

LEGISLATIVE COUNCIL BRIEF

**PUBLIC CONSULTATION ON
DETAILED PROPOSALS OF A COMPETITION LAW**

INTRODUCTION

At the meeting of the Executive Council on 29 April 2008, the Council ADVISED and the Chief Executive ORDERED that the Administration should publish the document at Annex, which outlines the proposed major provisions of a competition law, for a three-month public consultation.

JUSTIFICATIONS

Consultation on Competition Policy

2. In June 2006, the Competition Policy Review Committee (CPRC) recommended that we introduce a cross-sector competition law to be enforced by an independent Competition Commission. In November 2006, we launched a public consultation exercise to gauge the community's views on this issue. Feedback from the public indicated that most people support the introduction of a cross-sector competition law in Hong Kong. However, concerns were expressed by some respondents from the business sector that a new competition law might have an adverse effect on business, especially small and medium-sized enterprises (SMEs).

3. Stakeholders in the business sector have regularly stated their concern that a competition law could create problems for companies in Hong Kong – although they have not in most cases expressed outright opposition to the introduction of such a law. They point to the example of the USA, where there have been costly and time-consuming legal actions on competition issues, and consistently urge that in drafting a competition law for Hong Kong, we should take care that this does not lead to increases in the cost of doing business locally. In addition, some SME associations have expressed anxiety that a

competition law might create an additional compliance burden for SMEs, and might even leave them vulnerable to aggressive litigation from large firms.

Proposed Competition Law

4. To address the business sector's concerns, on 6 May we will publish for public comment an outline of the major provisions that we envisage the law would contain. This should help to remove some of the perceived problems that the business sector has identified vis-à-vis the likely effect of the law. It will also give us the opportunity to gauge the public's views on the proposed scope of the law and enforcement mechanisms, including the institutional arrangements, before we introduce a Competition Bill into the Legislative Council.

5. In drawing up the proposals for the scope of the competition law, in addition to taking account of the outcome of the public consultation exercise mentioned in paragraph 2 above, we have also reviewed best practice in other jurisdictions and taken expert economic and legal advice from consultants with extensive experience in this area. The following paragraphs summarise the major provisions that we consider to be necessary for a suitable competition law for Hong Kong.

(a) Institutional Arrangements

(i) A Competition Commission with full regulatory powers

6. Transparency, efficiency and the design of appropriate checks and balances will be essential to the success of the regulatory regime. We propose to set up a Competition Commission, which would operate independently from the Government. Its executive would be overseen by an appointed board.

7. The Commission would investigate anti-competitive conduct, determine whether infringements of the law had taken place and impose remedies as appropriate. We believe that this model would provide for efficient and consistent decision-making. It echoes current practice in the telecommunications and broadcasting sectors in Hong Kong, as well as in the EU and in common law jurisdictions such as Singapore and the UK.

8. To maximise checks and balances, we propose that within the Commission there should be a strict separation between investigative and adjudicative functions. This would be done by establishing a separate Investigation Committee to look at each case of potential infringement of the law. The Commission member(s) on the Investigation Committee would not be involved in the Commission's adjudication of the case in question. We also propose to allow for full rights of appeal against decisions of the Commission (see paragraph 9 below).

(ii) A Competition Tribunal to act as a review body

9. We propose to set up an independent Competition Tribunal that would have the power to review decisions made by the Commission. This would allow for expertise and experience in competition matters to accumulate within a dedicated body, and would help to ensure the development of clear and consistent jurisprudence on competition matters. Decisions of the tribunal would be subject to further appeal to the Court of Appeal on points of law and on the extent of any remedy applied.

(b) Prohibitions against anti-competitive conduct

(i) A general prohibition against anti-competitive conduct

10. Competition law commonly prohibits conduct that has the purpose or effect of substantially lessening competition. We propose to follow this approach by setting out general prohibitions against anti-competitive agreements between competing undertakings (we propose that "undertakings" should be defined in the law as entities engaged in economic activities) and abusive conduct by undertakings with substantial market power. To provide further clarity, we propose that the Commission should issue guidelines that would among other things –

- a) include examples of the types of agreement that are normally considered to be anti-competitive; and
- b) clarify the extent of market share that would be regarded as "substantial" for the purpose of assessing whether an undertaking had abused its market power.

(ii) Merger Regulation

11. Merger regulation is a feature of competition laws worldwide, including the competition regime in Hong Kong's telecommunications sector. Mergers can substantially lessen competition in markets, and without merger regulation, it is also possible for companies to evade the prohibition on anti-competitive agreements simply by merging.

12. The CPRC noted that large-scale mergers are not common in Hong Kong. It was also concerned that the new law should not target market structures, and for these reasons concluded that merger regulation should not be included in a new competition law. However, some people have expressed concern that to ensure the effectiveness of the law (and its consistency with well-established best practice internationally), we might need to regulate mergers.

13. We consider that although a competition law can function without merger provisions, at this stage it would be premature to withdraw a key element of the law without further public airing of the issues. For this reason, we have set out three options for merger regulation in the consultation paper, for comment and discussion by stakeholders.¹

(c) Exemptions and Exclusions

14. All jurisdictions with competition laws that we have reviewed recognise that there are circumstances in which exemptions to the application of the law can be justified, whether on economic grounds or in the wider public interest. We propose that under the new law the Commission should have the authority to grant exemptions for agreements where it considers that these would not cause any net economic harm. We further propose that where broader public policy considerations apply, the CE-in-Council should have the power to exclude the relevant activities from the application of the law.

¹ Briefly, the options would be –

- a) to include in the law “user-friendly” merger provisions similar to those found in the Telecommunications Ordinance;
- b) to include such provisions but to delay commencement until after a review of the effect of the law; and
- c) **not** to include merger provisions in the law, but to reconsider the need for them only after a review of the effect of the new law.

15. We believe that under this arrangement, the new law generally would not apply to the activities of the Government and statutory bodies. Even where the public sector is engaged in economic activities, these are normally pursued in the wider public interest. However, for the avoidance of doubt, and for the reasons elaborated below, we propose that the competition law should *not* apply to the Government or statutory bodies -

- (a) the activities of the Government and statutory bodies would almost invariably involve public services, public policy and/or public interests, which are commonly accepted grounds for dis-applying the law prohibiting anti-competitive conduct. This approach would avoid the operation of Government and statutory bodies being adversely affected by unfounded or misconceived complaints;
- (b) Hong Kong has a relatively small public sector when viewed in relation to overall GDP; there is no evidence that the Government or any statutory body has engaged, or is likely to engage in any anti-competitive conduct in the commercial market, which is the mischief that the proposed law is trying to curb;
- (c) many services that are provided in other economies by the public sector are in Hong Kong provided by the private sector, making Hong Kong one of the freest and most competitive economies in the world; and
- (d) feedback from the previous consultation exercise and subsequent discussion with stakeholders indicated that the main concern of the public is anti-competitive conduct in the private sector.

16. We recognise that there may be different views within the community on whether the competition law should bind the public sector. Practices in overseas regimes also vary. We propose to conduct a review of the issue in the light of actual experience in implementing the competition law.

(d) Allowing rights of private legal action

17. We consider that any person who has suffered loss or damage from anti-competitive conduct should have the right to bring a private action for compensation and other remedies regardless of whether a decision of

infringement has been made by the Commission. This would mean that even if the Commission were to limit its focus to major cases of anti-competitive conduct, parties who felt that they had been victims of other cases of anti-competitive conduct would have an opportunity to seek redress through private action.

18. As noted above, some business sector representatives have raised the concern that providing for full rights of private action might lead to excessive litigation, citing the USA as an example of such a situation. Our research shows that the case of the USA is exceptional, and is fuelled by special features in that country's legal system. In other major overseas jurisdictions, there have been few private actions involving competition matters. Nonetheless, to address the concerns of the business sector, we propose that private actions instituted pursuant to the future Competition Ordinance should be heard by the Competition Tribunal, which would possess the appropriate expertise on economic and commercial matters, and would provide a relatively informal procedural setting that should allow for complex competition issues to be settled in a timely manner and at a lower cost to all parties involved. We further propose that the Tribunal should have the power to strike out vexatious or frivolous actions.

(e) Treatment of SMEs

19. Some SME representatives have raised the concern that they might unwittingly fall foul of the new law. Some also fear that large companies may use litigation as a strategic tool to harass SMEs.

20. We have discussed these concerns in detail with competition law experts both locally and overseas and we believe that SMEs would be unlikely to have sufficient market power for their conduct to have the *effect* of substantially lessening competition. Admittedly, they could be subject to sanction if they engaged in "hard-core" conduct (such as price-fixing, bid-rigging or market sharing), which is normally considered to have the *purpose* of substantially lessening competition. But such agreements generally involve the voluntary participation of those concerned, and therefore would not be entered into unwittingly.

21. As for the concern that big firms could use litigation to harass SMEs, overseas experience shows that cases initiated by big enterprises against SMEs are extremely rare. In any event, as noted above, the Competition Tribunal would have the power to disallow actions that were without merit.

22. Whilst we will propose a number of measures that could address SMEs' concerns and that are consistent with the objective of the law, we do not recommend a wholesale exclusion for all SMEs. This would be extremely difficult to administer, and more importantly, would significantly compromise the effectiveness of the new law. Nonetheless, we propose that the Commission should in its administrative guidelines clarify that it would not normally pursue an agreement if the aggregate market share of the parties to the agreement does not exceed a certain level, say 20%.

TIMETABLE

23. We will start a three-month public consultation exercise by issuing the consultation paper at the Annex on 6 May. Taking into account the views expressed during the consultation period, we would then aim to introduce a Bill into LegCo during the 2008-09 session.

IMPLICATIONS OF THE PROPOSAL

24. The setting up of a new regulatory authority to enforce the law would require additional recurrent resources. Having reviewed the size and functions of a number of local and overseas authorities, we estimate that initially the Competition Commission might need a full-time executive of about 70 staff, many of whom would have professional legal, economics and accounting backgrounds. We estimate that such an establishment would require an annual budget of \$60 million to \$80 million. In addition, taking reference from the budget of other Tribunals in Hong Kong, we estimate the initial cost of operating the Competition Tribunal to be about \$6 million annually. The full amount of additional resources required will be ascertained at a later stage and sought in accordance with established procedures.

25. The proposals in the consultation document are in conformity with the Basic Law. The proposal has no environmental or productivity implications. As far as sustainability implications are concerned, the guiding principle of

achieving a competitive and prosperous market-based economy which provides the resources to meet the needs and aspirations of the population will be observed.

26. As for the economic implications of introducing a general competition law, by providing a level playing-field for all entrepreneurs, the proposed law would help ensure the free play of market forces and enhance competition. It would thus enhance economic efficiency, thereby reinforcing business confidence and benefiting consumer welfare. The economic benefits would likely be higher level of output, lower prices and more choices of product. Experience from other jurisdictions suggests that SMEs would not face a significant increase in compliance costs, given that they would be unlikely to be targeted by competition regulation. Large businesses and multi-national corporations might look to engage additional resources to help ensure compliance, especially at the initial stage. For the economy as a whole, any additional cost to businesses should be more than offset by the longer-term benefits of a more effective and credible competition regime.

PUBLIC CONSULTATION

27. The Economic Services Panel discussed the report on the outcome of the public consultation on the way forward for competition policy on 26 March 2007. There was support for the introduction of a new, cross-sector competition law, however, reservations were also expressed, and some Members asked for justification as to why a cross-sector approach was preferred to one that is sector-specific. Some Members considered that we should first engage the community in an open discussion of the potential implications of such a step, and explain the way in which the legal framework might operate, before seeking to introduce any new competition law.

PUBLICITY

28. We will announce the issue of the consultation paper on 6 May. The document will be distributed at District Offices and uploaded onto the Commerce and Economic Development Bureau website. A spokesman will be available to answer press enquiries. We will brief the Economic Development Panel of the LegCo on the consultation paper on 6 May.

Enquiries

29. For enquiries on the brief, please contact Mr. Jonathan McKinley, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry) (2918 7470) or Miss Anna Chor, Assistant Secretary for Commerce and Economic Development (Commerce and Industry) (2918 7492).

Commerce and Economic Development Bureau
May 2008

Detailed Proposals for a Competition Law

- A Public Consultation Paper

**Commerce and Economic Development Bureau
May 2008**

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**FOREWORD BY THE SECRETARY FOR COMMERCE
AND ECONOMIC DEVELOPMENT**



Hong Kong thrives on competition. The business sector and consumers alike benefit from markets in which competition is free and fair, as such markets attract investment, innovation and improvements in product and service quality.

