenger lift etc.) so that other repairers are effectively excluded from entering the market; another example exclusive dealing practices, through the use of real coercion, or practical coercion through rebates and discounts, to secure orders of a whole line of products, or to secure repeated orders over time, effectively precluding a consumer from switch to another competitor. In particular, if the rebates or discount are "punitive" or discretionary in nature, it would be more readily found to found as abusive practices.[48] Such practices if done by a player with sufficient market power would effectively preclude others from entering into the market.

---

[45] Michal S. Gal (n 32) pp 53-54.
[46] Michal S. Gal (n 32) p 54.
[47] Singtao Daily, *Adm@rt Complains that Sources of Goods being Cut off* (速銷商稱貨源遭封殺) (7 Aug 1999) and Mingpao, *Supermarket Pricewar raises Government's Concern* (超市減價戰惹港府關注) (1 Dec 1999). Note there is no suggestion that there is actual anti-competitive practices (in any case it would not be illegal then).
[48] Mark Furse, *Competition Law of the UK and EC* (3rd Edn, Oxford University Press, 2002) 213.

These examples illustrate that exclusive behaviour that can be conducted are varying in circumstances and economic analysis should be conducted for each case. Yet if it much be recalled that adherence to economic analysis may lead to uncertainty. A right balance have to be drawn, particularly in light that the merger control regime may be ineffective and largely decorative and control against abusive behaviour is the only safeguard against the many dominant incumbents in the economy. Perhaps the best approach is to supply the prohibition with detailed guidelines and transparent enforcement policy.

4.2.4 Is Merger and Acquisition Control regime necessary?

In some jurisdictions the competition law provide the authority the power to provide structural remedy, and in a more prospective form, merger control regimes effectively preclude industries from being more concentrated when the authorities found that a more concentrated structure is undesirable. The following discussion is focused chiefly on merger control, since structural remedy is now rarely imposed and in any event, unnecessary and ineffective in a small open economy, since most of the local monopoly can be disciplined readily by the forces of global trade in the long run.

Merger control can be considered as a preventive form of structural "control" that has been proliferated relatively recently and is adopted by competition authorities worldwide. Although it is sometimes said that merger control is an extension of prohibition against anti-competitive agreements since the merged undertakings is in effect, a form of *permanent* agreement, merger control has a wider implication and theoretical basis than the other two-limbs of competition law.[49] The value of merger control can be explained by the "Structure, Conduct, Performance paradigm",[50] since mergers would after market structure, it would also affect the ability of firms to behave competitively. Merger control is not simply a preventive version of prohibition against abuse, its main purpose is to maintain competition within a market through preserving a pro-competition market structure.

The main concern of a merger control regime in a small economy is that concentration in small economy are more likely to be beneficial than not. Concentration is not just a mere characteristic of small economy, very often firms in a small economy

[49] Meaning the prohibitions against anti-competitive practices and prohibition against the abuse of dominant position.
[50] Alison Jones and Brenda Sufrin (n 30) p 20.

have to merge and grow in size in order to realize efficiency and perhaps to be able to compete at an international scale.[51] There is a distinction between dynamic efficiency, the ability and incentive for firms to increase output and enhance productivity, and allocative efficiency, the ability for the economy to allocate resources properly.[52] Very often, a merger and concentration of market power would result in reduction of allocative efficiency but increase, though less quantifiable, are beneficial to the economy in the long run. These two notions of efficiency, in light of the speculative nature of the later, are very difficult to balance with each other.

Different jurisdictions adopt different tests to evaluate the pro-competitive arguments against its anti-competitive effects. Generally speaking, it appears that smaller jurisdictions tend to welcome more speculative and less quantifiable arguments on public benefit or efficiency. In the US, efficiency arguments is a rebuttal that can be used to rebut the ban on a particular merger, while in Canada, an explicit efficiency exception is acknowledged and anti-competitive mergers would be approved if resulting efficiency can be satisfactorily proofed by the parties in the merger. In even smaller jurisdictions like Australian and New Zealand, efficiency arguments would be considered as part of the "public benefit" test and these arguments would be taken into account in various stage of the merger analysis, not only when after a merger is found anti-competitive.[53] The position in Singapore is unclear but it appears that public interest would be a ground to "save" a merger proposal.[54] In the Hong Kong telecommunications industry merger control, there is an interesting "public interest defence" that can be used to counteract a finding of anti-competitive merger. Such a defence appeared to be unique in the world and is potentially boarder than mere efficiency arguments.[55]

