British Chamber of Commerce in Hong Kong

Response to the Government's Consultation Paper on the – *Promoting Competition – Maintaining our Economic Drive*

Submitted to the Economic Development and Labour Bureau

February 5th, 2007

This response is submitted to the Economic Development and Labour Bureau in response to the Government's consultation paper of November 2006 on the way forward for competition policy in Hong Kong. It has been written by the Business Policy Unit of the British Chamber of Commerce in Hong Kong, the Chamber's think tank and advisory group on Government policy, and represents the views of the Chamber's members.

The British Chamber is one of Hong Kong's largest international business organisations. The Chamber comprises major multinational companies and institutions, as well as a substantial number of SMEs and represents a broad spectrum of British, Hong Kong, Chinese and international companies. Collectively, this membership makes a significant contribution to the Hong Kong economy and to employment, and constitutes a cross-section of business opinion in the SAR.

1. The Need for a New Competition Law in Hong Kong

Discussions with Chamber members reveal no significant concern about anti-competitive practices in Hong Kong. Indeed, greater concern is voiced over potential increases in regulation and the interference of Government in areas better left to market forces. Hong Kong is a small market that has proved its effectiveness over time. The Chamber strongly believes that fair competition is one of the keys to this effectiveness and acknowledges that there may be a role for a general competition law to continue to safeguard fair competition into the future.

In the opening paragraphs, the Government's consultation paper states the objective of competition policy as being, "To promote economic efficiency or the best use of resources from the society's perspective." Later this objective is "further clarified" as being, "To enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare." The benefits of competition are also listed, including: maximising efficiency in the allocation of resources, providing a clear indication of

market preferences, maintaining costs at viable levels whilst providing a range of choices, and the Government's consultation paper also hints at benefits for other policy objectives including "trade, industrial and consumer protection policies."

In the UK, the purpose of competition legislation is to ensure that the consumer gets a fair deal. There are, of course, wider policy benefits, but the objective is clear: "to make the markets work well for consumers." The objectives and benefits outlined in the Government's consultation paper seem to be focused on efficiency in general, including "increasing the output obtained by a given input, improving the allocation of resources between different uses, improving managerial or other kinds of efficiency, and improving responsiveness to changing demand and supply conditions." Consumer protection appears to be included as a by-product.

The policy objectives outlined in the consultation paper are too broad. Greater specificity and clarity of objective are required for the basis of policy making. Competition policy legislation does not provide a panacea. The question that must be asked is, "Will the introduction of competition legislation in Hong Kong help to achieve the objective for which it exists?" Many competition-related problems in Hong Kong exist as a result of market size. Mere creation of a law would not necessarily solve these. Regulation and schemes of control would still be critically important in many areas. In Hong Kong, many monopolies/oligopolies arise from Government laws and regulations relating to property and the supply of land into the market, and a competition policy law would do nothing to change this situation. No competition policy law can be applied without agreement at the outset on the boundaries of the market within which a monopoly or market dominance is deemed to occur. Defining 'the market' is notoriously difficult (and often controversial), and will only become more so as Hong Kong's boundary with the Mainland becomes more porous.

Most large companies in Hong Kong also operate in many other countries, where they are subject to local competition policy laws. Thus, complying with a specific Hong Kong competition policy law should create no new challenges. It is the Government's role to safeguard a 'level playing field' for businesses operating in Hong Kong and it is reasonable for Government to take measures to guard against attempts by individual or groups of businesses to manipulate the market through unfair practices. However, for Government to gain the full support of the community on this initiative, the

objectives of the proposed legislation should be much clearer. Much of the detail of the new competition policy, including the appropriate structure of the regulatory authority, will then become apparent.

2. Inclusion of All Sectors of the Economy

Policies which promote fair competition should not be directed primarily or solely against a specific sector. That practice itself would be unfair. Defining the limits of any sector can be challenging. Almost certainly, different standards would emerge sector-by-sector (already apparent in the differences between OFTA and the Broadcasting Authority) creating legal confusion. A sector-specific approach would need to be drawn up and overseen by Government officials, creating conflicts, tending to opaque decision-making, and perhaps also weakening the "rule of law" in Hong Kong.

By contrast, a single transparent law applicable to all sectors would reinforce rather than weaken the rule of law in Hong Kong. It would by definition be predictable, fair and consistent across sectors, and could be administered in a transparent way by an independent body, and ultimately enforced by the courts of law.