We value competition as a cornerstone of Hong Kong's economic success. For this reason, in 2006 we consulted the public on how best to ensure that our competition policy can keep pace with the times, whilst serving the public and facilitating a business-friendly environment.

The results of the public consultation exercise showed clearly that the community supports the introduction of a cross-sector competition law. Most respondents also expressed the view that we should set up an independent commission to enforce such a law, and that such a commission should be empowered to investigate and where appropriate sanction possible cases of anti-competitive conduct.

Based on the outcome of the consultation exercise, we have been working with a team of international experts in competition law to draw up detailed proposals for legislation that would be appropriate for Hong Kong. We have studied best practice in other jurisdictions, as well as drawing on aspects of Hong Kong law, including the provisions relating to competition in the broadcasting and telecommunications sectors.

This document aims to present in a straightforward fashion the major provisions that we envisage would form the basis of a competition law for Hong Kong. We recognise that there are concerns in some sectors about the implications of this new legislation. Therefore, before we prepare the Bill, we would like to hear your views on the proposals described in the following pages.

I encourage you to submit your comments to the Commerce and Economic Development Bureau, so that we can prepare a Competition Bill that will reflect the views of the community.

Frederick S Ma
Secretary for Commerce and Economic Development

INTRODUCTION AND OVERVIEW

Review of Hong Kong's competition policy

In its report published in June 2006, the Competition Policy Review Committee (CPRC) noted that whilst Hong Kong had a free and open economy with few market barriers, there were concerns about possible cases of anti-competitive conduct. It concluded that, to allow for the effective investigation of such cases and the imposition of sanctions where appropriate, the Government should introduce a cross-sector competition law and establish an independent Competition Commission¹.

2. On 6 November 2006, we issued a public discussion document, entitled "Promoting Competition: Maintaining our Economic Drive"², and invited views from the public on the way forward for the implementation of Hong Kong's competition policy. We summarised the public response to the document in the Report on Public Consultation on the Way Forward for Hong Kong's Competition Policy³. This indicated that –

- (a) there was wide support for a cross-sector competition law in Hong Kong;
- (b) there was a high level of support for a stronger regulatory environment for competition; and
- (c) there were nonetheless concerns in the business sector that such a law could lead to higher costs and time-consuming litigation.

Introduction of a Competition Law

3. In view of the wide support for new legislation, the Government has decided to introduce a cross-sector competition law, and to set up an independent Competition Commission to enforce the law. We aim to introduce a Competition Bill in the 2008-09 legislative session, and accordingly, the Commerce and Economic Development Bureau has begun work on the design of the law. We have also conducted extensive research on international best practice in this area.

4. The introduction of a cross-sector competition law is a new initiative for Hong Kong. We understand that some stakeholders, particularly in the business sector, are concerned that such a law might create an unnecessary regulatory burden, especially

¹ See the Report on the Review of Hong Kong's Competition Policy, available on line at <http://www.cedb.gov.hk/citb/ehhtml/pdf/speech3/CPRC.pdf>.

² Available at http://www.cedb.gov.hk/citb/ehhtml/pdf/publication/Booklet_Eng.pdf.

³ Available at <http://www.cedb.gov.hk/citb/ehhtml/pdf/publication/ConsultationReport-eng.pdf>.

for SMEs. To help address these concerns, and to give the public a better understanding of the likely content of the proposed new law, this document sets out the major provisions that we consider should form the basis of the law.

5. In the interests of clarity, and to avoid producing a document of excessive length, we have not included the detailed legal references that would appear in a formal Bill. However, in Chapter I, we set out the proposed major provisions in a similar sequence as they might appear in a Bill, in order to give an impression of the possible overall “shape” of the draft legislation. Subsequent chapters provide further background and explanation on the provisions.

CHAPTER I : SUMMARY OF MAJOR PROVISIONS

I. Purpose of the legislation and definition of key terms (Proposals 1-2)

We propose that the Competition Bill include at the outset a short clause that outlines the purpose of the legislation, followed by a list of definitions of the terms that appear in the remainder of the Bill. Consistent with our existing competition policy and the recommendations of the Competition Policy Review Committee, the purpose of the legislation should be to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition.

1. The objective of the Competition Ordinance should be to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition.

2. The following are examples of terms that might be defined in the Ordinance –

“Board” would mean the board of the Commission, comprising the members appointed in accordance with the Ordinance

“Commission” would mean the Competition Commission to be established under the Ordinance to enforce the law

“conduct rules” would mean the prohibition on agreements and concerted practices that have the purpose or effect of substantially lessening competition and the prohibition on abuse of substantial market power

“horizontal agreement” would mean an agreement made between competitors who provide similar products or services in the same market

“leniency programme” would mean a programme under which a party to a prohibited agreement that comes forward with information that is helpful to an investigation may have any subsequent penalty waived or reduced

“representative action” would mean an action brought by a body on behalf of a defined group that has been affected by an unlawful practice. The Tribunal would be required to have reached the view that the representative can fairly and adequately represent the interest of the group before allowing such an

action

“Tribunal” would mean the Competition Tribunal to be established under the Ordinance, among other things, to review the Competition Commission’s decisions and to hear private cases

“undertaking” would mean an individual, company or other entity that engages in economic activities

“vertical agreement” would mean an agreement made between one party in its capacity as a supplier of goods or services and another party in its capacity as an acquirer of goods or services from the supplier.

II. Appointment of a Competition Commission (Chapter II – Proposals 3-15)

To provide for the effective enforcement of the new competition law, we propose the establishment of a new, independent authority, the Competition Commission. The Commission would have the power to investigate and determine whether an infringement of the law had taken place. It would also have the authority to apply remedies, including fines up to a certain level, and to require that anti-competitive conduct cease. The Commission would have clear internal checks and balances.

3. An independent Competition Commission in the form of a body corporate should be set up to enforce the new competition law. The Commission should have a “two-tier” structure, with an appointed board of Commission members overseeing a full-time executive arm.
4. The Commission should have a minimum of seven members, including a Chairman, appointed by the Chief Executive. At least one Commission member should have experience in SME matters. The actual number of Commission members appointed could be more than the minimum required so as to ensure that there was a sufficiently large “pool” of members to allow for the efficient conduct of the Commission’s business.
5. The Commission should have the power to investigate, determine and apply remedies in respect of infringements of the conduct rules under the competition law.

6. The Commission should have other functions directly related to the objective of the competition law, including educating the public and business about the competition law and promoting compliance programmes.
7. The Commission should be able to commence an investigation either of its own initiative or in response to a complaint. It should be able to exercise its formal investigative powers when it has reasonable cause to believe that an infringement of the conduct rules has taken place.
8. The Commission should have the power to require a person, by notice in writing, to provide information and produce documents that it considers relevant to an investigation or to appear before the Commission to give evidence. The Commission should also have the power to conduct a physical search of premises if so empowered by a warrant issued by a magistrate.
9. There should be a formal separation within the Commission between the investigation and adjudication of infringements, through the establishment of an Investigation Committee, which is to be responsible for conducting the investigation. The Investigation Committee will be chaired by a Commission member who will not then participate in the decision on the complaint in question.
10. A Commission member who in any way, directly or indirectly, has interest in a matter being investigated by the Commission should be required to disclose the nature of his or her interest. The relevant member should thereafter not take part in any deliberation or decision of the Commission with respect to that matter.
11. Before the Commission makes a determination of infringement of the conduct rules, it should first notify the party concerned of the material facts and particulars of the conduct and its considerations in making such a determination. The party should be given the opportunity to provide information or documents and make submissions that it considers are relevant to the case, which the Commission should be required to take into account.
12. The Commission should have the power to enter into binding settlements with a party under investigation.

13. Confidential information provided to the Commission by complainants or persons under investigation, or acquired by the Commission using its formal investigative powers should be protected under the law.
14. The Commission should keep proper accounts and records of transactions, and prepare financial statements which give a true and fair view of its financial status.
15. The Commission should furnish an annual report to the Secretary once a year. The Secretary should table this annual report in the Legislative Council no later than six months after the end of the previous financial year.

III. Appointment of a Competition Tribunal (Chapter II – Proposals 16-22)

To provide a forum for a full review of decisions by the Competition Commission, we propose the setting up of a Competition Tribunal. The Tribunal would be made up of judicial officers and experts in economics, commerce or competition law. There would be a further right to appeal against Tribunal decisions in the Court of Appeal.

16. A Competition Tribunal should be established to hear, among other things, applications for review of the decisions of the Commission and private actions under the competition law.
17. Tribunal members would be either “judicial” members (i.e., judges or former judges), or “non-judicial” members with expert knowledge of economics, commerce or competition law. One of the judicial members would be the President of the Tribunal. Both the President and other judicial members would be appointed by the Chief Executive on the recommendation of the Chief Justice. Non-judicial members would be appointed by the Chief Executive.
18. When hearing reviews, the Tribunal should sit as a three-member panel, chaired by a judicial member, and comprising at least one non-judicial member with expertise in economics. The Tribunal should have the power to review cases on their merits on the same evidence as was before the Commission, and should have the power to admit new evidence if it considers this appropriate.

19. The Tribunal should possess the necessary powers for discharging its functions effectively and efficiently. The Tribunal proceedings should be conducted as informally and expeditiously as possible. The Tribunal should not be bound by rules of evidence.
20. Any person aggrieved by a determination by the Commission should have the right to seek a review by the Tribunal of the determination, including the penalty imposed by the Commission.
21. The Tribunal should have the power to decide whether or not to suspend a Commission decision before determining a review application.
22. An appeal against a decision of the Tribunal should be available. Such an appeal should be heard by the Court of Appeal and should be limited to points of law or any remedy applied in respect of an infringement, including the amount of any fine.

IV. Prohibition against anti-competitive conduct (Chapter III – Proposals 23-32)

We propose that the law prohibit anti-competitive conduct in two broad areas: participation in agreements and concerted practices that have the purpose or effect of substantially lessening competition; and abusing substantial market power with the purpose or effect of substantially lessening competition. It will always be necessary to establish that conduct actually has had a substantial adverse effect on competition or that that was its purpose. This means that there will not be an absolute rule against agreements between competitors where such agreements benefit competition nor an absolute prohibition on a large business competing strongly in the market. The penalties for infringement would be civil in nature.

23. The conduct rules should apply to “undertakings”, which may be defined as individuals, companies or other entities engaging in economic activities.
24. There should be a general prohibition on agreements and concerted practices that have the purpose or effect of substantially lessening competition.
25. The Ordinance should not give a list of examples of anti-competitive agreements. However, the Commission should be required to issue guidelines, and these would give examples of the types of conduct that would commonly

- be considered anti-competitive.
26. The focus of the prohibition on agreements should be on horizontal agreements. Vertical agreements should only be addressed in the context of abuse of substantial market power.
 27. There should be a general prohibition on an undertaking that has a substantial degree of market power from abusing that power with the purpose or effect of substantially lessening competition.
 28. There should be no per se infringements and the Commission would be required to conclude that conduct had the purpose or effect of substantially lessening competition before it could determine that an infringement had taken place.
 29. Infringement of the conduct rules should be subject to civil, but not criminal, penalties. Fines of up to \$10 million could be imposed by the Commission. More serious penalties, including higher fines and disqualification from holding a directorship or a management role in any company for up to five years, could be imposed by the Tribunal, on application by the Commission.
 30. The Commission should have the power to make such directions as it considers appropriate to –
 - a) bring the infringement of the conduct rules to an end
 - b) eliminate the harmful effect of such infringement
 - c) prevent the re-occurrence of such infringement.
 31. On application by the Commission, the Tribunal should have the power to make an interim “cease and desist” order before a decision is made on whether conduct constitutes an infringement.
 32. The Commission should introduce a leniency programme, under which a party to a prohibited agreement that comes forward with information that is helpful to an investigation may have any subsequent penalty waived or reduced.

V. Right to institute private action (Chapter IV – Proposals 33-42)

In order to allow for private action by entities that feel they have been the subject of anti-competitive conduct, we propose to allow private actions to be brought before the Competition Tribunal. Such actions could either be “follow-on” actions, seeking compensation for losses suffered as a result of anti-competitive conduct, or “stand-alone” actions, seeking a determination by the Tribunal. To minimise spurious litigation, the Tribunal would have the power not to hear frivolous or vexatious claims, and the Commission would have the right to make appropriate representations with regard to claims.