In addition, merger control carries with it a compliance burden which may not be accepted by the public. Merger control regime, including the ones in the US and EC, usually impose *ex ante* control on merger activities so that the competition authority can take the opportunity to evaluate the effect on competition and prevent the anti-competitive mergers to take place if necessary. However, such clearance system, together with the proliferation of merger control regimes in various jurisdictions has made the global competition law landscape increasingly complicated. Parties would want to

---

[51] Michal S. Gal (n 32) pp55-56, Ch 6.

[52] Ibid. pp 13-14.

[53] Ibid. Ch 6.

[54] Thomas Jones and Martyn Taylor , "Telecoms: Recent Regulatory Developments in Singapore" Computer and Telecommunications Law Review (2004), 10(6), 137 – 141, 139.

[55] Richard Whish's comments as quoted by Mark Williams 2005 (n 1) Ch 7.

conduct a merger at a global scale often have to pass through hurdles in various jurisdictions before such a merger is cleared. This has resulted in substantial costs, complications and possible delays in carrying out merger activities and this has also created tremendous burden on the legal professionals specializing in competition law. [56]

Another problem of the *ex ante* regime is that it is highly speculative and is prone to error. When deciding whether a merger should be granted clearance, the authority has to predict whether a particular merger would have substantial adverse effect on competition that warrants intervention. Such prediction carries significant risks. Although various quantitative tests can be used to analyze the possible impact on the structure of the market, such tests are not sufficient in itself to predict the full effect of a merger on the market. Moreover, we have to bear in mind that the accuracy of such tests is in turn based on how the market is defined, again a very uncertain area in competition law.[57] The high degree of uncertainty of this area of competition law and the possibility of erroneous judgment is indeed fully acknowledged by those who advocate for such control.[58]

It is suggested that an *ex post* merger control system should be adopted instead; such regime is adopted in Singapore and in the telecommunications industry of Hong Kong. In an *ex post* system, no compulsory prior clearance is required, although usually the companies concerned would be allowed to seek "comfort" from the authority prior to the conclusion of the merger. An *ex post* can relieve the parties in a merger the burden in satisfying the requirements of the authority in the heat of a merger discussion and minimize the chances of wrong judgment since the ultimate effect of a merger can be better assessed when it is concluded. However, an *ex post* system would mean that remedies would be very weak and remedies such as divestiture and segregation are more difficult to perform after the merger is concluded and this would lead to strong opposition.

There is suggestions from the community that structural prohibition, or elements of structural prohibition, should be entirely removed from the Hong Kong competition regime altogether.[59] However, a merger control regime, albeit a weaker *ex post* system, can be used to prevent some exceptional mergers that would have drastic consequences to the economy. Just to illustrate this point, when one day suddenly the two supermarket chains decided to merge, a merger control regime would be very handy in dealing with that situation. Perhaps more importantly is for the competition authority to realize and

[56] Richard Whish (n 78) pp 782 – 783.
[57] ibid 789.
[58] ibid 788 - 789.
[59] See Ronny Tong (n 41) for a proposal to this effect.

bear in mind that concentration may actually do more good than harm in a small open economy. With this mindset, there should be no need to remove the merger control regime from the general competition law regime but enforcement focus would undoubtedly shift to the finding of anti-competitive behaviour instead.

It is therefore proposed that Hong Kong can adopt a limited form of merger control, which consists of chiefly an *ex post* control regime with no compulsory notification requirement and the authority would only fully investigate a merger if there is *prima facie* sufficient competitive concern. An opportunity to seek comfort or prior approval should be provided to corporations on the other hand, and it can be expected any large scale or international mergers would like to seek prior approval and there is only minimal cost involved to file in one extra jurisdiction.

