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Economic Development Branch (Division A)
Economic Development and Labour Bureau
2/F, Main Wing, Central Government Offices
Lower Albert Road
Central, Hong Kong

[BY EMAIL AND BY POST]

Dear Sir/Madam,

Comments on the public discussion document on the way forward for competition policy in Hong Kong

This response is made on behalf of Shell Hong Kong Limited and other companies in the Royal Dutch Shell Group (Shell) conducting business in or with Hong Kong.

Shell welcomes this opportunity to comment in this public consultation process, and applauds the Economic Development and Labour Bureau of Hong Kong for the production of this well thought out, objective and balanced consultation document.

Key Question 1:
Does Hong Kong need a new competition law?

Shell believes in a free and competitive economy and we seek to compete fairly within the framework of all applicable laws (Shell Statement of General Business Principles, number 2).

Shell supports free enterprise. We believe that fair competition is key to a good environment for investment as it fosters continuous improvements in products and services.

Shell therefore supports the adoption of competition laws regulating anti-competitive agreements in Hong Kong. Such laws should be applied in a clear, objective and non-discriminatory manner. Any new competition law should be no more onerous on businesses than the widely understood and accepted principles of international antitrust.

Key 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?

Shell believes that competition law should be applied in a non-discriminatory manner (equally to companies in both the public and private sectors). Therefore, any new competition law should not be directed at specific sectors of the economy as this may

lead to unequal treatment, uncertainty and unfairness. We submit that greater clarity is provided for all businesses where competition laws apply across all sectors, thus providing a level playing field for all.

There are a variety of practical problems in targeting competition law only at limited sectors in the economy, including problems of definition, dealing with cross-sector issues, monitoring non-specified sectors and keeping up-to-date with which sectors require regulatory attention.

Applying competition laws across all sectors (rather than specific sectors only) would also be consistent with the approach of adopted in the vast majority of overseas jurisdictions with developed competition / antitrust laws.

Key Question 3:
Should the scope of any new competition law cover only specific types of anti-competitive conduct, or should it also include regulation of market structures, including monopolies and mergers and acquisitions?

Shell believes that Hong Kong should adopt competition laws that target anti-competitive behaviours and abusive practices and should not introduce broader competition laws aimed at addressing market structures such as monopolies.

As the consultation paper states, the mere presence of a monopoly or a dominant position in any market does not necessarily reduce economic efficiency, nor is it indicative of itself that any anti-competitive conduct is occurring. We believe that the focus of Hong Kong's new competition law should be on the actual conduct of firms in a market, and that the adoption of suitable provisions relating to the abuse or misuse of market power would be sufficient and appropriate to address any concerns about market structure without introducing specific or general provisions in relation to the investigation of market structures.

We would also point out that in our experience, the investigation by competition authorities overseas of market structures (for example market references by the UK Competition Commission and "Sector" enquiries by the European Commission in the European Union) are hugely expensive to all businesses involved, both large and small – they also consume significant agency resources for long periods of time. We would urge the Hong Kong Government seriously to consider whether such market investigations are really necessary or warranted, given that conduct can be effectively and appropriately controlled by adopting general provisions prohibiting certain types of anti-competitive agreements and conduct.

Furthermore we submit that there is no clear justification at this time for the regulation of mergers and acquisitions in Hong Kong, and would point out that mandatory merger filings can often be both burdensome and costly to business. To the extent that the Government feels it necessary and justified to introduce a system of merger control in Hong Kong at this point, we would encourage the Government to ensure that any filing requirements are not unduly onerous, since this could reduce the synergies and efficiencies which international mergers can bring.

In addition (if Hong Kong did decide to introduce a merger control regime at this stage):

- Any merger filing requirements should be limited to the impact of the deal within the jurisdiction, and should not require filing of international mergers if they do not affect conditions of competition within Hong Kong;

- Clearly understood rules should be established to give clear guidance to business on when filings are required, and the filing requirements (information to be provided) should be limited to the amount of data strictly and objectively necessary to assess the competitive impacts of the deal. Time limits for antitrust review should be established, as business requires legal certainty when undertaking major corporate restructuring;

- The substantive analysis of mergers should follow widely internationally accepted principles of antitrust and should seek to control only those mergers that risk strengthening a "dominant" position (i.e. a position of very significant market power).

Key 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?

Key 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 guidelines issued by the regulatory authority?