33. Parties should have the right to take both “follow-on” and “stand-alone” private action.
34. Any person who has suffered loss or damage from a breach of the Ordinance should have the right to bring private proceedings seeking damages.
35. Private cases that involve only competition matters should be heard solely by the Tribunal.
36. For “composite” claims that involve both competition and non-competition matters, the courts should have the power to transfer competition matters to the Tribunal for determination. When a court decides that it would hear a composite case in full, it would have the power to apply remedies in respect of all aspects of the case, including matters related to the competition law.
37. The Tribunal, of its own motion or on application by a party or the Commission, should be able to strike out any action which the Tribunal considers to be without merit or vexatious.
38. Where a matter is being investigated by the Commission and a third party commences a private action on the same matter, the Tribunal may adjourn the private case pending the outcome of the Commission’s investigation if the Tribunal considers that the matter would be better handled by the Commission.
39. With the agreement of the Tribunal or the courts, the Commission may intervene in any private proceedings relating to a contravention of the

competition conduct rules.

40. With the permission of the Tribunal, representative actions, such as on behalf of consumers or SMEs should be permitted. In granting such permission, the Tribunal must have reached the view that the representative can fairly and adequately represent the interests of the parties concerned.
41. The Tribunal should have the power to apply the following remedies in cases of stand-alone private action –
 - a) injunction or declaration
 - b) award of damages
 - c) termination or variation of an agreement
 - d) such other relief as the Tribunal deems appropriate.
42. Any leniency granted to a party by the Commission should have no impact on rights of private action. Information provided to the Commission by a party granted leniency should not be discoverable in private proceedings.

VI. Provisions related to application (Chapter V – Proposal 43 and Chapter VI – Proposals 44-45)

The proposals here concern specific measures to address the concerns of SMEs and the question of shared jurisdiction over competition matters in certain sectors by the Commission and existing regulatory bodies.

43. The Commission should be required in its guidelines to clarify that it would not pursue an agreement where the aggregate market share of the parties to the agreement did not exceed a certain level, except where “hard core” conduct was involved. The guidelines should give clear examples of what would be considered “hard core” conduct.
44. The Competition Ordinance should apply to all sectors, including the telecommunications and broadcasting sectors. The competition provisions in the Telecommunications and Broadcasting Ordinances that duplicate those in the Competition Ordinance should be repealed.
45. The Telecommunications Authority and the Broadcasting Authority should

share with the Competition Commission jurisdiction over competition matters in their respective sectors.

VII. Exemptions and exclusions (Chapter VII – Proposals 46-50)

We envisage that in cases where agreements or other activities carry greater economic benefit than anti-competitive harm or could achieve other important social or public policy objectives, there would be justification for granting exemptions or exclusions from the application of the law. We propose that appropriate criteria and mechanisms for granting such exemptions and exclusions be established. We also propose that the competition law should not apply to the Government or statutory bodies. We would review this issue in the light of experience in implementing the law

46. An agreement may be exempted from the prohibition on anti-competitive agreements if it yields economic benefits that outweigh the potential anti-competitive harm. A party to an anti-competitive agreement may apply to the Commission for an exemption if it has grounds to believe that such an exemption should be granted.
47. The Commission may issue a block exemption in respect of a category of agreement that is likely to yield economic benefit that outweighs any anti-competitive harm.
48. The conduct rules should not apply to any undertaking entrusted with the operation of services of general economic interest, such as essential public services of an economic nature.
49. The Chief Executive-in-Council may exclude activities from the prohibition on anti-competitive conduct if he considers that there are sound reasons of public policy for so doing.
50. The conduct rules should not apply to the Government or statutory bodies. The Government would conduct a review of the issue in the light of actual experience in implementing the competition law.

CHAPTER II: INSTITUTIONAL ARRANGEMENTS

General considerations

A key factor in the successful implementation of the new competition law will be the establishment of a credible and effective institutional framework for enforcing the law. The competition authority must be able to deal with possible breaches of the law in an efficient and consistent manner. We also need to ensure that proper checks and balances are put in place to protect the rights of parties under investigation.

2. In this chapter, we set out our proposals in respect of the institutional arrangements for the new competition regime, with brief explanations where appropriate. Individual proposals should be considered in the context of the whole institutional framework. In particular, the enforcement mechanism should be considered in conjunction with the appeal mechanism.

The Competition Commission

An independent “two-tier” structure

Proposal 3: An independent Competition Commission in the form of a body corporate should be set up to enforce the new competition law. The Commission should have a “two-tier” structure, with an appointed board of Commission members overseeing a full-time executive arm.

Proposal 4: The Commission should have a minimum of seven members, including a Chairman, appointed by the Chief Executive. At least one Commission member should have experience in SME matters. The actual number of Commission members appointed could be more than the minimum required so as to ensure that there was a sufficiently large “pool” of members to allow for the efficient conduct of the Commission’s business.

3. It is widely accepted internationally that the establishment of a regulatory body independent of the government can help to promote the effective and impartial enforcement of competition law. We propose that the Commission be established as a body corporate, and that it be independent of Government. In this regard, whilst the Policy Secretary with responsibility for economic development should be able to

notify the Commission of government economic policy, which the Commission should be required to take into account when discharging its duties, he should have no power of direction over the Commission.

4. The Board of the Commission should consist of a minimum of seven members. The members would be appointed by the Chief Executive, based on their expertise and experience in law, economics, commerce, consumer affairs, accounting or public policy. At least one of the members should be a person experienced in matters relating to small and medium enterprises (SMEs). One of the members would be appointed as the Chairman of the Commission.

5. On procedural matters, the required quorum for the Board should be three members, and Board decisions should be determined by a majority vote during meetings.

6. The Commission should appoint a full-time Chief Executive Officer (CEO), who would be the head of the Executive. The main responsibility of the CEO would be to supervise the day-to-day administrative functioning of the Commission. To achieve separation between the Board and the Executive, the CEO would not be a Commission member. Neither the CEO nor the other staff constituting the Executive would be civil servants.

Powers and Functions

Proposal 5: The Commission should have the power to investigate, determine and apply remedies in respect of infringements of the conduct rules under the competition law.

Proposal 6: The Commission should have other functions directly related to the objective of the competition law, including educating the public and business about the competition law and promoting compliance programmes.

7. We consider that a system whereby the Commission takes up both the investigative and adjudicative roles is likely to be the most effective and credible form of regulatory regime for Hong Kong, as it allows for efficient and consistent decision-making in a small economy like ours. Hong Kong has experience in the operation of such a model from the current sector-specific regimes in the

telecommunications and broadcasting sectors. It is logical to maintain the same approach when we move to the introduction of a cross-sector competition law, with the proviso that appropriate checks and balances are built into such a system (as further discussed in paragraphs 10 to 12 below).

8. Specifically, we propose that the Commission's functions should include –
- to eliminate or control conduct that has an adverse effect on competition in Hong Kong;
 - to promote understanding by the public of the value of competition and the role of the competition law in protecting competition;
 - to issue guidelines for the purpose of providing practical guidance in respect of any provisions of the Ordinance;
 - to co-operate with and provide assistance to competition authorities or organisations in relation to competition matters, whether in Hong Kong or elsewhere;
 - to advise the Government or public authorities in relation to competition policy and competition law;
 - to conduct inquiries in relation to matters affecting competition in markets in Hong Kong;
 - to promote and encourage research and skills development on legal, economic and policy aspects of competition law in Hong Kong; and
 - to perform such other functions and discharge such other duties as may be conferred on the Commission by regulation made under the Ordinance or by any other written law.

Investigation and adjudication

Proposal 7: The Commission should be able to commence an investigation either of its own initiative or in response to a complaint. It should be able to exercise its formal investigative powers when it has reasonable cause to believe that an infringement of the conduct rules has taken place.

Proposal 8: The Commission should have the power to require a person, by notice in writing, to provide information and produce documents that it considers relevant to an investigation or to appear before the Commission to give evidence. The Commission should also have the power to conduct a physical search of premises if so empowered by a warrant issued by a magistrate.

Proposal 9: There should be a formal separation within the Commission between the investigation and adjudication of infringements, through the establishment of an Investigation Committee, which is to be responsible for conducting the investigation. The Investigation Committee will be chaired by a Commission member who will not then participate in the decision on the complaint in question.

Proposal 10: A Commission member who in any way, directly or indirectly, has interest in a matter being investigated by the Commission should be required to disclose the nature of his or her interest. The relevant member should thereafter not take part in any deliberation or decision of the Commission with respect to that matter.

9. It is important that the Commission have the necessary powers to investigate possible infringements of the competition law. It should also have the express power not to investigate complaints that it regards as vexatious or frivolous. The recommended investigative powers are in line with those of other regulators in Hong Kong as well as competition authorities in other jurisdictions. In order to ensure that these investigatory powers are used in appropriate circumstances, the Commission should have to satisfy a threshold requirement, namely that it has reasonable cause to believe that an infringement has occurred, before exercising these powers. To safeguard the fundamental legal rights of individuals, the Commission should be required to obtain a warrant from a magistrate before exercising the more intrusive power of searching premises, whether these are commercial or domestic premises.

10. Under the proposed institutional arrangements, the Commission will act as both the investigating and the adjudicating authority. Checks and balances are therefore required, with the aim of ensuring that the regime is fair and impartial.

11. To this end, we propose that there be a separation between the investigation and determination functions within the Commission. First, the Board's power to determine that conduct is infringing and the penalties and orders in respect of that conduct could not be delegated. Second, the Board would appoint an Investigation Committee to oversee the investigation of cases of possible anti-competitive conduct. Such a committee could be established on a case-by-case or a standing basis. The committee should be chaired by a member of the Commission, and could include other members, personnel of the Executive and third parties co-opted as experts.

12. On completion of an investigation, the Investigation Committee should report its findings to the Board, which is then to make determinations based on the report. Commission members who are members of the Investigation Committee should not be entitled to participate in the adjudication of a case, although they may be allowed to attend the relevant Board meeting to clarify issues related to the investigation.

Notification

Proposal 11: Before the Commission makes a determination of infringement of the conduct rules, it should first notify the party concerned of the material facts and particulars of the conduct and its considerations in making such a determination. The party should be given the opportunity to provide information or documents and make submissions that it considers are relevant to the case, which the Commission should be required to take into account.

Proposal 12: The Commission should have the power to enter into binding settlements with a party under investigation.

13. Requiring the Commission to inform a party that it is under investigation would very likely obstruct the course of such an investigation, perhaps by allowing the party in question an opportunity to destroy relevant documents. Nonetheless, it is commonly the case that before the exercise of investigatory powers which require a party to attend for a formal interview or to provide documents or information, that the party is notified of the matter under investigation.

14. Further, it is also a fundamental principle that a party under investigation should receive notice of the allegations made in respect of it prior to the making of any decision against that party. In a civil administration model, such as the one proposed for Hong Kong, the competition authority is normally required to give the party notice of a potential finding of infringement of the anti-competitive conduct provisions and the evidence on which it is based before a decision is made, and to provide an opportunity for the party to make representations. The Commission has to give due regard to the representations in making its final decision.

15. The overall objective of the competition law is to enhance economic efficiency. Where the Commission has good cause to believe that anti-competitive conduct has taken place, rather than make a formal determination, it might be more effective to

reach a settlement with the party under investigation. This also provides an opportunity for the undertaking being investigated to reach a negotiated outcome with the Commission and avoid the uncertainty of a formal determination, which may have more adverse consequences. We thus propose that the Commission have the power to enter into such settlements. The Commission would need to judge carefully which would be a more efficient and effective course of action, and take into account the interest of parties that might have been affected by anti-competitive conduct, when deciding whether or not it might be appropriate to reach a settlement.

Confidential information

Proposal 13: Confidential information provided to the Commission by complainants or persons under investigation, or acquired by the Commission using its formal investigative powers should be protected under the law.

16. In the course of an investigation, the Commission would be likely to have access to confidential information, which may relate to the identity of persons furnishing information, or to the commercial affairs of the parties concerned. We propose that the people involved in carrying out the investigation and those assisting in the investigation should be prohibited from divulging such information in any form.