4. 3 Reponses to Key Questions 3,4 and 5

Putting the above recommendations together, in response to Key Questions 3, 4 and 5, it is recommended that the classic "tri-limb structure" to be adopted, subject to modification as required by reason of Hong Kong's characteristics as a small and open economy. The law should prohibit anti-competitive agreements generally instead of only on the 7 specific types of practices identified by the Discussion Document so as to facilitate the investigation into more subtle forms of collusion. Also, enforcement focus should lie on crumbing down "anti-competitive practices" instead of abuse of dominance or monopoly control; and that the merger or acquisition regime should still be enacted, but it should be an *ex post* regime to relieve the business community from the compliance burden it poses.

5. IMPORTANCE OF ECONOMIC ANALYSIS

If we consider that the purpose competition law is to enhance economic efficiency, then it is important that when approaching competition cases, economic analysis and vigorous reasoning process should be adopted as much as possible. *Per se* prohibition, on the other hand, is not based on economic analysis of individual cases, but rather, business enterprises would be found infringing competition law provisions once it is found performing certain conduct.

Since the 1970s, with the general acceptance of the Chicago school economics, the worldwide consensus in competition law enforcement is to remove *per se* prohibition

as much as possible. For example, vertical restraints, including resale price maintenance and exclusive distribution agreement, which limit competition at the retail level, were once presumed to be anti-competitive, however, with the development of better economic analysis, such assumption is now abolished and an economic analysis regime is used instead. Indeed, during the past 20 years, Chicago school thinking has transformed entirely Antitrust enforcement in the US have broken down almost all the *per se* doctrines in antitrust law.[60] Now rigorous economic analysis is at the centre of antitrust and this has fundamentally changed the way competition cases are handled by competition authorities and the judiciary.

Thus at a theoretical level, the contemporary consensus on competition law is that the purpose and effect of suspected anti-competitive conduct should always be analysed before a business undertaking would be found guilty of infringing the competition law provisions; as long as the conduct does not has the potential or has in fact distorted competition in the market, business undertakings are free to adopt whatever strategies they want.

5.1 Balance economic analysis with want for legal certainty

In practice, however, the want for legal certainty may actually conflict with the want for economic analysis and flexibility and the two conflicting goals have to be carefully balanced. Clearly business enterprise, as well as their legal representatives, would like to have a degree of legal certainty, that they can easily conduct self-assessment and feel certain that whether their practices would be caught by the competition authority. To illustrate, legal certainty and opportunity for self-assessment can be conferred in the following ways:

5.1.1 *De Minimis* Doctrine

Competition law enforcement involves time and costs in investigation and analysis, it would not be desirable for the competition authority to search for small enterprises which infringes competition law while there are bigger enterprises in the market that is behaving anti-competitively and in any case, the effect of anti-competitive behaviour of small enterprises is unlikely to be appreciable. For example, the naked agreement between bars

[60] Jonathan B. Baker, "A preface to post-Chicago antitrust," in Antonio Cucinotta, Roberto Pardolesi and Roger Van Den Berg (eds), *Post-Chicago Developments in Antitrust Law* (Cheltenham: Edward Elgar, 2002) pp 66-67.

on the same street to raise price to the same level should not warrant scrutiny from the competition authority (except perhaps a warning), since such cartel would have no appreciable effect in the market as customers will gradually shift away, perhaps in a few weeks' time, to other drinking establishments.[61] It is essential that SMEs are relieved from excessive compliance burden.

The most effective way to relieve such burden is to provide a blanket exemption to small undertakings that satisfy the criteria of "smallness". There are generally two main criteria available: the market share of an undertaking and the annual turnover of an undertaking. In relation to anti-competitive agreement, the EC concluded that undertakings with combined market share of less than 5% market share would not have appreciable anti-competitive effect.[62] Prior approval is not required under the merger control regime unless the aggregated turnover of the undertakings concerned exceed a certain threshold.[63] A *de minimis* doctrine of appropriate breadth should be able to relieve SMEs of any substantial compliance burden and their concerns about the excessive burden and the provisions being inappropriately used to attack them is unwarranted.[64]