Many jurisdictions around the world have introduced a general prohibition of agreements and concerted practices having an anti-competitive object or effect. Such laws then sometimes go on to provide a non-exhaustive list of the types of conduct included in the prohibited practices. A growing body of case law, academic writing and publications by antitrust agencies has helped to define this further. These laws and their interpretation are generally well understood by international business. In many countries, businesses have been assisted by the publication (by the national antitrust / competition agency) of very pragmatic Guidelines on the interpretation of the law and its likely practical application.

Shell supports regulatory certainty, however, this does not necessarily mean that the law needs to define in detail every type of conduct prohibited under the law, provided that the new law follows internationally accepted principles of antitrust law and practice. In particular:

- The prohibition and the interpretation in the Guidelines should be no more onerous to business than such widely accepted principles of international antitrust;

- The interpretation of the prohibition should be limited to that objectively necessary to protect consumers and preserve the competitive process, the law should favour the process of competition rather than the preservation of individual competitors – and therefore should apply equally to all entities engaged in trade (both in the public and private sector);

- The prohibition should apply only to conduct which has a clear effect on competition within Hong Kong, and should not apply activity which has no real economic impact within Hong Kong;

- Most importantly, and to be consistent with accepted international antitrust principles, antitrust laws should **not** apply to agreements or arrangements between wholly owned or wholly controlled companies within the same Corporate Group.

Shell would therefore support the adoption of a general prohibition against anti-competitive conduct supplemented with guidelines on the types of conduct considered to be anti-competitive We believe this approach will achieve the right balance between certainty for business and regulatory flexibility.

Key Question 6:
In determining whether a particular type of anti-competitive conduct constitutes an infringement of the competition laws, should the "purpose" or "effect" of the conduct in question be taken into account, or should conduct on its own be regarded as sufficient in determining that an infringement has taken place?

Although an "either / or" test (i.e. either the object or the effect of restricting competition) would be consistent with the test used in a number of jurisdictions, Shell believes that to ensure jurisdictional certainty, competition law should only apply to conduct which has a clear effect on competition in the relevant country.

Key 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?

Shell submits that whilst it may be appropriate to exempt certain categories of agreement from the application of the new competition law, it would not be appropriate to exempt categories of undertakings (traders / firms etc) or certain economic sectors from the application of the new competition law. In other words, the new competition law should create a level playing field and should be applied in a transparent and non-discriminatory fashion across all sectors of the economy.

Key Question 8:
Which would be the most suitable of the three principal options for a regulatory framework for the enforcement of any new competition law in Hong Kong? The options are:
Option 1: A single authority with power to investigate and adjudicate
Option 2: Separation of enforcement and adjudication
Option 3: Adjudication by a specialist tribunal

Shell believes that a clear separation of powers of investigation and adjudication is required to promote fairness and prevent abuse. To prevent overloading of courts in Hong Kong, adjudication by a specialist tribunal will ensure that proper resources and expertise are dedicated to competition cases. Competition law is widely acknowledged to be a complex and specialist area of the law, and a specialist tribunal including

competition law practitioners and experienced antitrust economists will greatly assist in the development of a coherent competition in Hong Kong.

In addition, to protect the rights of defence, a fully functioning appeals procedure should be established.

Key Question 9:
Regardless of the option, 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

Shell has no specific view on this question, other than to observe that the presence of an independent board could increase accountability (provided the members of the Board are free from political allegiance / bias and had no conflicts of interest (either personal of economic) with the activities of the agency).

Key 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?

Shell strongly supports the proposal that the new competition law should provide for the competition authority to be the only body with power to conduct formal investigations. Any other arrangement would create uncertainty, increase costs and increase the likelihood of unmeritorious cases being pursued.

The competition authority should adopt and publish clear guidelines to ensure that a consistent approach is taken to the initiation of investigations.

Key Question 11:
What formal Power of investigation should a regulatory authority have under any new competition laws?

Shell believes that whilst it is important for antitrust and competition authorities to have the means to investigate suspected infringements of competition law rules, it is essential that such investigations are conducted in a manner that fully respects the legitimate rights of the defence. In particular the process should embody fundamental principles of law such as the right to be heard, the right to understand the case against the company (including access to the investigator's file) and the right to legal representation. Fundamental principles should also include the protection of legal privilege.

As a general proposition, Shell would support the introduction of investigatory powers that, whilst fully recognising and respecting the rights of the defence as highlighted above, enabled the authority (on the production of a valid mandate or decision authorising the investigation) to:

- Enter business premises
- Take copies of books and records (including computer records)
- To ask for oral explanation on the spot (although it will be important to ensure that the relevant individual has access to legal advice at the time)

It will be extremely important to ensure that any investigation can be only be conducted within the scope of the mandate authorising it, and that such mandate should clearly identify the suspected infringement and the business area which is the subject of the investigation. A failure to do this could risk an investigation becoming a "fishing expedition" which would be an inappropriate use of regulatory resources and would damage business confidence in the competition enforcement regime.