3. Inclusion of Market Structures

The CPRC has recommended against targeting market structures (defined as merger and acquisition activity or regulating "natural monopolies"). The Chamber has some sympathy with this view. Market dominance in a small jurisdiction like Hong Kong is not necessarily an indication of manipulation, or even a capacity to manipulate the market. For example, Hong Kong's leading air cargo company might handle some 80 percent share of Hong Kong's air freight business, but it is competition with Singapore, Seoul, Bangkok, Dubai that prevents egregious market abuse. The same is true of English language newspapers, where the small size of the market and the advertising pool that underpins it has, over three decades, made it virtually impossible to develop a viable second daily.

Market dominance in itself should not be considered unlawful and that regulation should not inhibit the market unduly, the exclusion of market structures from regulation could create a potential loophole in the proposed legislation that would allow for merger and acquisition activity for the purpose of uncompetitive practices. A Competition Policy Authority should have power to take a look at a

company/sector where market share has exceeded a certain threshold. This would ease public anxieties about market dominance, and need only trigger an investigation if evidence of abuse of market dominance were discovered.

4. Inclusion of Specific Types of Anti-Competitive Conduct

A new competition law should set out a general prohibition against anti-competitive conduct with examples of such conduct. Specific anti-competitive practices should be prohibited. The seven types of conduct identified by the CPRC are appropriate. These are:

- Price fixing
- Bid-rigging
- Market allocation
- Sales and production quotas
- Joint boycotts
- Unfair or discriminatory standards
- Abuse of a dominant market position

Attempts to legislate formally for every potential scenario would be unworkable. Drafted correctly, legislation can bestow a regulatory authority with broad powers and the capacity to use discretion, particularly in response to changing circumstances. Guidelines for business should also be issued by the regulatory authority.

5. Assessing Anti-Competitive Behaviour

The consultation paper raises the question of whether anti-competitive behaviour *per se* should be prohibited, or whether the purpose or effect of anti-competitive conduct should determine whether there has been an infringement of competition law. Reliance on assessment of the competitive effects and purpose of conduct would increase the complexity of the legal compliance process and that the law should be applied on a *per se* basis. If transgressions arise without intent, then the ruling of the regulatory authority should reflect this - perhaps simply with an instruction to amend conduct.

6. Exclusions or Exemptions

Exemptions would tend to water down the legislation and increase its complexity. However, exemptions are important for the purposes of remedying any unintended and undesirable consequences of any new competition law, e.g. any undue restraint on technological developments and any undue interference with the operation of public services. Like other foreign jurisdictions, any new competition law should contain a set of well defined conditions for the application and granting of such exemptions, an important example of which is public interest.

7. The Regulatory Framework

On the question of the regulatory framework, there are obvious weaknesses in the current system that should be addressed. The present arrangement with COMPAG exposes the system to accusations of collusion between Government and business, and therefore compromises the stature required to be an effective regulatory body. COMPAG does not possess the power to summon individuals to give evidence or to gain access to relevant papers and records. The current system is not openly transparent (a deterrent to potential defenders) and it does not possess the necessary administrative powers to correct uncompetitive practices.

The Chamber, therefore, suggests that the current system be amended as follows:

- An independent chairperson be appointed;
- The panel consist of members from a wide cross-section of society, to include representatives from Government, from other regulatory bodies, from the judiciary, from business, and from the public;
- The regulatory authority have the power to summon witnesses, take evidence under oath and summon or sequester relevant papers to provide the background to the case under review;
- Meetings may be open to the public;
- The regulatory authority publish regular statements on its activities, including objectives, outcomes, and running costs, with the aim of demonstrating delivery of direct financial benefit;

- It should have the administrative power to require those guilty of uncompetitive practices to take action to correct them within a set time period;
- Those guilty of uncompetitive practices should have the option of seeking a judicial review of the findings; and
- It should report to the Chief Executive of the Hong Kong SAR.

Transparency and independence are critical to the effective workings of such a regulatory authority if such a body is to be credible. Existing sector-specific regulators should be assimilated into one regulatory authority. Grandfathering them would no doubt only lead to long-term anomalies, and greater administrative costs. In addition, should the basis of the legislation be consumer protection, the Government should consider the role of the Consumer Council (which exists as an advocate for consumer interests).