5.1.2 Safe Harbours and Presumptions of Dominance

Sometimes the competition authority would create safe-harbours, presumptions of non-infringement are usually based on some simple indicators, particularly a firm's market shares. The activity of a firm falling within a safe harbour would be assumed to have no appreciable anti-competitive effect. Safe-harbours provide that opportunity for businesses to conduct self-assessment and obtain legal certainty. For examples for vertical restraints in the EC, there is a safe harbour presuming non-dominance if the business concerned has less than 30% market share.[65]

---

[61] Such agreements among small shops and stores operating in close proximity are not unusual.
[62] Commission Notice on agreements of minor importance (de minimis Notice) (replacing [1986] OJ C 231/2) [1997] OJ C 372/13, [1998] 4 CMLR 192.
[63] Article 1 of the Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertaking [1989] OJ L395/1, but Article 22 mandates that national laws, instead of Community law, will be applied in appropriate cases.
[64] Such concerns has been reported, see Hong Kong Economic Times, *SMEs Opposing Competition Law for Fear of being Forced out by Conglomerates* (中小企反競爭法憂財團封殺) (20 May 2006), A20.
[65] Roger Van den Bergh, "The Difficult Reception of Economic Analysis in European Competition Law", in Antonio Cucinotta, Roberto Pardolesi and Roger Van Den Berg (eds), *Post-Chicago Developments in Antitrust Law* (Cheltenham: Edward Elgar, 2002) pp 34 – 59, 46-47; see also Richard Whish (n 78) pp 46-47 for a table of safe harbors

Conversely, presumption that a certain element of competition provision is satisfied can also confer a degree of legal certainty since firms know that when they will be caught by the competition law provision. However, there exist tension between the adoption of economic analysis and legal certainty through the use of safe-harbours and presumptions of infringements and this can be best demonstrated by an important presumption, presumption of dominance in cases of prohibition against abuse of dominance position.

The tension between the adaptation of economic analysis and legal certainty (so that businesses can self-assess) is perhaps best demonstrated by to determine whether a firm has acquired a "dominant" position, or what is termed as "market power".

In European Competition Law, when a firm has acquired a "dominant position", it is prohibited from abusing such position so that competition in the market is distorted.[66] The essential issue in determining dominance is the ability to act independently in a particular market.[67] In applying this legal test, it is noted that, while market size is generally a good indicator for market power, a holistic approach may be required particularly for a smaller economy and factors including entry barrier etc. should be taken into consideration as well.[68] For example, where barrier to entry is low, a local monopoly may well have little dominance in the industry, since its monopolistic position would not be sustainable in like of potential competitions from emerging competitors.

In practice, the holistic approach is not always strictly followed and *market share* would be a very important indicator, if not the sole indicator, of market power. The reliance on market share is sometimes preferred as it provides the opportunity of conferring legal certainty to business enterprises. Various presumptions and safe-harbours have been introduced in order to provide certainty and opportunity for self-assessment or the businesses. The ECJ in *AKZO v Commission* held that there is a presumption of dominance when an undertaking has a market share of 50% or more.[69] In Singapore, the presumption of dominance is set at 60%.[70] It appears that the presumption for dominance for telecommunications industry in Hong Kong is in par with overseas jurisdiction and is set at 50%.[71] Besides providing legal certainty for businesses in a

---

[66] Article 82 of EC Treaty (n 24)

[67] Alison Jones and Brenda Sufrin (n 30) p 260, see also Case 85/76 *Hoffmann – La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211.

[68] Michal S. Gal (n 32) Ch 6.

[69] Case C-62/86 [1991] ECR I-3359, [1993] 5 CMLR 215.

[70] Competition Commission of Singapore "Guidelines of s.45 Prohibition" (2005) para 38.

[71] Draft Telecommunications Authority Guidelines on Anti-Competitive Conduct, OFTA, 2004.

"reserved" sense, such presumption also shifts the burden of prove from the competition authority to the businesses and it is for the businesses to show that they are not dominant.

