CDI
Community Development Initiative
社區發展動力培育

The Key to Perfecting Competition Legislation

Creating a Favourable Business Environment and Protecting Consumer Interests

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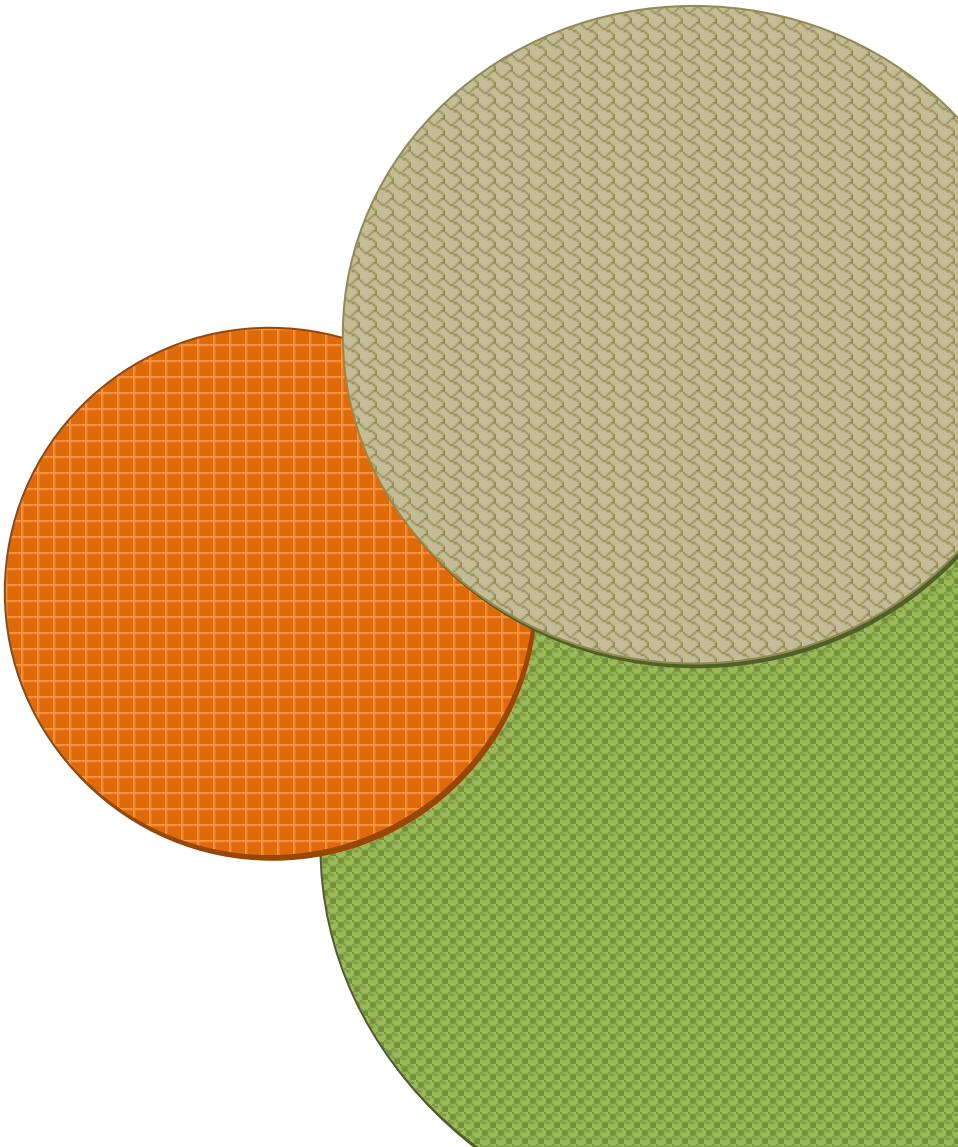

The key to perfecting competition legislation – Creating a favourable business environment and protecting consumer interests

Executive Summary

Since the first reading and debate in the Legislative Council (LegCo) in 2010, lawmaking process of the competition bill has come to the crucial moment. The government has been putting on efforts advocating sustainable competition so as to enhance economic efficiency and free trade through the practice of competition law. Nonetheless, business communities challenge the effectiveness of the law. Together with the fear of intervening free trade principle, the intention to abandon the bill is seemingly obvious.

Community Development Initiative (CDI) believes that consumers can be benefited from the passage of competition law. In principle, the law can promote economic efficiency and protect fair competing environment of the market under various regulatory measures. Therefore, CDI intends to discover deficiencies of the present bill and put forward with recommendations in detail, facilitating in-depth discussions among different stakeholders. It is hoped that efforts above would be able to generate conciliations between the executives and the business communities hence the bill can be passed in accordance with the proposed legislation schedule.

In the research report, CDI has attempted to recommend amendments of the bill in the following respects:

1. For the concerns of the ambiguity definition of "undertakings", the report has quoted examples from western countries to elaborate so. It further points out that the definition in the existing bill is sufficient. Should there be amendments in future, it can be proposed by the Competition Commission.

