

Proposed research outline

Competition policy in selected countries

1. Background

1.1 In the 1990s, the Government started conducting research on competition policy and considering whether Hong Kong should enact any competition law for maximizing the benefits of the society. 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 to enhance economic efficiency and free flow of trade, thereby benefiting consumer welfare, with the Government taking action only when market imperfections or distortions limited market accessibility or market contestability, and impaired economic efficiency or free trade, to the detriment of the overall interest of Hong Kong.

1.2 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 remain no statutory procedures that the Government can take to reign in businesses engaging in restrictive practices in other sectors of the economy.

1.3 To ensure that the competition policy would keep pace with time, serve the public interest and 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.

¹ CC completed six sectoral studies on the banking, supermarket, 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 to examine the extent to which more competition should be introduced in the public and private sectors.

1.4 In 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 and a stronger regulatory environment for competition. Nonetheless, there were some concerns in the business sector about the possible effect that the new law might have on business operations.

1.5 To allay the concerns of the business sector, the Government issued in May 2008 a 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.

1.6 The Government released a report on views collected during the public consultation in September 2008. According to the consultation findings, there remained broad support in the community for the introduction of a competition law. On the other hand, some respondents raised concerns regarding certain specific proposals. In the light of the feedback received from the public consultation, the Government considered making some modifications to the original proposals, particularly relating to the institutional framework and the exemptions provisions in the Competition Bill. Based on the current schedule, the Government intends to introduce the Competition Bill into the Legislative Council in the 2009-2010 legislative session.

1.7 Against the above background, at its meeting on 15 October 2009, the Panel on Economic Development (Panel) requested the Research and Library Services Division (RLSD) to conduct a research study on competition policy in selected places to facilitate discussion on the topic by the Panel and the relevant bills committee to be formed.

2. Proposed places to be studied

2.1 RLSD proposes to conduct a research study on competition policy in the United States (US), the United Kingdom (UK) and Singapore. Both the US and UK, with a long history of enforcing competition laws, have served as references to other places when they set up their own regulatory framework. Meanwhile, Singapore enacted its competition law as recently as 2004 and its implementation was in phases to allow time for the Singaporean government and businesses to prepare for the enforcement of the law. In view of the distinctive features exhibited in the implementation of competition policy in these three places, their experience will be useful to Hong Kong.

The United States

2.2 In the US, the federal government enacted the *Sherman Antitrust Act* in 1890 to oppose the combination of entities that could potentially harm competition, such as monopolies or cartels.³ In 1914, the federal government enacted two important pieces of legislation, which were:

- (a) the *Clayton Antitrust Act* to strengthen the US antitrust law regime by preventing anti-competitive practices in their incipency. It addressed specific anti-competitive practices such as price discrimination, mergers and acquisitions, prohibited a person of serving as a director of two or more corporations, and empowered private parties injured by violations of the Act to sue for damages.
- (b) the *Federal Trade Commission Act* for establishing the Federal Trade Commission, an independent agency of the federal government, to enforce the Act and perform functions such as carrying out investigations, enforcement actions, and consumer and business education. Under the Act, the Federal Trade Commission shares enforcement of antitrust laws with the Department of Justice.⁴ While the Federal Trade Commission is responsible for civil enforcement of antitrust laws, the Antitrust Division of the Department of Justice has the power to bring both civil and criminal action in antitrust matters.

³ In 1879, the Standard Oil Company of Ohio devised a new type of trust agreements to overcome prohibitions against corporations owning stock in other corporations in Ohio. At the time, a trust was a form of a contract whereby one party entrusted their property to a second party. The property was used to benefit the first party. In a corporate trust, the corporation assigned its stock to a board of trustees. The trust then issued trust certificates to the stockholders. The stockholders received the financial benefits, while the board of trustees maintained operational control. By consolidating control of most companies in an industry under one controlling board, the industry would essentially be monopolized. Hence, in the US, "competition law" is more commonly known as "antitrust law".

⁴ The Federal Trade Commission devotes most of its resources to certain segments of the economy, including those where consumer spending is high: health care, pharmaceuticals, professional services, food, energy, and company technology and internet services; whereas the Department of Justice focuses on major industries such as telecommunications, banking, railroads and airlines.

