

立法會
Legislative Council

LC Paper No. CB(1)1440/07-08(01)

Ref : CB1/PL/EDEV

Panel on Economic Development
Special meeting on 6 May 2008

Updated Background Brief on Competition Policy in Hong Kong

Purpose

This paper summaries the background and outcome of the public consultation on the way forward for competition policy in Hong Kong, and Members' major concerns and views on related issues.

Need for a review of competition policy

2. Between 1993 and 1996, the Government commissioned the Consumer Council ("CC") to undertake a series of studies on competition in Hong Kong.¹ In its final report, CC recommended the adoption of a comprehensive competition policy and enactment of a general competition law in Hong Kong. In December 1997, the Government established the Competition Policy Advisory Group ("COMPAG").² In May 1998, COMPAG promulgated a Statement on Competition Policy ("COMPAG Statement"), articulating the objective of the Government's competition policy as being "to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare." COMPAG Statement also indicated that where justified, the Government would take administrative or legal steps as appropriate to remove business restrictive practices that impair economic efficiency or free trade.

3. In 2000 and 2001, legislative proposals were passed to specifically prohibit certain types of anti-competitive conduct and the abuse of a dominant position in the telecommunications and the broadcasting markets respectively. The enactment of these laws was consistent with the Government's policy of

¹ CC completed six sectoral studies on the banking, supermarkets, gas supply, broadcasting, telecommunications, and private residential property markets.

² COMPAG was established under the chairmanship of the Financial Secretary to provide a high-level and dedicated forum to review competition-related issues which have substantial policy or systemic implications, and examine the extent to which more competition should be introduced in the public and private sectors.

legislating on competition issues on a sector by sector basis. However, other than the broadcasting and telecommunications sectors, there are no statutory procedures that the Government can take to reign in businesses that are engaged in restrictive practices in other sectors of the economy. In the absence of supporting legislation, COMPAG has been unable to determine the extent to which complaints of anti-competitive conduct might be justified. In handling complaints relating to suspected anti-competitive conduct, COMPAG generally asks the policy bureau responsible for the sector concerned to investigate whether such conduct has in fact taken place. As the bureau has no statutory power to require the provision of information from the party under investigation, it could only rely on the latter's co-operation. Moreover, even if a complaint of anti-competitive conduct is substantiated, COMPAG has no power to sanction the parties concerned nor to require them to desist from the restrictive practice in question.

4. On the other hand, with enhanced public education on consumer protection, the public has developed a keen sense of consumer rights. In recent years, there has been increasing demand for greater consumer protection and more competition in sectors such as transport and utilities which are perceived to allow limited opportunities for new market entrants. Allegations of a lack of competition or of anti-competitive behaviour have also been made against some specific sectors, for examples, the sale of auto-fuel, supermarkets, port related fees and charges, exhibition services and the supply of fresh pork. Besides, bundling of services across sectors, such as the inclusion of telecommunications service charges in estate management fees has also raised concerns.

5. In view of the continuing public concern on the need or otherwise to introduce a broader competition law, COMPAG appointed the Competition Policy Review Committee (CPRC) in June 2005 to review the effectiveness of Hong Kong's competition policy. In June 2006, CPRC submitted its report to COMPAG, recommending that a new law with a clearly defined scope be introduced in Hong Kong to tackle anti-competitive conduct across all sectors.

Public consultation on competition policy in Hong Kong

6. Recognizing that there were divergent views in the community on the extent to which the Government should regulate competition by legislation, and on whether such legislation should apply across all sectors or only to specific areas, CPRC advised the Government to engage a public consultation on the way forward before implementing any of the recommendations.

7. On 6 November 2006, the Government published the document, "Promoting Competition – Maintaining our Economic Drive" for a three-month public consultation. The consultation document has identified 20 questions for respondents to consider in three main areas namely, the need for Hong Kong to introduce a new competition law, the regulatory framework for

competition law, enforcement and other regulatory issues to be considered. The consultation document is hyperlinked in the **Appendix**.