Whether these "safe harbours", or the presumptions of infringement, really provides adequate legal certainty is questionable. First, the use of "safe harbour" and the presumptions are used for the purpose of convenience only, in any event, they are rebuttable. Secondly, the apparent legal certainty conferred by these presumptions and safe harbours may be misconceived since the definition of market would affect the calculation of market share, and market definition itself is a very uncertain concept in competition law, the smaller the market is defined, the more dominant an undertaking would be.[72] This illustrated again that in current competition law regime insistence on economic anlaysis may sometimes be sacrificed for want of legal certainty. Undoubtedly however, should a competition law be enacted in Hong Kong, business enterprises would also insist in having some form of legal certainty through safe-harbours. Despite all the defect surrounding these safe-harbours and presumptions, it is suggested that they should be able to work in most of the bases where market definition is not disputed.

5.1.3 Transparent Procedure and Provisions of Guidelines

Legal certainty can also be provided by having a more transparent enforcement procedures, with assessment and analytical framework that the competition authority adopts spelt out in detail to provide an opportunity for business enterprises to self-assess. The European Commission have issued various Guidelines and Regulation spelling out in detail how the Commission will approach a particular Competition Law issue in order for business enterprises to follow.[73] A complete set of Guidelines where produced by the Competition Commission of Singapore before the provisions came into force earlier this year.[74] Guidelines are also provided in Hong Kong's telecommunication industry-specific competition law regime.[75] For example, when the merger control regime is introduced, there has been active correspondence between the OFTL and incumbent licensees on how the economic analysis of mergers should be conducted.[76] This is a recommended approach to enhance transparency and would provide possibility of self-assessment and legal certainty. It is recommended that sufficient enforcement guidelines should accompany the future competition law in Hong Kong so that there is abundant chances

[72] Roger Van den Bergh (n 65) pp 47-48.
[73] One of the best example in the EC is the Notice on the definition of Relevant Market, [1997] OJ C 372/5.
[74] The guidelines are available at the Commission's website: www.ccs.gov.sg
[75] see n 15 for the competition law scheme.
[76] Mark Williams 2005 (n 1) pp 324-333.

for undertakings to conduct self-assessment and avoid being caught by competition provisions.

5.2 Balancing economic analysis with efficient enforcement.

Although as mentioned above, economic analysis should be adopted to analyse the "purpose" or "effect" of any suspected anti-competitive conduct; in practice, most jurisdictions would categorise certain agreements as *per se* anti-competitive. This rule has important utilitarian value since ubiquitous application of the rule of reason would result in huge enforcement costs; in addition, it is believed that a *per se* prohibition would have a stronger deterrence effect.[77] Naked or explicit cartels, price-fixing agreement and perhaps bid-rigging are practices that would be normally considered a *per se* anti-competitive.[78]

It is recommended that such approach should also be adopted in Hong Kong, that certain hardcore anti-competitive conducts should be prohibited *per se* without investigating into the "purpose" or "effect" of those conducts. This would confer further legal certainty to business enterprises in a converse sense, in that they would realise what ought not to do, but with little prejudice to the need to insist on economic analysis.

5.3 Response to Key Question 6

Hence in response to Question 6 of the Discussion Document, it is submitted that the "purpose" and "effect" of the conduct should be taken into account rather that prohibition of certain types of conduct. However, while the law should insist upon economic analysis of all cases, this has to be balanced against the want for legal certainty and efficient enforcement, as such, in implementation, it may be necessary to provide for certain doctrines, presumptions and *per se* prohibition.

6. CONCLUSION

With the recent changes in the HKSAR Government's attitude towards the adaptation of a general competition law, it appears by now few will doubt the value of a general competition law. Yet, the concerns from the opposing sectors of the community are very

[77] Keith N. Hylton, (n 33) p 114.
[78] See Richard Whish (n 29) pp110-115 for the types of agreements that would be deemed as *per se* anti-competitive under EC Law.

real concerns that should be taken into account when building the competition law regime in Hong Kong.

Besides, it must be borne in mind that it would be unwise to transplant competition law provisions from a bigger economy to a small economy, particularly when a smaller economy would have different considerations and perhaps demand a more flexible and less invasive competition law regime.