17. There may however be exceptional situations where disclosure of confidential information is necessary for the Commission to perform its duties under the Ordinance, or for the purpose of proceedings before the Tribunal or a court. In such cases, the Commission would have to consider whether such disclosure would be consistent with the public interest, and the extent to which information might need to be disclosed to allow the Commission to discharge its duties. Any person to whom the Commission discloses confidential information should then be subject to the same obligations of confidentiality as the Commission itself.

Oversight and reporting

Proposal 14: The Commission should keep proper accounts and records of transactions, and prepare financial statements which give a true and fair view of its financial status.

Proposal 15: The Commission should furnish an annual report to the Secretary once a year. The Secretary should table this annual report in the Legislative Council no later than six months after the end of the previous financial year.

18. In addition to internal check and balances, we propose that in order to provide for a high degree of transparency and accountability in the work of the Commission, it should be subject to appropriate reporting and audit obligations. It should be required to prepare an annual budget and keep proper accounts. It should also produce an annual report, which would be tabled in the Legislative Council. The report should include statistics on complaints received and the duration of investigations and audited financial statements.

The Competition Tribunal

Functions

Proposal 16: A Competition Tribunal should be established to hear, among other things, applications for review of the decisions of the Commission and private actions under the competition law.

19. In order to ensure that the regulatory framework includes a full set of checks and balances, we propose that decisions of the Commission should be subject to review on both points of fact and points of law by a separate independent and impartial tribunal. This would be similar to arrangements under the Telecommunications Ordinance, where a Competition Appeals Board may review decisions of the Telecommunications Authority⁴. This is also similar to the arrangements for review under the UK and Singapore Competition Acts⁵.

20. Because of the complex nature of evidence in competition matters and the need to assess expert evidence on the economic impact of conduct, the review body needs to have access to economic and commercial expertise. We therefore propose that a specialist Tribunal be established to hear competition reviews, as such a body could be constituted in such a way as to include experts from relevant fields. In addition, the proceedings of a Tribunal are usually less formal when compared with those of the courts. This should enable it to handle complex competition issues in a timely manner and at comparatively lower cost to all parties involved.

⁴ Telecommunications Ordinance, s 32M.

⁵ Competition Act 2004 (Singapore), s 71 and Competition Act 1998 (UK), s 46.

Membership and Proceedings

Proposal 17: Tribunal members would be either “judicial” members (i.e., judges or former judges), or “non-judicial” members with expert knowledge of economics, commerce or competition law. One of the judicial members would be the President of the Tribunal. Both the President and other judicial members would be appointed by the Chief Executive on the recommendation of the Chief Justice. Non-judicial members would be appointed by the Chief Executive.

Proposal 18: When hearing reviews, the Tribunal should sit as a three-member panel, chaired by a judicial member, and comprising at least one non-judicial member with expertise in economics. The Tribunal should have the power to review cases on their merits on the same evidence as was before the Commission, and should have the power to admit new evidence if it considers this appropriate.

Proposal 19: The Tribunal should possess the necessary powers for discharging its functions effectively and efficiently. The Tribunal proceedings should be conducted as informally and expeditiously as possible. The Tribunal should not be bound by rules of evidence.

21. Given that the Tribunal would be likely to have to assess expert evidence on the economic impact of conduct, we propose that the Tribunal should always sit with at least one member with economic expertise. Questions of law however should always be determined by the judicial member who is the Chairman of the hearing panel. This is consistent with the current practice of the Competition Appeals Board under the Telecommunications Ordinance.

22. In order to allow it to discharge its duties in an effective and efficient manner, when hearing a review the Tribunal should have the power to –

- give directions to the parties to the review concerning procedural matters to be complied with by the parties
- require any person to produce documents relevant to the review
- require any person to appear to give evidence on oath
- receive evidence in a non-public session if it considers this to be in the interests of justice

- have the contempt powers which the Court of First Instance possesses
- make costs awards, including, where just and equitable, the Tribunal's costs.

23. Proceedings before the Tribunal should be conducted with as little formality and technicality and with as much expedition as the requirements of the competition law and the procedures of the Tribunal permit. The Tribunal, like the Competition Appeals Board, should not be bound by the rules of evidence⁶. It should make its decision based on the evidence which was before the Commission, although it should have discretion to admit further material⁷. Relevant parties should also be allowed to be represented by a legal practitioner in Tribunal proceedings if they so wish.

Right to seek review

Proposal 20: Any person aggrieved by a determination by the Commission should have the right to seek a review by the Tribunal of the determination, including the penalty imposed by the Commission.

Proposal 21: The Tribunal should have the power to decide whether or not to suspend a Commission decision before determining a review application.

Proposal 22: An appeal against a decision of the Tribunal should be available. Such an appeal should be heard by the Court of Appeal and should be limited to points of law or any remedy applied in respect of an infringement, including the amount of any fine.

24. To ensure that the Tribunal provides a full safeguard for decisions by the Commission, the scope for review should be broad. The Tribunal should be permitted to review fully a decision by the Commission and to substitute its own decision. Review should be available against the following decisions by the Commission⁸ –

- whether a conduct rule has been infringed
- any remedy which is applied in respect of infringement of a conduct rule, including the imposition of and the amount of any penalty.

25. Under the Telecommunications Ordinance, when an appeal is made, the

⁶ Telecommunications Ordinance, s 32O(1)(d).

⁷ Telecommunications Ordinance, s 32O(2).

⁸ e.g. Competition Act (Singapore), s 71.

Authority's decision is not suspended until the appeal is determined or withdrawn, except in the case of a decision that a merger is anti-competitive⁹ or where financial penalties are concerned. We propose that the Tribunal should have the power to decide whether or not to suspend a Commission decision before determining an appeal. The Tribunal could therefore suspend a decision of the Commission before completing the hearing of an appeal if it felt that this was in the interests of justice.

26. Parties subject to a determination under the competition law should have full access to further appeal channels following a decision by the Tribunal. Consistent with the practice in other common law jurisdictions, we propose that parties have the right to appeal to the Court of Appeal and then to the Court of Final Appeal, and that such appeal should be confined to points of law and the remedy applied, including the quantum of penalty, recognising that, given the specialised nature of competition matters, the Tribunal would be the most appropriate venue for making final decisions on points of fact¹⁰.

⁹ Telecommunications Ordinance, s 32N(1C)(3).

¹⁰ e.g. Competition Act 1998, (UK), section 49 and Competition Act 2004 (Singapore), s 74.

CHAPTER III: CONDUCT RULES

General considerations

In determining the type of conduct that would be considered an infringement of the competition law, our aim is to ensure consistency with the objective of the law and the underlying policy for competition in Hong Kong. We propose to achieve this aim by applying rules that prohibit conduct that has the purpose or effect of substantially lessening competition.

Application of the Conduct Rules

Proposal 23: The conduct rules should apply to “undertakings”, which may be defined as individuals, companies or other entities engaging in economic activities.

2. As the objective of the competition law is to enhance economic efficiency, it is logical that the conduct rules should apply to all entities that engage in economic activity. In the European Union (EU)¹¹ and Singapore¹², such entities are called “undertakings”. Other jurisdictions use different terms, but the scope of the entities to which the law applies is similar.

3. Regardless of the legal status and the source of finance of an undertaking, the conduct rules should apply when, and only when, it engages in economic activity. It is proposed that the definition of “undertaking” be stipulated in the law. For reference, the definition adopted in Singapore is: “any person, being an individual, a body corporate, an unincorporated body or persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services.”¹³

Prohibition on anti-competitive agreements

Proposal 24: There should be a general prohibition on agreements and concerted practices that have the purpose or effect of substantially lessening competition.

¹¹ Treaty establishing the European Community (EC Treaty), Article 81(1).

¹² Competition Act 2004 (Singapore), s 2.

¹³ Competition Act 2004 (Singapore), s 2.

Proposal 25: The Ordinance should not give a list of examples of anti-competitive agreements. However, the Commission should be required to issue guidelines that would give examples of the types of conduct that would commonly be considered anti-competitive.

Proposal 26: The focus of the prohibition on agreements should be on horizontal agreements. Vertical agreements should only be addressed in the context of abuse of substantial market power.

4. A common feature of competition law worldwide is a prohibition against agreements and concerted practices that have the purpose or effect of substantially lessening competition. Anti-competitive agreements should be prohibited, whether they are legally binding contracts or non-binding arrangements or understandings.

5. The competition laws in both the EU¹⁴ and Singapore¹⁵ prohibit concerted practices that are anti-competitive. Including a prohibition against anti-competitive “concerted practices” allows the law to capture a potentially wider range of conduct. In this regard, it is noted that the European Commission defines a concerted practice as -

“Co-ordination between undertakings which, without having reached the stage of concluding a formal agreement, have *knowingly* substituted practical co-operation for the risks of competition. A concerted practice can be constituted by *direct or indirect contact* between firms whose *intention or effect* is either to influence the conduct of the market or to disclose intended future behaviour to competitors.”¹⁶ (Emphasis added)

In proposing that the prohibition on anti-competitive agreements in the new competition law should also apply to concerted practices, we have taken into account the view that there is a relatively higher risk of collusive behaviour in a small economy. With fewer market participants in many sectors, it is easier for competitors in a small economy to co-ordinate their actions through covert means, such as through personal relationships.

6. Anti-competitive agreements can take various forms, which can change over

¹⁴ EC Treaty, Article 81(1).

¹⁵ Competition Act 2004 (Singapore), s 34(1).

¹⁶ European Commission, EU Competition Glossary, available at: http://ec.europa.eu/comm/competition/general_info/c_en.html#t103.

time. We consider that it is not feasible to set out in the law all the possible forms of agreement that would be prohibited. Rather, in line with practice in many other jurisdictions, we propose to set out a general prohibition against anti-competitive agreements and concerted practices.

7. It may be argued that we might increase legal certainty by listing out the specific types of agreement that would be considered anti-competitive, rather than providing for a general prohibition. However, we wish to avoid a situation whereby significant resources might be spent on arguing whether or not a specific agreement fell within a particular category of prohibited agreement, rather than addressing the more fundamental issue of whether the agreement would have the purpose or effect of substantially lessening competition.

8. Statutory language provides limited room for explaining examples or placing them within context. We therefore propose that the general prohibition against anti-competitive agreement should *not* be supplemented by examples within the Ordinance itself. Instead, in its guidelines on how it would interpret and implement the law, the future Competition Commission should include examples of agreements that could be considered to have the purpose or effect of substantially lessening competition, in particular those that would be most likely to be seen as constituting “hard core” anti-competitive conduct (see also paragraph 18). The Commission should be required to have regard to the guidelines when implementing the law.

9. An agreement between competitors who provide similar products or services in the same market is known as a “horizontal” agreement. An agreement that is made between one party in its capacity as a supplier of goods or services and another party in its capacity as an acquirer of goods or services from the supplier is known as a “vertical” agreement. Competition law regimes approach the issue of vertical agreements in various ways. We consider that, unless a supplier has substantial market power, a vertical agreement should be viewed simply as a way of influencing the way in which its product is distributed and marketed. A supplier that is competing with other suppliers has no incentive to use a distribution or marketing strategy that makes its product less attractive to consumers than its competitors’ products. However, a supplier with substantial power in a market could use a vertical agreement to limit access to the market by competing suppliers.

10. A competition authority generally need not be concerned with a vertical agreement unless at least one of the parties to the agreement has substantial market

power. Therefore, we propose to exclude vertical agreements from the scope of the prohibition against anti-competitive agreements, and to deal with such agreements in the context of abuse of substantial market power (see paragraphs 11 to 14 below). In the EU vertical agreements that meet certain conditions¹⁷ are granted a block exemption order¹⁸. Alternatively, we could provide for a complete exclusion of vertical agreements in the Ordinance, which is the approach in Singapore¹⁹. Our inclination is to follow the EU approach, as it would allow the exemption to be tailored specifically to the Hong Kong market and adjusted as market conditions change.

Prohibition on abuse of substantial market power

Proposal 27: There should be a general prohibition on an undertaking that has a substantial degree of market power from abusing that power with the purpose or effect of substantially lessening competition.

11. Competition law always prohibits the abuse of dominance or substantial market power with the purpose or effect of substantially lessening competition. The difference between “dominance” and “substantial market power” relates to the degree of market power of a firm that would render it liable to possible charges of abusive conduct. Some systems proceed on the basis of abuse of dominance, for example, the EU law, where there is a presumption of dominance at 50% of market share. The USA uses the concept of “monopolization”, which may be taken to mean more than 70% of the market.²⁰ In addition to the market share of an undertaking, other factors including the market shares of its competitors, the ease of entry into the market, and the bargaining power of the buyers (generally related to the number and size of the buyers), would also be considered in determining whether that undertaking possesses substantial market power.