10. Investigative Powers

Only the regulatory authority should have the power to conduct formal investigations into possible anti-competitive conduct. Companies or individuals with prima facie evidence that market abuse has occurred should have the power to submit evidence in confidence (akin to ICAC), but not to pursue an investigation themselves. Any new competition law should stipulate a threshold (defined, for example, by market share and/or annual turnover) that would have to be met before the regulatory authority would be required to initiate a formal investigation. The regulatory authority should therefore not be required to conduct a full investigation on every complaint it receives. Such measures would reduce the number of trivial, frivolous or malicious complaints in the Chamber's view.

Investigations themselves should be conducted as swiftly as possible as protracted investigations could prove ruinous to a company under investigation. A regulatory authority should have the power to require the production of specified documents or specified information. It should also have the power to enter and search premises. Guidelines should be produced outlining circumstances under which such powers can be employed, the extent of the powers and the procedures which should be followed in exercising such powers. Although investigative powers of the regulatory authority are necessary for the effective enforcement of any new competition law, such powers should not be unlimited or unchecked, e.g., a court warrant should be obtained before

officers may enter into the premises of the suspects, there should be strict confidentiality requirements on the regulatory authority, the right to personal data privacy and the privilege against self-incrimination should be respected.

11. Nature of Proceedings

Any new competition regulator ought to have the authority to reach a binding settlement with parties suspected of anti-competitive conduct as an alternative to formal proceedings, particularly if it has been shown that the transgression was not intentional. Any new competition law should provide the regulatory authority with adequate legal remedies for enforcing the terms and conditions of such settlement, be it a settlement payment or an undertaking to stop the conduct in question. Such flexibility should apply to minor infringements only and should not be open to abuse of the system through inappropriate lobbying of the regulatory authority.

Failure to co-operate with formal investigations by the regulatory authority should be made a criminal offence, as long as the regulatory authority has confidentiality obligations, and there are high threshold requirements for an investigation to be initiated. Attempts to withhold or alter evidence should be viewed as an obstruction of justice and be dealt with accordingly. There should be a wide spectrum of penalties ranging from petty fines or reprimand to imprisonment for failing to co-operate with the regulatory authority in its investigation depending on the severity of such failure.

12. Confidentiality

The balance between disclosing information and maintaining confidentiality is a delicate issue that the regulatory authority will have to face. Clear guidelines will need to be set out, taking into consideration existing privacy laws and other relevant international agreements to which Hong Kong is a signatory. Protection for whistle-blowers should be included, balanced with measures to ensure that malicious accusations are discouraged. For the purposes of effective enforcement of any new competition law, the regulatory authority must have the power to compel disclosure of confidential information. Any new competition law should nevertheless ensure that legal professional privilege will not be compromised under any circumstances.

13. Civil Claims for Damages

Some foreign competition laws contain provisions for a person who has committed an infringement to be liable for damages in respect of financial losses sustained by another person as a result of such infringement. If a new competition law in Hong Kong adopts this approach and provides for a right to bring a civil action based on a competition law infringement, such right should be limited to cases where the regulatory authority has made an infringement finding. A time limit for taking such private action should also be imposed. These measures should help to prevent extensive litigation between parties accusing one another of anti-competitive conduct and possible abuse of the new law by virtue of trivial, frivolous or malicious action.

14. Allaying SME Concerns over Onerous Legal Burdens

SMEs form the largest business sector in Hong Kong. The majority of these companies operate in highly competitive business sectors in which no individual player has the power to distort the market. SME members of the Chamber view competition legislation positively. A new competition law should stipulate a sufficiently high threshold (defined, for example, by market share and/or annual turnover) which would have to be met before the regulatory authority would be required to initiate a formal investigation so that SMEs, by virtue of their lack of market power, would be unlikely to be targeted by the regulatory authority. Some thoughts need to be given to the right to bring a civil action based on a finding of competition law infringement by the regulatory authority. In any event, any new competition law must not create a significant legal burden to local businesses.

15. Government Leadership

The greatest number of complaints to COMPAG for alleged anti-competitive conduct concern 'unfair or restrictive government practices'. The Government must review its own tendering processes to ensure that these are not in effect causing price regulation by Government. Hong Kong's free market economy platform will be distorted if prices are no longer set by market forces. This damages the open market mechanism and violates the principles of fair competition, which would severely damage Hong Kong's reputation as the freest economy in the world.

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5th February 2007