The author believes that it is possible to enact a competition law regime that is both effective and efficient in terms of its enforcement process. By pursuing a sole and pure economic object, the law can avoid being too invasive and end up becoming a source of inefficiency. By drawing a proper balance between use of economic analysis and the provision of suitable exemptions, guidelines and opportunity to self-assess, the law can be effective while maintaining a minimal compliance burden for businesses. By focusing on behavioural instead of structural prohibition, efficiency generated through concentration is preserved while adequate safeguard is provided against abuse of such concentration. This enforcement focus would be more aligned with the non-interventionist tradition.

The author believes a sensibly drafted and enforced general competition law can greatly enhance the local economy by encouraging competitions and new entrants to the economy, making the economy more adaptive and more innovative and ready to face the ever-increasing challenges from the Mainland China. It is hope that the Government would have enough will and determination to persuade non-believers in the business community to support such a significant move in Hong Kong's economic history.

BIBLIOGRAPHY

Baker, Jonathan B., "A preface to post-Chicago antitrust," in Antonio Cucinotta, Roberto Pardolesi and Roger Van Den Berg (eds), *Post-Chicago Developments in Antitrust Law* (Cheltenham: Edward Elgar, 2002) pp 60 – 75.

Competition Commission of Singapore "Guidelines of s.45 Prohibition" (2005) para 38.

Council of the European Union, Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (Regulation implementing Articles 81 and 82 of the Treaty), Official Journal [2003] L1/1, [2003] 4 CMLR 551. (the "Modernization Regulation").

Council of the European Union, "Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between undertakings (the EC Merger Regulation)", [2004] OJ L24.

European Commission, Commission Notice on the non-Imposition or Reduction of Fines in Cartel Cases (Leniency Notice) [1996] OJ C 204/14 European Commission, Notice on the definition of Relevant Market, [1997] OJ C 372/5.

European Commission, Commission Notice on agreements of minor importance (de minimis Notice) (replacing [1986] OJ C 231/2) [1997] OJ C 372/13, [1998] 4 CMLR 192.

European Commission, Communication from the Commission on the application of the Community competition rules to vertical restraints (follow-up to the Green Paper on vertical Restraints), [1998] OJ C 365/3, 354/4.

Fox, Eleanor M., "Post-Chicago, Post-Seattle and the Dilemma of Globalization", in Antonio Cucinotta, Roberto Pardolesi and Roger Van Den Berg (eds), *Post-Chicago Developments in Antitrust Law* (Cheltenham: Edward Elgar, 2002)

Fraser Institute, *Economic Freedom of the World 2005 Report*

Furse, Mark, *Competition Law of the UK and EC* (3rd Edn, Oxford University Press, 2002)

Gal, Michal S., *Competition Policy for Small Market Economies* (Cambridge: Harvard University Press, 2003)

Heritage Foundation, *Heritage Foundation Index of Economic Freedom*

Hong Kong Chamber of Commerce, *Statement on Competition Policy* (Jul 2005).

Hong Kong Consumer Council, *Competition Policy: The Key to Hong Kong's Future Economic Success* (1996)

Hong Kong Economic Journal, *Ronny Tony Obtains Support from Business Community in Promoting Fair Competition Law* (湯家驊爭取商界推公平競爭法) (10 November 2004)

Hong Kong Economic Times, *SMEs Opposing Competition Law for Fear of being Forced out by Conglomerates* (中小企反競爭法憂財團封殺) (20 May 2006), A20

HKSAR Government, *The Statement on Competition Policy* (May 1998, as amended)

HKSAR Government, *Review Committee set up by COMPAG* (Press Release, 1 June 2005)

HKSAR Government, *CE's "Letter to Hong Kong"* (Press Release, 16 Oct 2005)

HKSAR Government, *Hong Kong Ranked World's Freest Economy for 12th Consecutive Year* (Press Release, 4 Jan 2006)

HKSAR Government, *The 2005-06 Policy Address*

Hong Kong Economic Times, *Cross-sector Competition Law – no Criminal Section – Committee propose Investigatory and Adjudicative Bodies – Consultation Starts next Month* (競爭法研跨行業 不涉刑事　委會倡設調查及訟裁機構 下月諮詢) (1 June 2006)