2. For the issue of exemption of government departments and statutory bodies, the existing Competition Bill states that all departments will be exempted and the government will proposed a list of the exempted statutory bodies which to be passed in the LegCo. The report has referenced from verdicts from the European Union and concluded that it is unnecessary to grant exemptions for all government departments in the legislation stage. Should there be complaints being filed, the Competition Commission should initiate investigations of the departments being reported. For the statutory bodies, economic behaviors competing with private sector should not be exempted if the activities engaged are not endorsed by the ordinance, such as the exhibition industry run by HKTDC or consultant and training services conducted by Productivity Council. Such recommendation is on for the sake of avoiding monopoly of the market by statutory bodies with their advantages from bloc exemptions. In addition, CDI further suggests that exemptions of statutory bodies should be approved by Competition Commission instead of the LegCo so as

to ensure decisions were made and judged through professional procedures from economic and legal perspectives, instead of the political outcome from the legislature.

3. The existing bill does not set the threshold of market share to be considered as "market dominance". Critics have replied that undertakings can be fallen into the trap of competition law easily without clear-cut references. CDI proposes that the bill can refer to standards set by the European Union and the UK as at 40%. When the threshold of certain undertaking exceeds this ratio, it will be deemed as holding dominant power of certain market.

4. To mitigate concerns from the small &medium-sized enterprises, CDI recommends "Deminimis Approach", the common practices from the western countries, to be injected into the bill. If the sum of market shares of the concerned parties do not exceed a certain proportion, or the total sales volume of the concerned parties does not exceed a certain amount, the enforcement institution will not investigate these agreements or concerned practices. CDI suggests the sum of the market shares of the concerned parties can be set at 20%.

5. Business communities believe that 10% of the global turnover within the year of offences is a comparatively strict penalty rule. Moreover, oversea divisions of the large scaled enterprises have already registered as separate entities. Therefore, the expected deterrent effect might not be significant. CDI recommends the penalty amount can be adjusted to "10% of the turnover of related business". In further, the government should consider proportional penalty imposed to the violated undertakings if there are no obvious improvements and the anti-competitive behaviors still prevail.

6. Finally, the mechanism of "class action" in the bill should be added under current legislation. In details, the affected public can sue the large scaled enterprises as the aggregation of the plaintiffs. The existing bill allows independent litigation but the ordinary public does not likely to hold such abilities to sue the large scaled enterprises with limited capital. Class action is an alternative for the aggregation of the affected public to sue the enterprise within their affordability. It is hoped that enterprises can reflect their roles of social responsibilities throughout the process of litigation.

INTRODUCTION

Cross-sector competition legislation has been in place in the United States of America and the European Union for a number of years and they have been perfected over time. Singapore and Taiwan also have competition laws in place. Here in Hong Kong, the colonial government commissioned the Consumer Council to undertake a study on competition in Hong Kong. This resulted in a report published by the Council in November 1996[1], which recommended the adoption of a comprehensive competition policy and enactment of a general competition law in Hong Kong in order to promote fairness and to discourage anti-competitive practices.

Many years passed after that recommendation, with no competition laws in place in Hong Kong. The only "substitute" in place was the Competition Policy Advisory Group (COMPAG), which promulgated a statement on Competition Policy in 1998 and released another report in 2003 on maintaining a competitive environment and tackling anti-competitive practices. However, these two documents had no binding effect on companies to prevent anti-competitive behavior, nor did COMPAG's guidelines amount to mandatory provisions which applicable to relevant government departments. Despite the lack of statutory procedures to regulate restrictive practices in the economy as a whole, there were in fact laws which were 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. Since those rules came into play, it led to fair competition in the telecommunications sector, a more open market, and more choice for customers. In this instance, the promotion of competition became a means to enhance economic efficiency and promote free trade, which in tern benefits consumers[2].

Formulating a comprehensive competition law is crucial not only for businesses in terms of providing a more favourable economic environment but also for consumers, who will reap the benefits from greater competition. In his 2005 Policy Address, Chief Executive Donald Tsang announced that his government appointed a Competition Policy Review Committee in June that same year to look into the city's competition policy and to make recommendations on the future direction for competition policy in Hong Kong. Two consultation exercises on the introduction of a cross-sector competition law were conducted by the government in November 2006 and May 2008. Members of the public expressed general support for having competition laws in Hong Kong. The Competition Bill was subsequently introduced into the Legislative Council in July 2010.