8. By the end of the public consultation period, the Administration received 114 written submissions and 1276 signatures.³ According to the Administration, the majority of respondents supported the introduction of a cross-sector competition law in Hong Kong and there was a high level of support for a stronger regulatory environment for competition. Nonetheless, there were some concerns in the business sector, in particular from the small and medium-sized enterprises (SMEs), about the possible effect that a new competition law might have on business operations. In gist, the outcome of the consultation is as follows:

- (a) The majority of respondents supported the introduction of a cross-sector competition law in Hong Kong as the current regulatory regime for competition was not effective in curbing possible anti-competitive practices in sectors not covered by legislation with anti-competition provisions;
- (b) There was general support for the establishment of a Competition Commission as the regulatory authority, which should be overseen by an independent, appointed board to ensure that appropriate checks and balances were in place;
- (c) Some respondents commented that rather than targeting market structures through the regulation of monopolies and merger activities, the focus of the law should be on prohibiting conduct that was likely to lessen competition or distort the normal operation of the market. It was also generally considered that a breach of the law should attract civil rather than criminal penalties;
- (d) There was broad consensus that instead of having an exhaustive list of specific offences which might make the cross-sector competition law unnecessarily rigid, a better approach would be to stipulate in the law the broad general prohibition with examples of anti-competitive conduct. The regulatory authority could further clarify its understanding of the prohibition and give relevant examples in appropriate guidelines; and
- (e) Some respondents, such as those from the business sector, had expressed concerns that a cross-sector competition law could lead to higher business costs and potentially costly and time-consuming litigation.

³ Respondents included members of the general public as well as academics, political parties, various organizations and private companies. Views were also received from members of the Public Affairs Forum of the Home Affairs Bureau.

9. The Administration advised that given the significant support for the introduction of a new cross-sector competition law, it would begin to work on the drafting of appropriate legislation having regard to the views expressed during the consultation.

10. On 5 June 2007, the Government announced that it had appointed Arculli, Fong & Ng with an Australian law firm specializing in competition issues, Gilbert+Tobin, to provide expert services in relation to the preparation of the competition law for Hong Kong. The consultant would make reference to the regulatory framework in other jurisdictions and provide expert advice on issues relating to the drafting of competition law, including the establishment of an enforcement body and guidelines for the implementation of the law.

Further public consultation on detailed legislative proposals on a Competition Bill

11. The Chief Executive stated in his 2007-08 Policy Address that due to concerns in the business sector, in particular those of SMEs, the Government would issue a consultation paper on detailed legislative proposals on a Competition Bill for public discussion to allow stakeholders to better understand the proposed statutory framework, and express their views before the Government formally introduced the bill into the Legislative Council in the 2008-09 legislative session.

Major concerns and views expressed by Members

12. Members have been monitoring the development of a competition policy through raising questions and conducting motion debates at Council meetings in previous years. On 28 January 2005, the Council passed a motion on introducing a fair law for the oil industries. The details are hyperlinked in the **Appendix**.

13. The Panel on Economic Services (ES Panel) has all along been concerned about competition issues in various sectors of the economy, in particular the auto-fuel market. ES Panel discussed related issues at several meetings since 1998. When considering the findings and recommendations of an independent consultancy study on the local auto-fuel retail market and issues relating to the adjustment of auto-fuel prices at the ES Panel meetings on 24 April 2006 and 26 March 2007 respectively, some members expressed support for introducing a competition law in Hong Kong to prohibit cartel behaviour of the oil companies, and enhance competition in the auto-fuel market.

14. At the ES Panel meetings on 21 December 2006 and 26 March 2007, members were briefed on the public consultation on competition policy and its

outcome. While some members indicated full support for introducing a general competition law in Hong Kong, some members had reservation about the Administration's proposal highlighting the concerns of SMEs that they might easily fall foul of the new legislation, and hence vulnerable to legal actions initiated by large companies seeking to undermine small market players by accusing them of anti-competitive conduct. Members considered it necessary for the Administration to continue engaging SMEs to allay their worries, and explain to them the proposed regulatory framework as well as the benefits of the new law in promoting fair competition and free market discipline. The Administration assured members that given the small scale of operation of SMEs and their lack of market power, it was unlikely that they would be targeted by the regulatory authority. Moreover, to address the concerns, the new law could include provisions that the regulatory authority would invoke its investigatory power on substantiated complaints only when the parties under complaint had a combined market share meeting a prescribed threshold.

15. Given that the new competition law might increase compliance cost and hinder the operation of the business sector, members called on the Administration to ensure that the new law would balance the interests of relevant stakeholders and would not impede Hong Kong's status as a free market. Members noted that consideration would be given to including a general prohibition with examples of anti-competitive conduct under the new law, and the regulatory authority would issue guidelines on the types and details of market behaviours which would constitute anti-competitive conduct. On the suggestion of adopting a phased approach in regulating anti-competitive conduct, the Administration advised that at the initial stage, the new legislation would focus on prohibiting conduct that was likely to lessen competition or distort normal operation of the market, and most likely it would not target market structures through regulation of merger and acquisition activities. The Administration's intention was to take an incremental approach in implementing the new competition regime.