Hovenkamp, Herbert, "The Reckoning of post-Chicago antitrust", in Antonio Cucinotta, Roberto Pardolesi Roger Van Den Berg (eds), *Post-Chicago Developments in Antitrust Law* (Cheltenham: Edward Elgar, 2002) pp 1-33

Hylton, Keith N., *Antitrust Law – Economic Theory and Common Law Evolution* (Cambridge: CUP, 2003)

Jones, Alison and Sufrin, Brenda, *EC Competition Law: Text Cases and Materials* (Oxford: OUP, 2001)

Jones, Thomas and Martyn Taylor, "Telecoms: Recent Regulatory Developments in Singapore" Computer and Telecommunications Law Review (2004), 10(6), 137 – 141

Lee, Angeline, "Convergence in Telecom, Broadcasting and IT: A Comparative Analysis of Regulatory Approaches in Malyasia, Hong Kong and Singapore" (2001) 5 *Singapore Journal of International and Comparative Law* 674 – 694

Kwon, Ohseung, "Retrospect and Prospect on Korean Antitrust Law" (2005) Journal of Korean Law vol 4 iss 2 p 1

Marsden, Philip, Dr., *A Competition Policy for the WTO* (London: Cameron May, 2003)

May, James, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis", 50 Ohio State LJ 257 (1989)

Ming Pao, *Supermarket Pricewar raises Government's Concern* (超市減價戰惹港府關注) (1 Dec 1999).

Ming Pao, *Liberal Party Proposes Competition Law for Fuel, Electricity and Supermarket Industries* (自由黨倡燃油電力超市訂競爭法) (12 November 2004)

Office of Telecommunications Authority, Draft Telecommunications Authority Guidelines on Anti-Competitive Conduct (2004)

Office of the Telecommunications Authority, *Complaints about Arrangements for the Provision of Telephone and Internet Access Services at Banyan Garden Estate* (Case T261/03, July 2004)

SCMP, *Make Hong Kong the Cartel Capital of the World*, (18 August 2003)

SCMP, *Ccompetition Law Critics Betrays Their Entrenched Interests* (29 Sept 2005).

Singtao Daily, Adm@rt Complains that Sources of Goods being Cut off (速銷商稱貨源遭封殺) (7 Aug 1999)

Singtao Daily, *Businesses Softens Attitude towards Legislation* (商界對立法態慶軟化), (10 October 2005)

Tong, Ronny, *Fair Competition is our Livelihood – a Study on Competition Policies and Competition Laws Work Report No.2*, (May 2006)

United States Department of Justice, Antitrust Division, *Timeline of Antiturst Enforcement Highlights*. Archived at www.usdoj.gov/atr.

United Nations Conference on Trade and Development, *Model Law on Competition, Draft Commentaries to Possible Elements for Articles of a Model Law of Laws* (2000) UN Doc TD/RBP/CONF.5/7

Van den Bergh, Roger , "The Difficult Reception of Economic Analysis in European Competition Law", in Antonio Cucinotta, Roberto Pardolesi and Roger Van Den Berg (eds), *Post-Chicago Developments in Antitrust Law* (Cheltenham: Edward Elgar, 2002) pp 34 – 59

Wells, Wyatt C, *Antitrust and the Formation of Postwar World* (New York: Columbia University Press, 2002)

Whish, Richard, *Competition Law* (5th Edn, Oxford: OUP, 2003)

Williams, Mark, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge: Cambridge University Press, 2005)

Williams, Mark, "Seeds of its own destruction: Hong Kong's Dysfunctional Competition Policy" Journal of Business Law (Jan 2006) pp 52-73

World Economic Forum, *Global Competition Report 2005-06*

About the Author

Oliver Nip recently graduated from the Bachelor of Business Administration (Law) (2005) and Bachelor of Laws (2006) at the University of Hong Kong and is now enrolled in the Postgraduate Certificate of Laws course at the University. The author first encounter competition law when he took a course at the University of Warwick, UK on that subject during his exchange studies. He later wrote a research paper titled "Building the Competition Law Regime in Hong Kong" in June 2006 as part of his LLB studies. The above written submission is largely based on that research paper.