Key Question 12:
Should failure to cooperate with formal investigations by the regulatory authority be made a criminal offence?

Shell believes that it would be helpful for the legislation and guidance clearly to articulate a legal duty to cooperate. However we do not believe that it is necessary (particularly in the early years of a new competition law regime) to provide that a failure to cooperate is a criminal offence. Any failure to cooperate could be dealt with by a civil or administrative process and could result in the imposition of financial penalties rather than in a criminal record. If experience demonstrates that a large number of firms have failed to cooperate, then the Government would still have the option of introducing criminal enforcement penalties at a later stage.

Finally, if a failure to cooperate during an investigation was made a criminal offence, the legislation should clearly provide that the offence is only committed where the person is acting intentionally. In any event, there should be clear communication from the authority, and the opportunity to respond and challenge, where it believes there has been non-compliance before any proceedings are initiated.

Key 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 disclosures in order to take forward an investigation when the circumstances so require?

As noted in response to Question 11, Shell believes it is essential that the new competition law fully recognises and respects the legitimate rights of the defence, including:

- The protection of Legal Privilege (which should extend to advice given by in-house Legal Advisers / Counsel); and
- The protection of Business secrets / Confidential Information (to the extent that such business secrets / information are not direct evidence of the anti-competitive practice itself).

Key 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?

Shell generally prefers to see a single competition authority rather than a multiplicity of different competition / antitrust agencies in the same country. We suggest that having a

single agency (without separate sectoral regulators) could increase administrative efficiency and reduce bureaucracy and costs.

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

Given that competition law will be new to Hong Kong, and that criminal penalties are relatively new in other jurisdictions with established competition law, Shell believes that penalties should initially be civil only. The effectiveness of civil penalties can be monitored once the new competition law is fully established and has been tested, and criminal penalties introduced in consultation at a later stage if necessary.

Penalties for competition law infringements should be imposed in a clear, objective and non-discriminatory manner and due process should always be observed in the investigatory and decision making process. The maximum level of any potential penalty (whether an absolute figure or a percentage of turnover) should be clearly stated in law. The authority should have a certain amount of discretion to establish a penalty (up to the statutory maximum) taking into account the factors set out below:

- Penalties should be objective and based primarily on the gravity and the duration of the infringement;
- Penalties should only be imposed where an infringement is either intentional or negligent;
- Penalties should be imposed in a non-discriminatory manner against all proven infringers
- In assessing the level of penalties, authorities should take into account not only aggravating factors (such as a failure to cooperate) but also attenuating factors, such as cooperation during the investigation, the voluntary provision of information during the investigation etc;
- Clear recognition (in terms of a reduction in the level of any fine) should be given to the efforts made by each company towards competition law compliance training in its organisation.

We encourage the authority to adopt clearly understood and transparent guidelines on the calculation of any penalty.

There should be a process for appealing against penalties.

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

Shell welcomes the proposal to introduce a leniency programme, and would encourage the authority to ensure that any leniency programme is consistent with leniency programmes in other major jurisdictions.

Guidelines on the terms on which leniency will be available will need to be very clearly articulated, so that businesses are clear as to the circumstances in which leniency is available and how an application for leniency should be made.

Key Question 17:

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

Shell considers that a cease and desist presumption is inherent in the statutory prohibition of anti-competitive practices and the finding of a competition law violation. In that sense we consider that a separate power to issue such an order is not necessary.

Key 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?

Shell has some reservations about the option of entering into a binding settlement as an alternative to formal proceedings. Unless very carefully managed, such an option could, in some circumstances be open to an abuse of process.

Key Question 19:
Should any new competition law allow parties to make civil claims for damages arising from anticompetitive conduct by another party?

Key Question 20:
How should any new competition law address the concerns that businesses (especially SMEs) may face an onerous legal burden as a result of civil claims?

Business is generally concerned about the proliferation of litigation, and the proliferation of competition litigation is no exception. We submit that – particularly with the introduction of a new and untested competition law – it would not be appropriate to encourage civil litigation until the parameters and application of the laws are clearly understood by the business community, the courts and consumers alike.

For clarification or enquiry on our response, please feel free to contact the undersigned at or Ms. Julia Ma, our Managing Counsel, at at any time.

Yours sincerely,
For and on behalf of
Shell Hong Kong Limited

Andy Ku
Director