12. In a geographically concentrated economy such as Hong Kong’s, it is not unusual for a small number of firms to dominate certain markets. In such cases, the

¹⁷ The conditions include –

- the supplier’s market share does not exceed 30%
- if the agreement exclusively ties the buyer to the seller, the buyer’s market share does not exceed 30%
- any “non-compete” terms do not exceed five years

¹⁸ Commission Regulation (EC) No 2790/1999 of 2 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, available at: http://eur-lex.europa.eu/pri/en/oj/dat/1999/1_336/1_33619991229en00210025.pdf.

¹⁹ Competition Act 2004 (Singapore), Third Schedule.

²⁰ Australia and New Zealand adopt a “substantial market power” standard.

conduct of a firm with a significant market share, albeit short of the 50% presumption for “dominance” could have a major effect on competition. We therefore propose that rather than a test of “dominance”, the threshold for investigating possible abuse should be “substantial market power”, i.e., a market share of about 40%.

13. Adopting a “substantial market power” test would allow the future Competition Commission to investigate possible abuse in markets that are not subject to monopoly, but that are highly concentrated. Nonetheless, it should be stressed that size or the mere possession of substantial market power would not of itself be a reason to pursue an undertaking. Before initiating a formal investigation, the Commission would need to have grounds to believe that the undertaking’s conduct had the purpose or effect of substantially lessening competition. This should mitigate any danger of “over-regulation”.

14. In line with the approach to defining anti-competitive agreements (see paragraphs 4 to 8 above), we propose that the Ordinance include a general prohibition, without listing specific examples of conduct that could be considered abuse of substantial market power. The Commission should issue guidelines on how it would interpret and enforce the prohibition.

Conduct to have “purpose or effect”

Proposal 28: There should be no per se infringements and the Commission would be required to conclude that conduct had the purpose or effect of substantially lessening competition before it could determine that an infringement had taken place.

15. As noted above, the objective of the Competition Ordinance is to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition. In this context, conduct that has the effect of substantially lessening competition should clearly be prohibited. We have also considered whether conduct that has the purpose, if not the effect, of substantially lessening competition should also be prohibited.

16. Conduct that has an anti-competitive purpose inevitably has the potential to affect a market adversely, and is therefore undesirable - even if it does not have an immediate discernible effect. To focus only on the effect of conduct would mean that parties that intended to undermine competition but were unsuccessful would suffer no

consequences. Noting that the current sector-specific competition laws in the telecommunications and broadcasting sectors in Hong Kong adopt a purpose or effect test²¹, we propose that the new competition law follow a similar approach.

17. Regardless of the type or form of the conduct in question, a purpose or effect of substantially lessening competition would have to be shown before a decision of infringement could be made. In other words, without such purpose or effect the conduct in itself, or “*per se*”, would not be an infringement of the competition law.

18. However, even though conduct might not be an infringement “*per se*”, it is arguable that certain types of anti-competitive agreement, such as price-fixing, market allocation and bid-rigging, almost always have the effect of lessening competition and rarely have any redeeming economic benefit. Competition authorities in many jurisdictions therefore presume that such conduct is entered into with the purpose of substantially lessening competition. Whilst it would be up to the future Competition Commission to issue guidelines on how it would treat such “hard core” conduct, we consider that the list of such types of conduct should be kept to a minimum.

Merger regulation

19. Merger regulation is a feature of all major competition laws overseas – and indeed of our own competition regime for the telecommunications sector²². This is in part because mergers can lead to the creation of substantial market power which may in turn provide market participants with an ability to engage in anti-competitive conduct that may harm consumers. In addition, without merger regulation, undertakings may evade the prohibition on anti-competitive agreements simply by merging.

20. In a relatively compact geographical area, such as Hong Kong, one could argue that there may be limited scope for multiple providers of certain products or services to co-exist. In such cases, mergers may be the most efficient way to consolidate the industry and achieve economies of scale. One might also argue that mergers do not pose any practical competition concern in Hong Kong, given that large-scale mergers are not common here and that the open economy allows competition from firms outside Hong Kong.

21. The Competition Policy Review Committee recommended that the new law

²¹ See: Telecommunications Ordinance, s 7K; and Broadcasting Ordinance, s 13(1).

²² Telecommunications Ordinance (Hong Kong), s 7P.

should not target market structures. For this reason, and in view of the fact that it considered large-scale merger activity to be relatively uncommon in Hong Kong, it recommended that merger regulation should not be included in the proposed new competition law.

22. However, the proposed conduct rule against abuse of substantial market power does not provide a complete safeguard against the adverse effects that a merged entity can have on competition and consumers. It may be more difficult to regulate anti-competitive conduct after a merger has occurred than to prevent the creation of substantial market power through a merger in the first place. In this context, it may be more effective, where appropriate, to provide for a way of preventing the attainment of substantial market power through merger activity.

23. Even if there is a limited level of merger activity amongst local undertakings, as a small, open economy, Hong Kong is also potentially susceptible to global mergers which have an impact within Hong Kong. Two or more global undertakings with Hong Kong subsidiaries could merge their global operations, even if they kept the Hong Kong subsidiaries nominally separate. Merger regulation provides competition authorities with the ability to take action where a global merger has an adverse effect in their jurisdictions.

24. The public consultation exercise on the way forward for competition policy indicated that there are diverse views in the community on the issue of merger regulation. We therefore consider it premature to put forward a firm proposal before allowing for further public discussion of this issue. However, it is clear that if mergers are to be subject to regulation, such regulation should be tailored to the needs and characteristics of the Hong Kong economy. For example the merger rules could allow levels of concentration through mergers that would not be allowed in larger economies through the provision of formal “safe harbours” (which could be expressed in terms of a percentage of market share below which the Commission would not normally investigate) or guidelines issued by the competition regulator.

25. To reflect the above considerations, and to take account of possible concerns from some stakeholders that merger regulation may not be necessary at this time, we set out three options for the way forward, and invite views on these options –

- a) to introduce merger provisions that would be suitable in the Hong Kong context, e.g., provisions similar to those in the Telecommunication

Ordinance²³, whereby the Commission would only investigate a completed merger if it considered that serious competition concerns were raised²⁴. There would be a defined period of time after a merger within which the Commission would have to commence its investigation. Mergers that had competition concerns could still be approved if there were counter-balancing benefits. To provide more certainty, where notified of an intended merger, the Commission could be requested to give clearance within a short, defined time-frame for a merger to proceed. These safeguards could be further enhanced by having a threshold transactional value below which the Commission would not take action²⁵;

- b) to introduce merger provisions as broadly described above in the new law, but to delay the enforcement of such provisions until after a review of the effect of the law; or
- c) not to include merger provisions in the Bill initially, but rather to reconsider whether there might be a need to add such provisions only after a review of the effect of the new law.

Penalties for engaging in anti-competitive conduct

Proposal 29: Infringement of the conduct rules should be subject to civil, but not criminal, penalties. Fines of up to \$10 million could be imposed by the Commission. More serious penalties, including higher fines and disqualification from holding a directorship or a management role in any company for up to five years, could be imposed by the Tribunal, on application by the Commission.

26. The institutional arrangements adopted in a number of jurisdictions give the competition authorities the option of seeking either civil or criminal judgments in cases of anti-competitive conduct. Whilst penalties need to be sufficiently serious to have a deterrent effect, the introduction of competition laws will be a new step for Hong Kong. We therefore consider it appropriate to limit sanctions to civil penalties,

²³ Telecommunications Ordinance, s 7P.

²⁴ In considering whether serious competition issues were raised, the Commission would look, for example, at whether the market in question was of sufficient importance to merit a further investigation or whether the merger could substantially lessen competition, and if so, whether the relevant public benefits might outweigh the adverse effects of such lessening of competition.

²⁵ For example, where the combined annual turnover of the merged entity was below a certain amount – in the UK this amount is currently set at £50 million.

on the assumption that fines set at an appropriate level would remove economic incentives to engage in anti-competitive conduct. International precedent shows a wide range of levels of fine, usually subject to a cap of 10% of total turnover during the period when the infringement occurred. We propose that a similar cap apply in Hong Kong, and that the Commission should be required to publish guidelines on the factors to be considered in the calculation of fines.

27. In Chapter II above, we propose that the Commission would not only have the power to investigate, but would also adjudicate on cases of anti-competitive conduct. Accordingly, we feel that it would be prudent to provide a check on the Commission's scope for imposing penalties, and we therefore propose that the Commission should be allowed to impose a financial penalty of not more than \$10 million for infringement of the conduct rules. Any fine exceeding this amount could only be imposed by the Tribunal on application by the Commission. This fining structure echoes the practice currently adopted in the Telecommunications and Broadcasting Ordinances²⁶.

28. Where directors and senior management of a company act in a manner that contributes to a breach of the conduct rules, it is appropriate that they should face penalties that directly and significantly impact upon them. In the absence of criminal penalties, the threat of disqualification from holding a directorship or participating at the senior management level of a business should be an effective way of encouraging compliance with competition law. Again, given the serious impact of this penalty, we propose that such disqualification should only be imposed by the Tribunal upon application by the Commission.

Power to make directions

Proposal 30: The Commission should have the power to make such directions as it considers appropriate to –

- a) bring the infringement of the conduct rules to an end
- b) eliminate the harmful effect of such infringement
- c) prevent the re-occurrence of such infringement.

Proposal 31: On application by the Commission, the Tribunal should have the power to make an interim “cease and desist” order before a decision is made on whether conduct constitutes an infringement.

²⁶ e.g. Telecommunications Ordinance, s 36C.

29. In order to achieve the objective of the law, we consider that it is essential for the Commission to have the power to bring an infringement to an end. Such a power is common in other jurisdictions. For example, in the UK the Office of Fair Trading (OFT) may require the parties to an anti-competitive agreement to modify or terminate the agreement²⁷. In Singapore, the Competition Commission may direct parties to enter into a legally binding agreement specified by the Competition Commission or to provide a performance bond, guarantee or security²⁸.

30. The power temporarily to halt conduct that allegedly infringes the law, pending the completion of an investigation, can help to prevent such conduct from inflicting irreversible harm. Nonetheless, this power should be exercised with caution, to avoid having an adverse impact on a party that may be subsequently found not to have acted in an anti-competitive manner.

31. As to the question of who should have the power to issue interim “cease and desist” orders, arrangements in other jurisdictions vary. In some places, the power rests with the competition regulator, whereas elsewhere a specialist tribunal or the courts have this role. Given the potential impact on undertakings that may be subject to such an order, we consider that it would be appropriate for this to be issued by the Tribunal on application by the Commission. In reaching this view, we have noted that members of the Judiciary are comparatively more experienced in assessing when it is appropriate to exercise injunctive powers. Indeed, experience elsewhere suggests that competition regulators that have the power to make interim orders are reluctant to exercise this power, effectively making it redundant.

32. Interim cease and desist orders made by the Tribunal should be for a maximum limited period of time, although the Tribunal may renew them. This would ensure that the interim cease and desist order was kept under review and that the Commission had an incentive to complete its investigation expeditiously. The Tribunal should have the broad discretion to withdraw an interim cease and desist order on application of a respondent to such an order. Appeals on interim cease and desist orders to the Court of Appeal should be available if the respondent to the order has exhausted his or her rights to request the Tribunal to discharge the order.

²⁷ Competition Act 1998 (United Kingdom), s 32(3).

²⁸ Competition Act 2004 (Singapore), s 69(2)(iv).

Leniency programme

Proposal 32: The Commission should introduce a leniency programme, under which a party to a prohibited agreement that comes forward with information that is helpful to an investigation may have any subsequent penalty waived or reduced.

33. Due to the secretive nature of anti-competitive agreements, regulators often rely on the provision of information by one or more parties to an agreement to assist in investigations. The offer of leniency to parties who provide information has been effective in other jurisdictions in helping to uncover anti-competitive conduct. Under a leniency programme, a party to an agreement who provides relevant information may have any subsequent penalty imposed by the authorities substantially reduced or even waived. The extent of the relief given depends on factors such as whether the informant is the first party to the agreement to come forward, whether it cooperates throughout the investigation, and whether it has previously been active in encouraging other undertakings to take part in the agreement.