16. At the meeting of the Panel on Economic Development (EDEV Panel)⁴ on 22 October 2007, members noted that the Administration would issue a further consultation paper on detailed legislative proposals on a Competition Bill. Some members expressed grave concern that there could be changes in the legislative proposals following the consultation exercise in late 2006. Some members considered that SMEs' concern about the possible adverse effect of the competition law on normal business operations was attributable to the misunderstanding of the new competition law and thus urged the Administration to step up efforts on publicity and education in this regard. There was also suggestion that Administration should make clear that large companies would be the main target to be regulated by the competition law.

⁴ The Panel on Economic Services has been renamed as the Panel on Economic Development with effect from the 2007-08 session.

Latest development

17. The Administration will brief members of EDEV Panel on detailed legislative proposals to be included in the Competition Bill at the meeting to be held on 6 May 2008.

References

18. A list of the relevant papers is in the **Appendix**.

Council Business Division 1
Legislative Council Secretariat
2 May 2008

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List of relevant papers

Panel/Committee	Date	Paper
Council Meeting	27 January 1999	Motion debate on anti-monopolization (Hansard) http://www.legco.gov.hk/yr98-99/english/counmtg/hansard/990127fe.htm
Council Meeting	12 April 2000	LegCo question: Promotion of fair competition (Hansard P.86) http://www.legco.gov.hk/yr99-00/english/counmtg/hansard/000412fe.pdf
Council Meeting	19 December 2001	Motion debate on opposing unfair competition (Hansard P.227) http://www.legco.gov.hk/yr01-02/english/counmtg/hansard/cm1219ti-translate-e.pdf
Council Meeting	21 May 2003	LegCo question: Promotion of fair competition (Hansard P.35) http://www.legco.gov.hk/yr02-03/english/counmtg/hansard/cm0521ti-translate-e.pdf
Council Meeting	3 December 2003	LegCo question: Large real estate developers expanding business areas (Hansard P.16) http://www.legco.gov.hk/yr03-04/english/counmtg/hansard/cm1203ti-translate-e.pdf
Council Meeting	20 October 2004	Motion debate on enacting a fair competition law (Hansard P.202) http://www.legco.gov.hk/yr04-05/english/counmtg/hansard/cm1020ti-translate-e.pdf
Council Meeting	28 January 2005	Motion debate on introducing a fair competition law for the oil industries (Hansard P.186) http://www.legco.gov.hk/yr04-05/english/counmtg/hansard/cm0128ti-translate-e.pdf
Council Meeting	26 October 2005	LegCo question: Study on impact on competition of cross-sector businesses of real estate developers (Hansard P.10) http://www.legco.gov.hk/yr05-06/english/counmtg/hansard/cm1026ti-translate-e.pdf

Panel/Committee	Date	Paper
Council Meeting	2 November 2005	LegCo question: Competition Policy Review Committee (Hansard P.82) http://www.legco.gov.hk/yr05-06/english/counmtg/hansard/cm1102ti-translate-e.pdf
Council Meeting	16 November 2005	Motion debate on fair competition law (Hansard P.191) http://www.legco.gov.hk/yr05-06/english/counmtg/hansard/cm1116ti-translate-e.pdf
Council Meeting	3 May 2006	Motion debate on maintaining the competitive edge of Hong Kong (Hansard P.206) http://www.legco.gov.hk/yr05-06/english/counmtg/hansard/cm0503ti-translate-e.pdf
Economic Services Panel (ES Panel)	24 April 2006	<p>Administration's report on findings of a consultancy study on the local auto-fuel retail market (LC Paper No. CB(1)1303/05-06(03)) http://www.legco.gov.hk/yr05-06/english/panels/es/papers/es0424cb1-1303-3e.pdf</p> <p>Presentation materials on study of the Hong Kong auto-fuel retail market (LC Paper No. CB(1)1340/05-06(01)) http://www.legco.gov.hk/yr05-06/english/panels/es/papers/es0424cb1-1340-1e.pdf</p> <p>Background brief on the auto-fuel retail market (LC Paper No. CB(1)1312/05-06) http://www.legco.gov.hk/yr05-06/english/panels/es/papers/es0424cb1-1312-e.pdf</p> <p>Minutes of the meeting (LC Paper No. CB(1)1496/05-06) http://www.legco.gov.hk/yr05-06/english/panels/es/minutes/es060424.pdf</p>
ES Panel	19 July 2006	Administration's report on the Competition Policy Review Committee (with Annex on "Report on the review of Hong Kong's competition policy") (LC Paper No. CB(1)1923/05-06(01)) http://www.legco.gov.hk/yr05-06/english/panels/es/papers/es0719cb1-1923-1e.pdf

