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Panel on Economic Development Meeting on 16 December 2008

Updated background Brief on the Introduction of a Cross-sector Competition Law in Hong Kong

Purpose

This paper sets out the background and the latest progress on the introduction of a cross-sector competition law in Hong Kong, and summarizes 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 Kong¹. 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 to review competition-related matters. In May 1998, COMPAG promulgated a Statement on Competition Policy, 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". The Statement also indicated that "the Government will take action only when market imperfections or distortions limit market accessibility or market contestability, and impair economic efficiency or free trade, to the detriment of the overall interest of Hong Kong".

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 had substantial policy or systemic implications, and examine the extent to which more competition should be introduced in the public and private sectors.

3. In 2000 and 2001, legislation was enacted to specifically prohibit certain types of anti-competitive conduct and the abuse of a dominant position in the telecommunications and the broadcasting markets respectively. Apart from these two pieces of legislation, 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.

4. To ensure the competition policy would keep pace with time and continue both to serve the public interest and to facilitate a business-friendly environment, COMPAG, in June 2005, appointed a Competition Policy Review Committee (CPRC) to, inter alia, make recommendations on the future direction for competition policy in Hong Kong. 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

5. On 6 November 2006, the Government published the document "Promoting Competition – Maintaining our Economic Drive" for a three-month public consultation to gauge views on the need for Hong Kong to introduce a cross-sector competition law. The result of the consultation revealed that 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 the new law might have on business operations.

6. To allay the concerns of the business sector, the Administration issued on 6 May 2008 a further public consultation paper entitled "Detailed Proposals for a Competition Law" for a three-month consultation. The consultation paper presented the major provisions envisaged to form the basis of the new law and set out a number of proposals to address SMEs' concerns. Highlights of the major provisions of the proposed legislation are in the **Appendix**.

Discussion by the Council and Panels

7. Members have been monitoring the development of competition policy in Hong Kong through raising questions and conducting motion debates at Council meetings in previous years, covering areas such as promotion of fair competition, enactment of a fair competition law, exemptions and exclusion under the proposed competition law, and types of anti-competitive conduct to be covered in the competition law. The details are hyperlinked in the references section.

8. The Panel on Economic Services (ES Panel)³ has all along been concerned about competition-related issues in various sectors of the economy, in particular the auto-fuel markets. 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 possible cartel behaviour of the oil companies, and to enhance competition in the auto-fuel market.

9. 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 cross-sector competition law in Hong Kong, other members were concerned that SMEs might easily fall foul of the new legislation. The latter pointed out that these small market players might be vulnerable to legal actions initiated by large companies accusing them of engaging in anti-competitive conduct with a view to eliminating them from the market. Given that the new competition law might increase compliance cost and hinder the operation of the business sector, Panel members also 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.

10. At the meeting of the Panel on Economic Development (EDEV Panel) on 22 October 2007, 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. These members urged the Administration to step up efforts on publicity and education in this regard. There was also a suggestion that the Administration should make it clear that large companies would be the main target to be regulated by the competition law.

11. The Administration briefed the EDEV Panel on the detailed legislative proposals of the Competition Bill at the meeting on 6 May 2008. Members generally welcomed the Government's initiative in consulting the public on the subject. Some members reiterated concerns of SMEs about excessive litigation from large companies. On the proposal that the Competition Commission would not pursue an agreement if the aggregate market share of the parties to the agreement did not exceed a certain level (i.e. the "de minimis" approach) except where "hard core" conduct was involved, Panel members raised concern that in the absence of a clear definition of "hard core" anti-competitive conduct, the safeguard for SMEs under this proposal was rather limited. There was also concern as to how the new competition law could tackle the problem of abusing

³ The Panel on Economic Services was renamed as the Panel on Economic Development with effect from the 2007-2008 session.

substantial market power by large companies, as they could easily escape from the market share test through manipulating their shareholdings. Concern was expressed on the proposals of vesting power with the Chief Executive-in-Council to exclude activities from the prohibition on anti-competitive conduct and excluding the Government or statutory bodies from the law. There was a suggestion that exemptions and exclusions from the law should be approved by the Legislative Council (LegCo).

Latest development

12. The three-month consultation period on the detailed legislative proposals of the Competition Bill ended on 5 August 2008. The Administration released a report on views collected during the public consultation on 30 September 2008. According to the report, there is general public support for most of the proposals outlined in the consultation paper, and additional proposals have been received. The Administration will brief members of the EDEV Panel on the outcome of consultation at the meeting to be held on 16 December 2008. The Government will work towards the target of introducing a Competition Bill into LegCo in the 2008-2009 legislative session.

References

13. A list of relevant papers with their hyperlinks can be found from:
http://www.legco.gov.hk/database/english/data_es/es-competition-policy.htm

Council Business Division 1
Legislative Council Secretariat
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Highlights of the major proposals for a Competition Law

(Extracts from the public consultation paper on
"Detailed Proposals for a Competition Law",
issued by the Commerce and Economic Development Bureau in May 2008)

- (a) An independent Competition Commission (the 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 3);
- (b) 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 5);
- (c) 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 9);
- (d) A Competition Tribunal (the 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 (Proposal 16);
- (e) There should be a general prohibition on agreements and concerted practices that have the purpose or effect of substantially lessening competition (Proposal 24);
- (f) 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 25);
- (g) 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 (Proposal 29);
- (h) Any person who has suffered loss or damage from a breach of the Ordinance should have the right to bring private proceedings seeking damages (Proposal 34);

- (i) 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 37);
- (j) With the permission of the Tribunal, representative actions, such as on behalf of consumers or Small and medium-sized enterprises, should be permitted (Proposal 40);
- (k) 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 ((Proposal 43);
- (l) 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 (Proposal 46);
- (m) 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 (Proposal 48);
- (n) The Chief Executive-in-Council may exclude from the prohibition on anti-competitive conduct if he considers that there are sound reasons of public policy for so doing (Proposal 49);
- (o) 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 (Proposal 50).
- (p) On merger regulation, three options on the way forward are set out for views and comments (P.29 to 30):
 - (i) to introduce merger provisions that would be suitable in the Hong Kong context, e.g. provisions similar to those in the Telecommunications Ordinance, whereby the Commission would only investigate a completed merger if it considered that serious competition concerns were raised;
 - (ii) to introduce merger provisions as broadly as 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
 - (iii) not to include merger provisions in the Bill initially, but rather to reconsider whether there might be a need to add them only after a review of the effect of the new law.