34. We propose that the Commission have the authority to implement a leniency programme in Hong Kong. It should be noted that under such a programme, even where a party to an anti-competitive agreement has a penalty waived or reduced, it would however not be immune from the liability to pay damages to private parties that may have suffered loss or damage from the anti-competitive conduct. The Commission would be required to issue guidelines setting out the details of the leniency programme.

CHAPTER IV: PRIVATE ACTION

There are differing views on the extent to which the law should provide for the right to take private legal action in respect of cases of anti-competitive conduct. Some argue that access to justice by way of private action is a fundamental right that should not be denied without good justification. From a practical point of view, private action can supplement public enforcement of competition law. However, there is concern that providing for full rights of private action might lead to extensive and costly litigation. Furthermore, SME associations have expressed concern that big companies might use litigation to harass SMEs.

2. This Chapter outlines how we propose to provide for rights of private action under the competition law. The proposals reflect our views on how best to safeguard the right to a fair hearing whilst addressing the concerns raised by the business sector.

Right to take private action

Proposal 33: Parties should have the right to take both “follow-on” and “stand-alone” private action.

3. A “follow-on” action is one that is brought by a private party seeking a remedy in respect of conduct that has been found by the competition authority to have infringed the conduct rules. A “stand-alone” action is one brought by a private party seeking a ruling as to whether a breach of the conduct rules has taken place, and if so, an appropriate remedy.

4. The right to take follow-on action is normally provided for in competition law regimes where a civil administration model is adopted²⁹. It is generally agreed that parties that have suffered loss or damage as a result of anti-competitive conduct should have the right to compensation and other appropriate remedies. A decision by the competition authority that an infringement has taken place must be made before such an action can be taken.

5. The Competition Commission would simply not be able to investigate all potential cases of anti-competitive conduct. From a practical point of view, therefore, stand-alone private action can supplement the public enforcement of the competition law, by providing an alternative channel for pursuing claims of anti-competitive

²⁹ e.g., Competition Act 1998 (Singapore), s 86.

conduct that the Commission does not investigate. A successful private action by a party that had suffered as a result of anti-competitive conduct would also likely benefit other companies and consumers in the market concerned, and would help promote broader economic efficiency.

6. A further argument for providing for the right to take stand-alone private action is that this would also act as a deterrent against anti-competitive conduct. In a recent paper on this issue, the UK OFT stated that -

“A more effective private actions system would increase the incentives of businesses to comply with competition law, since the potential incidence and magnitude of any financial liability to a competition authority and/or a claimant will increase. As these financial risks increase, so does (or should) the interest of those ultimately responsible for the governance of the business (especially supervisory boards and non-executive directors) or for supporting the business (including, for example, financiers and investor groups).”³⁰

7. Stand-alone action is provided for in almost all the major overseas competition law regimes we have studied, as well as in Hong Kong, to some extent, through the competition provisions in the Telecommunications Ordinance³¹. We propose that the competition law provide for the right to take both follow-on action and stand-alone action. At the same time, we recognise the need to provide for safeguards against a proliferation of unmeritorious claims. Provisions aimed at easing the fears of the business sector in this regard are described in paragraphs 14 to 17 below.

Standing of a party intending to take private action

Proposal 34: Any person who has suffered loss or damage from a breach of the Ordinance should have the right to bring private proceedings seeking damages.

8. The term used to describe the entitlement of a person to bring legal proceedings is “standing”. In order to allow for full rights of private action, we consider that it is appropriate to provide for unrestricted standing. We therefore propose that *any* party who considers that it has suffered loss or damage should have standing to commence

³⁰ Office of Fair Trading, ‘Private actions in competition law: effective redress for consumers and business’, OFT Discussion Paper, April 2007, p. 7, available at: http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf.

³¹ Telecommunications Ordinance (Hong Kong), s 39A.

an action to seek remedy. Most overseas jurisdictions that we have studied, including Australia³², New Zealand³³, Japan³⁴, Canada³⁵ and the USA³⁶, have adopted this approach. Singapore³⁷ restricts standing to parties who have suffered *direct* loss or damage.

9. The importance of ensuring that the requirements for standing are not too restrictive is noted in the UK OFT discussion paper, viz -

*“...it is unlikely to be appropriate in policy terms to deny consumers and other end-users the right to sue for damages arising from breach of the competition rules. In many instances, it is consumers and end-users who suffer the effects of infringements, as higher prices are reflected along the chain of distribution.”*³⁸

Hearing of private cases

Proposal 35: Private cases that involve only competition matters should be heard solely by the Tribunal.

Proposal 36: For “composite” claims that involve both competition and non-competition matters, the courts should have the power to transfer competition matters to the Tribunal for determination. When a court decides that it would hear a composite case in full, it would have the power to apply remedies in respect of all aspects of the case, including matters related to the competition law.

10. As with the review of decisions made by the Commission (see paragraph 20 in Chapter II), we propose that private cases that involve only competition matters should be heard by the Tribunal. In overseas jurisdictions and in the sector-specific competition regime in Hong Kong, private cases are heard by the courts, or may be heard either by the courts or a Tribunal as in the case of the UK. In Hong Kong the courts would be equally well-placed to hear private actions in matters related to

³² Trade Practices Act 1974 (Australia), ss 80, 82.

³³ Commerce Act 1986 (New Zealand), ss 81, 82.

³⁴ Act concerning prohibition of private monopolization and maintenance of Fair Trade 1947 (Japan), ss 24-26.

³⁵ Competition Act 1985 (Canada), s 36.

³⁶ Clayton Act (USA), ss 4, 16.

³⁷ Competition Act 2004 (Singapore), s 86.

³⁸ Office of Fair Trading, ‘Private actions in competition law: effective redress for consumers and business’, OFT Discussion Paper, April 2007, p. 38, available at: http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf.

competition. However, we consider that the Tribunal would provide a relatively less formal procedural setting that should allow for complex competition issues to be settled in a timely manner and at a lower cost to all parties involved. For this reason, we propose that the Tribunal should be the venue for hearing solely competition-related actions.

11. Private commercial claims that are instituted in the courts may in future involve matters related both to competition law and to other, non-competition matters (these are known as “composite claims”). For example, a party that has been sued for breach of contract may allege that the contract is void under the competition law because it breaches the prohibition against the abuse of substantial market power. In such cases, the courts may simply decide to hear the competition and non-competition related claims together. However, if (as proposed above) jurisdiction for competition claims is vested in the Tribunal, there may be a risk of jurisdictional conflict and overlap arising, even though the courts are competent to hear civil claims.

12. To address this issue, we propose that in “composite claim” cases, the courts should have the discretion to transfer matters relating to competition law within the claim to the Tribunal, either by their own motion, or upon application by a party to the proceedings, or by the Commission. The court that transfers the competition law related matters should have the discretion to adjourn any hearing into the remaining aspects of the claim in question, pending the Tribunal’s determination (and any appeals for review of that determination). Alternatively, the court may decide that it is more efficient for it to deal with competition issues together with the other civil claims. When a court decides that it would hear a composite case in full, it would have the power to issue remedies in respect of all aspects of the case, including matters related to the competition law.

13. The main advantage of this approach is that it would allow for a degree of flexibility, in that it would offer the courts an option as to how to handle “composite” cases in the most effective and efficient manner. Whilst a court could decide that a complex competition matter would best be transferred to the Tribunal, if the competition aspects of a case required relatively little expertise, the court could instead choose to adjudicate on the case in its entirety. To ensure a smooth and consistent application of such shared jurisdiction between the courts and the Tribunal, clear procedural and substantive provisions for transferring claims from the courts to the Tribunal would need to be formulated.

Safeguards against excessive litigation

Proposal 37: The Tribunal, of its own motion or on application by a party or the Commission, may strike out any action which the Tribunal considers to be without merit or vexatious.

Proposal 38: Where a matter is being investigated by the Commission and a third party commences a private action on the same matter, the Tribunal may adjourn the private case pending the outcome of the Commission's investigation if the Tribunal considers that the matter would be better handled by the Commission.

14. There are concerns that allowing full rights of private action might encourage an excess of litigation. This could in turn potentially overload the competition regime and the courts, whilst tying up a significant proportion of the resources of the business sector, thereby defeating the objective of enhancing economic efficiency.

15. With these concerns in mind, we have researched practice in other jurisdictions that allow similar rights under competition law. This research shows that in overseas jurisdictions there are limited numbers of private cases related to competition law – with the exception of the USA, where a large proportion of litigation is presumed to be driven by the special characteristics of the legal system, such as contingency fees and the possibility of recovering treble damages. Elsewhere, there are far fewer cases. For example, there have been only some 60 determined cases involving private damages across the entire EU from the inception of the EC Treaty to 2004³⁹.

16. In many places, policy-makers are addressing the issue of what they consider to be “under-use” of provisions that allow for private actions. In a Green Paper on private actions, the EC noted the relatively small number of private actions in competition cases across the EU⁴⁰. In a subsequent White Paper, the EC has concluded that this is a result of various legal and procedural hurdles governing actions for antitrust damages and has set out a number of proposals to address the obstacles it has identified.⁴¹ In New Zealand, the Ministry of Commerce has noted

³⁹ Ashurst, ‘Study on the conditions for claims of damages in case of infringement of EC competition rules’, Comparative Report, 31 August 2004, available at:

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

⁴⁰ Commission of the European Communities, ‘Green Paper: Damages for breach of the EC antitrust rules’, COM (2005) 672.

⁴¹ Commission of the European Communities, ‘White Paper: on Damages for breach of the EC antitrust rules’, COM (2008) 165.

that the number of private actions that are being filed is “too few” thereby reducing the potential effectiveness of such actions in deterring anti-competitive conduct⁴².

17. In addition to concerns about the possibility of excessive litigation, some firms are concerned that other companies may file frivolous or vexatious claims, in order to disrupt their competitors’ operations. We have found no evidence in other competition regimes of such claims being made on any significant scale. Nonetheless, we consider it prudent to put in place measures to guard against this possibility, to ensure that the introduction of a general competition law in Hong Kong would not create an opportunity for companies to take unmeritorious legal action aimed purely at hindering competitors. Accordingly, we propose that the Tribunal should have the power to strike out any private action which it considered to be without merit.

18. Under the arrangements proposed here, there could be cases where a competition matter that was brought by a private party to the Tribunal was already the subject of an ongoing or planned investigation by the Commission. In such cases, “parallel” enforcement by the Tribunal and the Commission would lead to a duplication of resources. We therefore propose that if the Tribunal considered it preferable for the matter to be handled initially by the Commission, it could adjourn the case, either on application by a party or the Commission, pending the outcome of the investigation by the Commission. This proposal would not deprive the relevant party of access to the Tribunal, as they would retain the option of seeking a review of the Commission’s decision if they were not satisfied with the outcome of the investigation.

19. In order to give effect to this proposal we would need to put in place an appropriate procedure, whereby a party bringing a stand-alone action would be required to notify the Commission when it initiated its action. Within a certain time after being served with the notification, say 20 business days, the Commission would inform the Tribunal and the parties concerned whether or not it was currently conducting an investigation into the matter, and if not, whether or not it proposed to open such an investigation. On receipt of the Commission’s advice, the Tribunal would decide whether to adjourn the case, and would have the power to revisit its decision if, for example, there was a change in circumstances or the Commission’s investigation was taking some time to complete and this was having an impact on the party seeking to bring the action in the Tribunal.

⁴² R Jack Roberts, ‘International Comparative analysis of private rights of access: A study commissioned by Competition Bureau of Canada’, 1999, p. 67.

Intervention by the Commission

Proposal 39: With the agreement of the Tribunal or the courts, the Commission may intervene in any private proceedings relating to a contravention of the competition conduct rules.

20. Many competition authorities consider that the regulator should be able to give views on issues raised in private cases. This is because the outcomes of such cases could have an impact on the overall effectiveness of the competition regulatory regime. With this in mind, we consider that the Commission should have the opportunity to have its views heard on matters that come before the Tribunal (or in the cases of composite claims and appeal, to the courts), and which might affect the development of competition law jurisprudence in Hong Kong.

21. We acknowledge that allowing the Commission the right of intervention might add to the length of Tribunal (or court) proceedings and therefore the costs incurred by the parties involved. On the other hand, the early and expert involvement of the Commission could help in achieving faster settlements of cases, particularly where the Commission was able to assist the Tribunal (or the courts) with technical matters relating to, for example, the economic aspects of a case. In any event, we would expect the Commission to limit its involvement to addressing key questions with a bearing on its own future enforcement, bearing in mind that its primary function would be to enforce the competition law.