Panel/Committee	Date	Paper
		<p>Presentation materials on review of competition policy (LC Paper No. CB(1)2036/05-06(01)) http://www.legco.gov.hk/yr05-06/chinese/panels/es/papers/es0719cb1-2036-1-ce.pdf</p> <p>Submission from the Chinese Manufacturers' Association (LC Paper No. CB(1)1986/05-06(01)) http://www.legco.gov.hk/yr05-06/chinese/panels/es/papers/es0719cb1-1986-1-ce.pdf</p> <p>Minutes of the meeting (LC Paper No. CB(1)2220/05-06) http://www.legco.gov.hk/yr05-06/english/panels/es/minutes/es060719.pdf</p>
Council Meeting	25 October 2006	<p>LegCo question: Regulation of pump prices (Hansard P.27) http://www.legco.gov.hk/yr06-07/chinese/counmtg/floor/cm1025-confirm-ec.pdf</p>
ES Panel	21 December 2006	<p>Administration's paper on public consultation on competition policy (LC Paper No. CB(1)519/06-07(01)) http://www.legco.gov.hk/yr06-07/english/panels/es/papers/es1221cb1-519-1-e.pdf</p> <p>Legislative Council Brief on public consultation on competition policy with the public consultation document and the Report on the review of Hong Kong's competition policy (EDB CR2/3231/2006) http://www.legco.gov.hk/yr06-07/english/panels/es/papers/es1221-edbcr232312006-e.pdf</p> <p>Background brief on competition policy in Hong Kong (LC Paper No. CB(1)530/06-07(05)) http://www.legco.gov.hk/yr06-07/english/panels/es/papers/es1221cb1-530-5-e.pdf</p> <p>Minutes of the meeting (LC Paper No. CB(1)992/06-07) http://www.legco.gov.hk/yr06-07/english/panels/es/minutes/es061221.pdf</p>

Panel/Committee	Date	Paper
ES Panel	26 March 2007	<p>Administration's paper on the way forward for competition policy (LC Paper No. CB(1)1178/06-07(01)) http://www.legco.gov.hk/yr06-07/english/panels/es/papers/es0326cb1-1178-1-e.pdf</p> <p>Submission from The Chinese General Chamber of Commerce (Chinese version only) (LC Paper No. CB(1)1215/06-07(01)) http://www.legco.gov.hk/yr06-07/chinese/panels/es/papers/es0326cb1-1215-1-c.pdf</p> <p>Joint submission from The Chinese Manufacturers' Association of Hong Kong and Federation of Hong Kong Industries (Chinese version only) (LC Paper No. CB(1)1215/06-07(02)) http://www.legco.gov.hk/yr06-07/chinese/panels/es/papers/es0326cb1-1215-2-c.pdf</p> <p>Minutes of the meeting (LC Paper No. CB(1)1678/06-07) http://www.legco.gov.hk/yr06-07/english/panels/es/minutes/es070326.pdf</p>
-	5 June 2007	<p>Press release on consultant to provide expert services in relation to preparation of competition law for HK http://www.info.gov.hk/gia/general/200706/05/P200706050200.htm</p>
Council Meeting	4 July 2007	<p>LegCo question: Owners stipulating bundled lease terms (Hansard P.76, Floor version) http://www.legco.gov.hk/yr06-07/chinese/counmtg/floor/cm0704-confirm-ec.pdf</p>
Panel on Economic Development	22 October 2007	<p>Administration's paper on Policy Agenda of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau (LC Paper No. CB(1)43/07-08(02)) http://www.legco.gov.hk/yr07-08/english/panels/es/papers/edev1022cb1-43-2-e.pdf</p> <p>The 2007-08 Policy Address – A new direction for Hong Kong http://www.legco.gov.hk/yr07-08/english/panels/0708speech_e.pdf</p>

Panel/Committee	Date	Paper
		<p>The 2007-08 Policy Address – "Policy Agenda" http://www.legco.gov.hk/yr07-08/english/panels/0708agenda_e.pdf</p> <p>Minutes of the meeting (LC Paper No. CB(1)458/07-08) http://www.legco.gov.hk/yr07-08/english/panels/es/minutes/ev071022.pdf</p>

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2 May 2008