

**For information on
16 December 2008**

LEGISLATIVE COUNCIL PANEL ON ECONOMIC DEVELOPMENT

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

Purpose

This paper briefs Members on the outcome of the recent public consultation exercise on the detailed proposals for a competition law.

Background

2. In June 2006, the Competition Policy Review Committee (CPRC) recommended that the Government introduce a cross-sector competition law to be enforced by an independent Competition Commission. In November 2006, the Government issued a public discussion document to gauge the community's views on the way forward for Hong Kong's competition policy. Feedback from the public indicated a high level of support for the introduction of a cross-sector competition law, although concerns were expressed by some stakeholders in the business sector that a competition law might have an adverse effect on business, especially small and medium-sized enterprises (SMEs).

3. With a view to addressing these concerns, in May 2008 we launched a three-month public consultation on the proposed key elements that would form the basis for the competition law, such as the regulatory structure; conduct to be prohibited; penalties that would apply for infringing the law; and criteria and mechanisms for granting exemptions and exclusions from the application of the law. The consultation period ended on 5 August 2008.

Outcome of public consultation

4. In response to the consultation exercise we received more than 170 written submissions. We have assessed the views received and compiled

a report on the feedback, which has been published on the website of the Commerce and Economic Development Bureau (CEDB).

5. The response to this exercise and our discussions with stakeholders show that there is still broad support in the community for the introduction of a competition law. However, respondents raised concerns regarding certain specific proposals. The most commonly cited areas of concern were as follows –

- (a) *Institutional arrangements* : The proposal to give the Competition Commission powers to adjudicate on infringements and impose remedies in addition to its investigative role was considered by some respondents to amount to a concentration of too much power in one place;
- (b) *Conduct rules* : Some respondents felt that the proposed general prohibition on anti-competitive conduct could create uncertainty unless it clearly stated what types of conduct might constitute an infringement;
- (c) *Merger regulation*: Respondents' views were diverse. Those who opposed merger regulation argued that this would have a negative impact on the business environment. Others who supported merger regulation argued that this would be a vital component of competition law, without which certain anti-competitive conduct could easily occur; and
- (d) *Exemptions and exclusions*: The proposed non-application of the competition law to the Government and statutory bodies was considered by many to be contrary to the principle of establishing a level playing-field, given that there are areas where the Government and statutory bodies compete with the private sector.

Initial response to public feedback

6. In the light of the feedback received from the public consultation, we will consider where we might modify the original proposals. Our initial views on possible areas for modification are set out in the paragraphs below.

(I) Institutional arrangements – roles of the Competition Commission and Competition Tribunal

7. In addition to the public feedback on the extent of the powers of the Competition Commission, we have had regard to recent judgments made by the Court of Final Appeal (CFA) (in *Koon Wing Yee v Insider Dealing Tribunal and the Financial Secretary*) (“*Koon Wing Yee*”) and the High Court (in *Luk Ka Cheung v Market Misconduct Tribunal*) (“*Luk Ka Cheung*”) respectively. We are considering the implications of these two judgments on the competition law particularly in relation to the roles of the Competition Commission and Competition Tribunal.

(II) Conduct rules – proposed infringements

8. We recognise that certainty is a key concern for the business sector. To improve the clarity of the law, we supplement the general prohibition against anti-competitive conduct with a non-exhaustive list of examples of such conduct and will consider how we might make it a statutory requirement for the Commission to consult members of the community when drawing up its regulatory guidelines. Although the final format of the guidelines will be a matter for the Commission, we plan to table draft guidelines for reference when introducing the Bill into the Legislative Council.

(III) Merger regulation

9. In June 2006, the Competition Policy Review Committee (CPRC) took the view that as Hong Kong’s domestic market is relatively small, a high market concentration is inevitable in many sectors and might even help promote economies of scale. It further recommended that the focus of competition law should be on prohibiting conduct, rather than targeting market structures through the regulation of monopolies and merger activity.

10. In the recent public consultation exercise, views were divided on the issue of whether or not the law should include merger provisions. Given the recommendations of the CPRC and the lack of clear majority support for the inclusion of merger provisions, we consider that the Commission should focus initially on anti-competitive conduct. We would however reconsider

whether there may be a need to add merger provisions after a review of the effect of the new law.

(IV) Exemptions

11. Given the public response to the proposal to exempt government and statutory bodies from the application of the competition law, we have reviewed our earlier proposals. As most government activities are either non-economic in nature or could be described as essential public services, and as such, based on our observation of practice in other jurisdictions, they would in any effect be excluded from the ambit of the competition law. We therefore consider it appropriate in the interests of certainty to stipulate that the law should not apply to government activities. As to statutory bodies, we intend to stipulate that the law does not apply to these bodies *except where otherwise specified*. This would allow us to list in a Schedule to the law the statutory bodies that would *not* benefit from the overall exemption.

Way forward

12. The response to the public consultation exercise drew comments on many other detailed areas of the proposed law – indeed some responses included comment on every proposal in the consultation document. The full report and all the submissions (except where otherwise requested) have been uploaded onto the CEDB website for reference. Whilst the four key issues briefly discussed above were those most frequently commented on by respondents, we are also reviewing other detailed comments received and we will take these into account in the preparation of the Competition Bill.

13. In his 2008-09 Policy Address, when addressing the issue of the Competition Bill the Chief Executive noted that: “We expect to introduce the Bill in the current legislative session.” The timetable for introduction of the Bill is very tight. However, we will continue to work closely with the Department of Justice and a team of independent consultants in order to meet the Chief Executive’s target.

Members’ views

14. We would at this stage welcome Members’ comments on the

issues briefly outlined here, or on other aspects of the proposed competition law arising from the public consultation exercise.

Commerce and Economic Development Bureau
9 December 2008