

**For discussion
on 21 December 2006**

**Legislative Council Panel on Economic Services
Public Consultation on Competition Policy**

Purpose

This paper briefs Members on the key issues set out in the public discussion document on the way forward for competition policy in Hong Kong and seeks their views.

Background

2. In June 2005, the Competition Policy Advisory Group (COMPAG) appointed the Competition Policy Review Committee (CPRC) to review Hong Kong's competition policy. We briefed this Panel on the CPRC's findings in July this year. After considering the recommendations of the CPRC and taking into account views expressed at the Panel meeting in July, we drafted a public discussion document, which we issued on 6 November to launch a three-month period of public consultation.

Public Discussion Document

3. The discussion document sets out the main areas for consideration when determining the direction for Hong Kong's policy, and seeks the views of the public on a number of key questions. The following major issues are among those highlighted in the document.

(a) The need for a new competition law

4. Having reviewed the CPRC report, we note that the introduction of a general competition law in Hong Kong could have the following benefits -

- (i) it would allow us to implement more effectively the current competition policy by providing a legal basis for the investigation and sanctioning of anti-competitive conduct. While the guidelines issued by the COMPAG in 2003 set out the types of conduct that we regard as anti-competitive, there is currently no legal mechanism to support

the effective enforcement of these guidelines. Collection of evidence, for example, is often difficult;

- (ii) it would strengthen our institutional framework for regulating competition, thereby promoting market discipline in Hong Kong;
- (iii) it would promote a level playing-field for business in Hong Kong by barring conduct that upsets the normal processes of competitive markets; and
- (iv) without such a regulatory regime, in the long term there might be an adverse effect on our relative competitiveness, especially in sectors with high entry barriers.

5. The CPRC report noted that any new competition law should be consistent with the existing policy on competition, which is to enhance economic efficiency and the free flow of trade, thereby also benefiting consumers. The discussion document further notes that if there is to be a new competition law, it should not create a significant additional burden on local business nor encourage interference with normal business practices or economically efficient market structures.

(b) Scope of competition law: cross-sector or sector specific

6. Considerations with regard to whether a new law should be cross-sector or sector specific are set out in the document. It is noted that there is a view that any new competition law should target only those sectors of the economy where anti-competitive conduct is suspected to be taking place. This would arguably be consistent with the current sector-specific approach to legislation. However, another viewpoint is that it would be both discriminatory and, in practice, logistically difficult to limit the application of the law to certain sectors. It is argued that, whilst competition *law* in Hong Kong is currently specific to the broadcasting and telecommunications sectors, the existing competition *policy* applies equally to all sectors.

(c) Types of conduct to be regulated

7. Arguments for and against the inclusion of merger and acquisition (M&A) control in any new competition law are set out in the document. The CPRC recommended that competition law should focus initially on regulating

“cartel”-type anti-competitive conduct and the abuse of market dominance. The document notes that, although provisions regulating M&A are common in competition law elsewhere in the world, there is at present relatively little large-scale M&A activity in Hong Kong. From the point of view of regulatory resources, it might be more effective initially to concentrate on behaviour that is more likely to be prevalent in Hong Kong.

(d) Institutional framework

8. In the discussion document, we set out three main options for an institutional model for competition regulation in Hong Kong, namely –

- (i) Option One: A single authority with the power to investigate and adjudicate on cases of anti-competitive conduct
- (ii) Option Two: An authority with the power to investigate cases and bring these before the courts for adjudication
- (iii) Option Three: Similar to Option Two, but with a specialist tribunal rather than the courts responsible for adjudication.

Many overseas regulators have the power both to investigate and to sanction anti-competitive conduct, with parties having the right of appeal to the courts or to a specialist tribunal. A similar approach is also adopted under the competition provisions in local broadcasting and telecommunications laws. Alternatively, having the regulator investigate possible infringements, but leaving the power to adjudicate and determine sanctions to the courts or a specialist tribunal, could provide for a high degree of checks and balances.

(e) Other issues

9. The discussion document also covers a number of issues related to procedure and enforcement, several of which were raised by Members during the discussion at the July panel meeting. These include –

- (i) the threshold that should be met before the regulatory authority may invoke its formal powers of investigation, in order to help minimise frivolous, malicious or trivial complaints;

- (ii) how best the regulatory authority may protect the confidentiality of information;
- (iii) the interface between the new competition regulator and existing sector specific regulators; and
- (iv) whether anti-competitive conduct should be punishable only by civil sanctions or should also have criminal consequences.

10. At the July panel meeting, some Members expressed concerns as to the possible impact of competition law on small and medium-sized enterprises (SMEs). The discussion document notes that, according to overseas experience, SMEs are not targeted by competition regulators. On the contrary, they may stand to gain from the introduction of competition law, given that the potential of larger firms to engage in abuse of dominance or other anti-competitive practice would be checked by such a law. The document also notes that institutional arrangements can be drawn up to minimise compliance costs for SMEs in appropriate circumstances.

Way Forward

11. The public consultation period will last for three months. We shall collect and analyse views expressed by stakeholders during the discussion process, following which we shall compile a report on the feedback. We shall brief Members on the outcome of the consultation exercise and proposals for a way forward with this issue in due course.

Economic Development and Labour Bureau
14 December 2006