2.3 The *Hart-Scott-Rodino Antitrust Improvements Act*, enacted to amend the *Clayton Antitrust Act* in 1976, has served as the primary framework for competition laws. In particular, the Act provides that before certain mergers, tender offers or other acquisition transactions can close, both parties must file a "Notification and Report Form" with both the Federal Trade Commission and the Antitrust Division of the Department of Justice, providing a detailed description of the proposed transaction and the parties involved. Upon the filing, there is an ensuing 30-day waiting period. It is unlawful to close the transaction during the waiting period.

2.4 Under the current framework for enforcing the competition laws, in the case of criminal sanctions, the roles of the enforcement agency and adjudicator are separate, with the competition regulator investigating possible anti-competitive conduct, and then where appropriate, putting the evidence before the court for a judgement. The penalties of violating the competition laws may be civil or criminal, and all appeals are dealt with by the court.

The United Kingdom

2.5 In the UK, the Office of Fair Trading, a non-ministerial government department established in 1973 under the *Fair Trading Act*, has its mandate to ensure that businesses are in open, fair and vigorous competition with each other for the benefits of companies, customers and the economy. Subsequently, the *Enterprise Act* enacted in 2002 has introduced a new regime primarily for the assessment of mergers. The Competition Commission, an independent public body set up under the *Enterprise Act*, is empowered to investigate and address issues of concern in three areas:

- (a) In mergers – when the larger company may gain a more than 25% market share and where a merger appears likely to lead to a substantial lessening of competition in one or more markets in the UK;
- (b) In markets – when it appears that competition may be being prevented, distorted or restricted in a particular market; and
- (c) In sectors – where some aspects of the regulatory system may not be operating effectively or when certain categories of dispute between regulators and regulated companies need to be addressed.

2.6 Most of the Competition Commission's inquiries involve cases referred to it by the Office of Fair Trading. After the investigations, the Competition Commission is authorized to direct companies to take certain actions to improve competition.

2.7 The Office of Fair Trading determines civil cases while the court handles criminal prosecutions. A civil penalty of a fine up to 10% of annual turnover for up to three years may be imposed on businesses which violate the competition laws, whereas a prison term of up to five years may be imposed for criminal offences. Appeals against the decisions are handled by the Competition Appeal Tribunal, a specialist judicial body. Further appeals should be directed to the Court of Appeal.

Singapore

2.8 Singapore enacted the *Competition Act* in November 2004 to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of the economy. A phased approach was adopted for the implementation of the Act. The main phases are:

- (a) Phase 1: the provisions establishing the Competition Commission of Singapore in January 2005;
- (b) Phase 2: the provisions on anti-competitive agreements and behaviours, and abuse of dominance effective in January 2006; and
- (c) Phase 3: the remaining provisions pertaining to mergers and acquisitions enforced in July 2007.

2.9 Singapore adopts a model that resembles a single authority with power to both investigate and adjudicate. The Competition Commission of Singapore, established under the *Competition Act*, is empowered to investigate and adjudicate anti-competitive activities. It also has the powers to impose sanctions. Businesses infringing the competition law are subject to a civil penalty only, with a fine of up to 10% of annual turnover for three years. An appeal against the decision of the Competition Commission of Singapore can be made to the Competition Appeal Board, an independent body comprising members appointed by the Minister for Trade and Industry. Further appeals are through the court.

3. Proposed scope of the research

3.1 The research covers the following aspects:

- (a) background leading to the introduction of the competition legislation and the problems it aims to deal with;
- (b) problems encountered during enforcement and legislative amendments, if any, to evaluate the effectiveness of the laws;
- (c) institutional arrangement for enforcing the competition legislation, covering missions, functions and duties, organization structure, appointment, funding and accountability arrangements;
- (d) types of conduct that are considered as anti-competitive acts;
- (e) exemptions and exclusions of anti-competitive acts, and their grounds;
- (f) types of offences – civil and/or criminal – held for infringement of the conduct rules;
- (g) procedures of initiating action against anti-competitive practices and appeal; and
- (h) enforcement mechanism and penalties.

4. Proposed completion date

4.1 RLSD proposes to complete the research by February 2010.

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