22. The manner in which the Commission could give its views on private cases should be flexible enough to allow for varying degrees of involvement, depending on the nature of the case and the specific issue at hand. For example, it could appear as an expert body or “friend of the court” to help explain technical matters, or it could participate as a full party to the action in question, calling evidence in its own right and cross examining other parties’ witnesses.

23. To ensure that the Commission only intervened in private proceedings where it could make a significant contribution to the consideration of the case in question, we propose that the Commission would need to seek the permission of the Tribunal (or the courts) to intervene. The Commission’s participation in the proceedings would be subject to any directions given by the Tribunal (or the courts). Nonetheless, given that making a written submission would be unlikely to add significantly to the length or cost of proceedings, nor unduly divert the resources of the Commission, it is

proposed that the Commission should have the right to make such submissions without the need for permission to be granted by the Tribunal (or the courts).

Representative actions

Proposal 40: With the permission of the Tribunal, representative actions, such as on behalf of consumers or SMEs, should be permitted. In granting such permission, the Tribunal must have reached the view that the representative can fairly and adequately represent the interests of the parties concerned.

24. A “representative action” is one where a body acting for the interests of a defined group that has been affected by an allegedly unlawful practice is authorised to bring an action on behalf of the group. The representative body should be a credible organisation acting in the interests of those it represents, and may have to satisfy a set of objective criteria to ensure that it has the appropriate status⁴³.

25. Experience in other jurisdictions shows that consumers and SMEs affected by anti-competitive conduct are reluctant to bring court cases on their own. This may be due to concerns that the legal process might be so time-consuming and costly that it would outweigh their own individual loss, even though the aggregate loss to consumers or business at large could be significant. Providing for representative actions would give consumers and SMEs an avenue for pursuing cases in a manner that would minimise their time and monetary commitment. It could also increase the deterrent effect of the competition law, in that businesses that breached the law could find themselves having to pay damages to all those who had been affected, not just those who were sufficiently motivated, or otherwise able, to pursue claims.

26. In the UK, bodies specified by the Secretary of State (such as consumer organisations) can bring representative actions on behalf of consumers⁴⁴. The OFT has recommended that representative actions be expanded to allow such actions to be brought on behalf of SMEs and that other parties, including the OFT itself, should be eligible for appointment as a representative⁴⁵.

⁴³ Representative action is different from class action (as most commonly seen in the USA), where a single member of a group certified by the court conducts the litigation on behalf of himself and the other group members.

⁴⁴ Competition Act 1998 (UK), s 49B.

⁴⁵ Office of Fair Trading (2007), ‘Private actions in competition law: effective redress for consumers and businesses,’ OFT Discussion Paper.

27. To encourage consumers and SMEs to pursue legitimate claims, we propose that the competition law should provide for representative actions. To help guard against potential abuse of the system, any body wishing to bring such an action would require the permission of the Tribunal, which would only grant such permission if it considered that the body could fairly and adequately represent the interests of the relevant parties.

Scope of remedies

Proposal 41: The Tribunal should have the power to apply the following remedies in cases of stand-alone private action –

- a) injunction or declaration
- b) award of damages
- c) termination or variation of an agreement
- d) such other relief as the Tribunal deems appropriate.

28. It is important that the law provide for the adjudicating body to have available a broad and flexible range of remedies to deal with the wide variety of facts which are likely to arise in individual cases of infringement. We propose that in private cases the Tribunal should be able to apply any or all of the remedies that the Commission might impose when carrying out public enforcement, and any remedies available to the Court of First Instance in civil proceedings.

Reference to the leniency programme

Proposal 42: Any leniency granted to a party by the Commission should have no impact on rights of private action. Information provided to the Commission by a party granted leniency should not be discoverable in private proceedings.

29. We have proposed that the competition law should provide for a leniency programme, under which parties to an anti-competitive agreement who reported the conduct to the Commission would be granted a reprieve against fines or other remedies provided that certain conditions were fulfilled (see paragraphs 33 and 34 in Chapter III).

30. This raises the question of whether granting leniency should affect the right to take private action. Granting parties to anti-competitive agreements immunity from

having to compensate other parties that had suffered damage from anti-competitive conduct could act as a strong incentive for seeking leniency. Yet it would also undermine the ability of victims of anti-competitive conduct to seek damages.

31. We propose that the Commission's decision to grant leniency should only impact on matters it is investigating, and should not have any impact on third party rights to seek compensation. The International Competition Network, an organisation of competition authorities, says that: "civil plaintiffs could seek discovery of this material resulting in exposure of the leniency applicants to further litigation, making them potentially worse off than if they had not sought leniency in the first place."⁴⁶ To allay this concern and to facilitate an effective leniency programme, we also propose that where parties to anti-competitive agreements provide information that is useful to the Commission in the context of leniency applications, such information should not be discoverable in private proceedings. This is consistent with the approach taken by the European Commission⁴⁷ and should help strike a balance between encouraging cooperation and protecting the private rights of affected parties to compensation.

⁴⁶ International Competition Network, 'Anti-cartel enforcement manual: Drafting and Implementing an Effective Leniency Program', Cartel Working Group, April 2006, p. 8.

⁴⁷ See Community Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1705&format=HTML&aged=0&language=EN&guiLanguage=en>.

CHAPTER V: ISSUES OF CONCERN TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

During the public consultation on the way forward for competition policy, organisations representing SMEs raised the concern that competition law might make the operating environment for SMEs more complex and increase their costs. They also expressed concern that SMEs might unwittingly fall foul of such a law and that under the new law, larger companies could threaten to sue SMEs in order to force them to comply with unreasonable business conditions.

2. Whilst noting these concerns, we consider that a competition law should enhance the overall business environment, rather than place an undue burden on normal business operations. To help reduce compliance costs, the law should provide clarity about what may constitute an infringement. Additional guidance should be provided by the Commission, which would be required to issue guidelines on how it would apply the conduct rules and investigate complaints. Mechanisms also should be put in place to guard against possible misuse of the law by large companies to harass SMEs, as well as help SMEs protect themselves from anti-competitive conduct.

3. Having discussed the concerns of SMEs with competition law experts, we believe that SMEs should not be unduly concerned about the implementation of an appropriately designed competition law. Almost by definition, SMEs do not have the power to influence markets significantly. Therefore, their conduct is unlikely to have the effect of substantially lessening competition. They could still be subject to investigation if they engaged in “hard core” conduct, such as price-fixing or bid-rigging. However, as such conduct almost always involves a clear intention on the part of the firms involved, it is highly unlikely that this would be entered into unwittingly. Also, based on our study of overseas experience, we consider that concerns about a proliferation of litigation by large companies are unlikely to become a reality (see paragraph 15 in Chapter IV). On the contrary, many of the competition cases have been brought by SMEs to counter anti-competitive conduct by larger firms.

4. We believe that rather than create problems for SMEs, the new competition law would benefit them, as it would check the potential of undertakings to engage in abusive or other anti-competitive conduct. SMEs could also benefit from lower costs of inputs in a more competitive business environment.

5. In drawing up the proposed major provisions of the competition law, we have borne in mind the concern that these should not unduly affect the operating environment for any business, including SMEs. We therefore do not see a need to exempt SMEs from the law. This would in any event be impractical, given the difficulty of defining what exactly constitutes an SME, and would compromise the effectiveness of the law. We do however propose to implement a number of arrangements that might further give comfort to SMEs, as described in the following paragraphs.

a) “De minimis” approach

Proposal 43: The Commission should be required in its guidelines to clarify that it would not pursue an agreement where the aggregate market share of the parties to the agreement did not exceed a certain level, except where “hard core” conduct was involved. The guidelines should give clear examples of what would be considered “hard core” conduct.

6. It is common practice in other jurisdictions to identify conduct that is of limited economic significance and that is therefore unlikely to be anti-competitive. The threshold for such conduct may be set using turnover or market share of the undertakings involved. For example in the US⁴⁸ and Singapore⁴⁹, the competition authorities would not normally pursue an agreement if the aggregate market share of the parties to the agreement did not exceed a certain level, say 20%.

7. However, this approach would not apply to agreements involving “hard core” conduct, i.e., price-fixing, bid-rigging, output restriction and market allocation. Such conduct almost always is presumed to have the *purpose* of substantially lessening competition, and is unacceptable under a competition regulatory regime that seeks to implement a policy of promoting economic efficiency (see paragraph 18 in Chapter III). Such an arrangement would help make SMEs aware of what conduct would likely always be considered anti-competitive. This would facilitate compliance, whilst putting proper business practices of SMEs outside the jurisdiction of the competition law.

⁴⁸ In the US, the courts have found that a 30% market share was insufficient to support a finding of market power (Jefferson Parish Hosp. Dist. No. 2 v Hyde, 466 U.S. 2, 26-29 (1984)). In addition, in relation to the health care sector, the US Department of Justice has also indicated that the US agencies will not challenge joint ventures in relation to physicians which constitute less than 20% or less of the physicians in the market (see: <http://www.usdoj.gov/atr/public/guidelines/1791.htm>).

⁴⁹ Competition Commission of Singapore, ‘CCS Guidelines on the section 34 prohibition’, June 2007, para 2.19-20.

8. Different mechanisms are used to implement these so-called “de minimis” exceptions. In the UK, the Competition Act provides that small agreements which can be specified by turnover or market share of the undertakings involved are immune from financial penalties⁵⁰. In Singapore, the Commission uses guidelines to set out the 20% market share threshold. We consider that in a small economy like Hong Kong, the use of guidelines would be the most appropriate mechanism for setting a similar threshold.

b) Exemptions for “vertical” agreements

9. In the absence of market power, we accept the view that agreements between purchasers and suppliers usually do not pose competition concerns. We have therefore proposed (see paragraphs 9 and 10 in Chapter III) to adopt an approach similar to that followed in the EU, whereby a block exemption would be granted in respect of such agreements where the parties to the agreement concerned do not have market power. SMEs could then enter freely into supply or purchase agreements that would allow for the most efficient distribution arrangement for their products, without fear of infringing the competition law.

c) Power of the Competition Tribunal to strike out vexatious claims

10. We have noted above that the introduction of competition law has *not* led to a proliferation of litigation in most overseas jurisdictions. There has also been no evidence of big companies filing frivolous or vexatious claims against SMEs. Nonetheless, to guard against this possibility, we have proposed that the Competition Tribunal may strike out any private action which it considers to be without merit or vexatious. If an SME considered that a private action against it was without merit, it could either ask the Tribunal to strike out the case or seek the assistance of the Commission to bring an appropriate application before the Tribunal.

d) Appointment of Commission members with SME experience

11. We have proposed (in paragraph 4 in Chapter II) that at least one of the Commission members should be a person experienced in matters relating to SMEs. Whilst this member would not be a representative of SMEs as such, he or she would be in a position to judge how the Commission’s various decisions might affect the interests of SMEs, and could make suggestions as to how to align the

⁵⁰ Competition Act 1998 (UK), s 39.

interests of SMEs with the overall objective of the competition law.

12. In addition, one of the key roles of the Commission, particularly in the initial period following enactment of the law, would be to educate the public, including SMEs, on the economic benefits of competition, and the role of the competition law in helping to realise these benefits. The Commission would also be tasked to advise SMEs clearly as to the types of business practice that might constitute anti-competitive conduct under the law. The presence of a Commission member familiar with SME concerns would help the Commission perform this task effectively.

e) Availability of representative action

13. Earlier in this document (paragraphs 24 to 27 in Chapter IV), we have proposed that the competition law permit representative actions. This would allow an organisation to bring private cases on behalf of SMEs, and would help SMEs that suffered damage from anti-competitive conduct, but which had limited resources, to seek redress.

CHAPTER VI: RELATIONSHIP WITH EXISTING SECTOR-SPECIFIC LAWS

The Telecommunications Ordinance and the Broadcasting Ordinance currently contain provisions relating to competition. With the introduction of a cross-sector competition law, we need to consider how best to manage the interface between the new law and the competition provisions in these Ordinances.

Proposal 44: The Competition Ordinance should apply to all sectors, including the telecommunications and broadcasting sectors. The competition provisions in the Telecommunications and Broadcasting Ordinances that duplicate those in the Competition Ordinance should be repealed.

Proposal 45: The Telecommunications Authority and the Broadcasting Authority should share with the Competition Commission jurisdiction over competition matters in their respective sectors.

2. A key reason for introducing a general competition law is to ensure that anti-competitive conduct in all sectors of the economy should be treated equally. Whilst the characteristics of various industries are different, and would likely warrant separate assessments of the degree of competition in the relevant markets, the same competition law principles should apply consistently.

3. The new competition law should be able to deal with anti-competitive conduct that straddles more than one sector, and to achieve this objective, the new law must cover *all* sectors. If conduct in one particular sector, say, telecommunications were dealt with separately and under a different law, parties to an anti-competitive agreement that involved both the telecommunications and one or more other sectors would be subject to scrutiny under different regulatory regimes. This could lead to confusion and duplication of resources, and result in inconsistent decisions about what constituted anti-competitive conduct in the different sectors concerned.

4. If more than one competition law applied to the same sector, this would likely create higher compliance costs for some businesses. For example, if competition in the telecommunications and broadcasting sectors was regulated under both the general competition law and the sector-specific laws, companies in these sectors would need to ensure that their business practices did not constitute an infringement under either law.

5. With these considerations in mind, we propose to repeal the sections of the Broadcasting and Telecommunications Ordinances that deal with anti-competitive conduct where these can be replaced by appropriate provisions in the new competition law.

6. Once the new law is in place, the Commission would be able to exercise its authority in respect of competition matters in the telecommunications and broadcasting sectors. However, we also need to consider whether the Broadcasting (BA) and Telecommunications Authorities (TA) – which will continue to regulate other sector-specific matters under their respective statutory remits – should continue to have a role in regulating competition in their respective sectors.

7. In this connection, we note that the BA and TA have experience of competition regulation in their respective sectors, and that there would be merit in retaining this specialist knowledge. Moreover, within these sectors, specific regulatory issues may involve both competition and non-competition matters. In such cases, it would be more cost-effective for the companies concerned to deal only with the sector-specific regulator. With these factors in mind, we propose that within their respective sectors the BA and TA should have the same powers as the Competition Commission to enforce the new competition law. This is similar to the arrangement adopted in relation to various sector specific regulators in the UK.

8. Having more than one authority exercise concurrent power under the same law could admittedly lead to a situation where the respective regulators might interpret the law differently. However, under the new law, all reviews relating to competition matters would be heard by the Competition Tribunal, so that any inconsistencies could be resolved at this level. In the long run, the different regulators would also likely take into account the past rulings of the Tribunal when enforcing the law.

9. To ensure coordination between the Commission and the BA and TA in the exercise of concurrent jurisdiction, we propose that the Commission, in consultation with the sector-specific regulators, should issue guidance and procedural rules that would clarify the circumstances in which each regulator would investigate cases that involved competition issues in the broadcasting or telecommunications sector.

CHAPTER VII: EXEMPTIONS AND EXCLUSIONS

As emphasised throughout this document, the main objective of the proposed competition law is to enhance economic efficiency and thus the benefit of consumers through promoting sustainable competition. In order to achieve this objective, the law should in principle cover all sectors of the economy. Nonetheless, there are some situations in which restrictions on competition may not necessarily harm economic efficiency or conflict with the other aims of society. In such situations, it may be necessary to provide for an appropriate exemption to be given, or even to exclude certain activities from the application of the law. This Chapter discusses the proposed criteria and mechanisms for granting exemptions, as well as addressing the issue of exclusions from the law.

2. We believe that the law should allow for exemptions and exclusions only where it could be clearly shown that this would enhance economic efficiency or achieve other important social or public policy objectives. The areas that are eligible for exemption or exclusion may change as technology and economic organisation evolve. We therefore consider that the best approach is to establish a clear set of criteria and a transparent mechanism for granting exemptions or exclusions. These are described in proposals 46 to 49 of this chapter.

3. Given that the activities of the public sector almost invariably would fall under the criteria for exemptions and exclusions, we propose that for the avoidance of doubt, the competition law should not apply to the Government or statutory bodies. We would review this issue in the light of experience in implementing the law.

Exemption on grounds of economic benefit

Proposal 46: An agreement may be exempted from the prohibition on anti-competitive agreements if it yields economic benefits that outweigh the potential anti-competitive harm. A party to an anti-competitive agreement may apply to the Commission for an exemption if it has grounds to believe that such an exemption should be granted.

4. Bearing in mind that the main objective of the proposed competition law is to enhance economic efficiency, it is logical that an agreement that yields efficiency gains that outweigh any anti-competitive harm should be exempted from the law.

Following such logic, the UK⁵¹ and the Singapore⁵² competition laws provide exemptions for agreements which contribute to improving production or distribution, or promote technical or economic progress, but which do *not* -

- a) impose on undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
- b) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

5. We consider that similar considerations apply in Hong Kong, and therefore propose that agreements that meet criteria such as those outlined above should be exempted from the application of the proposed competition law. To qualify for an exemption, the parties to the agreement in question would need to show that the economic benefits involved had a direct causal link with the agreement, and that they were of a value that was significant enough to outweigh any anti-competitive effect.

6. A party to an anti-competitive agreement may apply to the Commission for an exemption on the grounds that the agreement yields economic benefits that outweigh the potential anti-competitive harm. As the exemption criteria would be set out in the law, an undertaking could also make its own assessment of whether the exemption might apply to its agreements (“self assessment”). Over time we anticipate that self assessment would become commonplace.

Block exemptions

Proposal 47: The Commission may issue a block exemption in respect of a category of agreement that is likely to yield economic benefit that outweighs any anti-competitive harm.

7. It is possible that a *category* of agreement could meet the criteria for exemption listed at paragraph 4 above. Rather than having to assess the economic benefit and anti-competitive harm of every single agreement in a single category, we propose that the Commission be empowered to issue a block exemption in respect of the whole category of agreement. The law would stipulate a set of procedures for the Commission to follow in making such an order, for example, a requirement to consult stakeholders and to review the order within a certain time.

⁵¹ Competition Act 1998 (United Kingdom), s 9.

⁵² Competition Act 2004 (Singapore), s 41.

Exclusion on grounds of public interest

Proposal 48: The conduct rules should not apply to any undertaking entrusted with the operation of services of general economic interest, such as essential public services of an economic nature.

8. Enhancing economic efficiency by promoting competition is important for the effective functioning of markets in Hong Kong. However, there could be situations in which other considerations might override this objective. In such situations, it would be appropriate for certain activities or undertakings to be excluded from competition regulation. It should be noted in this context that if an organisation is not engaged in economic activity, it would not fall within the definition of “undertaking”, and would therefore not in any event be subject to the application of the conduct rules under the competition law (see proposal 23 and paragraphs 2 and 3 in Chapter III above).

9. Competition laws in the EU⁵³, the UK⁵⁴ and Singapore⁵⁵ contain provisions to the effect that prohibitions on anti-competitive conduct should not apply to: “any undertaking entrusted with the operation of services of general economic interest in so far as the prohibition would obstruct the performance of the particular tasks assigned to that undertaking”. The laws do not explicitly define what constitutes a “service of general economic interest”. Rather, the application of this concept is established by case law or guidelines, which suggest that such services may be described by the general term “essential public services of an economic nature”.

10. The European Commission has stated that services of general economic interest are services that the authorities consider should be provided in all cases, whether or not there is an incentive for the private sector to do so⁵⁶. The European Commission and the European Court have further ruled that such services must be widely available and not restricted to a class, or classes, of customer⁵⁷.

11. The services covered under such a definition are generally those that entail

⁵³ EC Treaty, Article 86(2).

⁵⁴ Competition Act 1998 (United Kingdom), Schedule 3, para 4.

⁵⁵ Competition Act 2004 (Singapore), Third Schedule, para 1.

⁵⁶ Office of Fair Trading, ‘Services of general economic interest exclusion’, Competition Law Guideline, December 2004, p. 9.

⁵⁷ Office of Fair Trading, ‘Services of general economic interest exclusion’, Competition Law Guideline, December 2004, p. 10.

specific public service obligations. In other jurisdictions these are typically services provided by the “big network” industries in sectors such as public transport, water supply, power supply or postal services, where large-scale investments in infrastructure or facilities are required to ensure the wide availability of services to the public.

12. Given that the operating environment in such sectors involves aspects that may go beyond the objectives of the competition law, we propose that the Ordinance should provide that services of general economic interest be excluded from the application of the law.

Exclusion on public policy grounds

Proposal 49: The Chief Executive-in-Council may exclude conduct from the prohibition on anti-competitive conduct if he considers that there are sound reasons of public policy for so doing.

13. Just as we propose above (proposal 48) that the competition law should allow for exclusions in respect of services of general economic interest, we accept that a case for exclusion could be made in respect of conduct that might be seen as anti-competitive, but which was also subject to overriding public policy considerations.

14. There is a general understanding in most administrations of the types of service that could be considered as yielding economic benefit. However, the question of what might constitute legitimate grounds for excluding conduct for reasons of “public policy” is less clear-cut. It is therefore necessary to consider where the authority for deciding to exclude conduct on such grounds should lie.

15. The proposed remit of the Competition Commission would be to implement a law whose objective is to enhance economic efficiency. It could therefore be argued that making a decision to exclude specific conduct in consideration of wider public policy objectives would be beyond its purview. In the UK⁵⁸ and Singapore⁵⁹, the power to make such a decision is vested with the Minister or Secretary of State in charge of competition policy. We believe that in Hong Kong, it would be appropriate to vest such power with the Chief Executive-in-Council, who would be in

⁵⁸ Competition Act 1998 (United Kingdom), Schedule 3, para 7.

⁵⁹ Competition Act 2004 (Singapore), Third Schedule, para 4.

the best position to assess the relative merits involved in such cases.

Non-application to the Government and statutory bodies

Proposal 50: The conduct rules should not apply to the Government or statutory bodies. The Government would conduct a review of the issue in the light of actual experience in implementing the competition law.

16. For the reasons explained in paragraph 3 above, we propose that the law should not apply to the Government or statutory bodies. This approach should help ensure that the operation of Government and statutory bodies would not be affected by unfounded and misconceived complaints. In putting forward this proposal, we have also taken into account the fact that Hong Kong has a relatively small public sector and that many services that are provided in other economies by the public sector are in Hong Kong provided by the private sector. Feedback from the previous consultation exercise and subsequent discussion with stakeholders indicated that the main concern of the public is anti-competitive conduct in the private sector.

17. We recognise that practices in overseas regimes vary, depending on the local situations and the role of the government in the economy. In this connection, we will conduct a review of the issue in the light of actual experience in implementing the competition law.

CHAPTER VIII: NEXT STEPS

The aim of this document has been to set out in plain language and in as concise a form as possible the proposed major provisions of a general competition law for Hong Kong, so as to allow stakeholders to review the proposals and offer comments and suggestions prior to the tabling of a Bill in the Legislative Council.

2. In his 2007 Policy Address, the Chief Executive said that the Government planned to introduce a Competition Bill into the Legislative Council in the 2008-09 legislative session. This remains our intention. Given the complex nature of competition legislation, and the wish of the Government to make good progress with the introduction of a Bill, we have already begun initial preparation for the drafting of the law. Nonetheless, recognising that members of the public and stakeholder groups may well have views on the proposals set out in the above chapters, we will not finalise the draft legislation until we have completed a review of all comments and submissions received in response to this document.

3. With the introduction of the Bill, members of the community will have a further opportunity to comment on the competition law, and to make submissions on the detailed provisions therein as part of the legislative process. The Government will also participate fully in this process, explaining where necessary the rationale behind specific proposals.

4. It is now nearly two years since the Competition Policy Review Committee delivered its report on proposals for taking forward Hong Kong's competition policy. During that time, there has been regular and constructive public debate on the best way forward for Hong Kong. Whilst we consider that it is now time to move ahead with the establishment of a suitable legislative framework, including the setting up of an appropriate regulatory authority, we remain open to further views on the relevant arrangements. In this connection, we invite members of the public and interested organisations to submit comments in writing to the following address -

Commerce, Industry and Tourism Branch (Division 2)
Commerce and Economic Development Bureau
Level 29, One Pacific Place
88 Queensway
Hong Kong
(Fax No. 2877 5650)

Alternatively, submissions can be made by e-mail to –

competition@cedb.gov.hk

In order to ensure that views are fully considered before we proceed to finalise draft legislative proposals, they should be submitted on or before **5 August 2008**.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
May 2008