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[1] Consumer Council, Competition policy: The Key to Hong Kong's Future Economic Success, November 1996, http://www.consumer.org.hk/website/ws_en/competition_issues/competition_studies/1996fairtrade.html

[2] Competition Policy Advisory Group, Statement on Competition Policy, May 1998, http://www.compag.gov.hk/cgi-bin/compag/frame.cgi

Various members of the business sector, especially SMEs and their representative bodies, voiced opposition against the implementation of competition law, arguing it would hinder the development of the free market. CDI believes the contrary – Competition law is designed to enhance competitiveness, not diminish it, thereby bringing the benefits of greater competition to markets within Hong Kong where anti-competitive practices undermine the competitive process. Monopolies and reduced competition ultimately lead to market failure. The emergence of a cross-sector competition law will not affect or interfere with the operation of a free market. Research scholars have pointed out that competition law ensures competition and successful market behavior.[3]

The government's current Competition Bill prohibits three major areas of anti-competitive conduct, including the first conduct rule which covers anti-competitive agreements, concerted practices and decision; the second cud of conduct rule covers the abuse of a substantial degree of market power in a market. There is also a prohibition against mergers or acquisitions applying only to carrier licenses granted by the Telecommunications Authority, which are likely to have the effect of substantially lessening competition in Hong Kong. The Competition Bill has entered the second reading stage, but the current draft of the Bill fails to meet the expectations of the business community and SMEs. CDI understands the direction in which the government is aiming for when it comes to implementing competition legislation, but we believe there is room for improvement on the Competition Bill. We also believe our proposed changes may allow the bill to be passed by a majority in the Legislature. Throughout our report, CDI aims to expose loopholes in the current bill and to make suggestions for its improvement. These suggestions will be supported by examples of experiences in foreign countries that have competition laws in place.

[3] Slot and Johnston, 2006, p4

PART 1 – DEFINITION OF "UNDERTAKING"

Part 1, Section 2 of the Competition Bill defines an undertaking as any entity, regardless of its legal status or the way in which it is finance, engaged in economic activity and includes a natural person engaged in economic activity. In order for the public to gauge a clearer understanding of an "entity engaged in economic activity", our think-tank will try to use overseas cases as examples to specify the nature of an undertaking.

The Treaty establishing the European Community (the EC Treaty) does not offer a definition for "undertaking" – it only stresses a "natural or legal person" that is engaged in economic activity. Over the years, this has come to include companies, partnerships, professional groups engaged in economic activities, trade associations/chambers of commerce, and agricultural cooperatives. This shows that the European Union's definition of "undertaking" does not focus on their nature or legal status per se, but rather if they are engaged in any commercial activity that involves offering goods and services on the market.

CASE 1 – EUROPEAN COMMISSION DECISION ON 1990 WORLD CUP TOURNAMENT (1994)[4]

The International Football Association (FIFA) appointed the Italian Football Federation (FIGC) as the organizer of the 1990 World Cup. FIFA and FIGC agreed to set up a local organizing committee, which would be responsible for the technical and logistical arrangements of the 1990 World Cup in Italy. The local organizing committee chose two travel agencies for the purpose of marketing package tours to the World Cup. Other than these two agencies, which were given exclusive rights to these package tours for the World Cup, tickets were also available through national football associations, European football associations, official sponsors and Banca Nazionale del Lavoro (an Italian bank). No other travel agencies were allowed to distribute package tours to the World Cup. This prompted a tour group to lodge a complaint with the European Commission, arguing that such conduct breached EU Competition Law within the meaning of Article 81(1) of the EC Treaty.

The European Commission came to the conclusion that although the World Cup is indisputably a major sporting event, it also involves activities of an economic nature, notably as regards the sale of 2,700,000 tickets for football matches – more than 20% of which were included in the package tours, the commercial exploitation of FIFA emblems, the World Cup mascot and the conclusion of television broadcasting contracts. It also found that FIFA may be a federation of sports associations and carries out sports activities, but it also carries out activities of an economic nature as well, such as determining advertising contracts and the conclusion of contracts relating to television broadcasting rights. In the case of the 1990 World Cup, the sale

[4] Distribution of Package Tours during the 1990 World Cup [1992] OJ L326/31 [1994]5 CMLR 253, EC Competition Law, p90-92, 2001

of advertising and television broadcasting rights accounted for some 65% of total World Cup revenue.

As the organizer of the 1990 World Cup, FIGC had the task of ensuring that everything was in order, from supplying enough car parking spaces to providing press facilities. For the purpose of financing such expenditures, the FIGC also had a share in net profits and it was allowed to exploit commercially the 1990 World Cup emblem. Therefore the FIGC was also found to have carried out activities of an economic nature in accordance with the EC Treaty's definition. The Commission held that FIFA, FIGC and the local organizing committee for the World Cup were all found to have been involved in activities of an economic nature and these were "undertakings".

CASE 2: EUROPEAN COMMISSION'S RULING ON FENIN (2003)[5]

FENIN is an association of businesses that market medical goods and equipment used in hospitals run by the Spanish National Health System (SNS). FENIN felt that the SNS enjoyed a dominant position and used it to their advantage, thereby prompting FENIN to lodge a complaint with the European Commission. The Commission rejected FENIN's complaint on the basis that the organisations in question were not undertakings in the meaning understood in EU competition law, so therefore SNS could not be subject to EU competition law.

Case 3 ： UK Competition Appeal Tribunal ruling on Bettercare Group Ltd (2002)[6]

The Bettercare Group complained that the North and West Belfast Health and Social Services Trust was abusing its dominant position by purchasing services at an excessively low price. Trusts are organizations that are part of the National Health Service (NHS) in each of the four nations of the United Kingdom. They purchase – and in some cases provide – primary health care and residential care services for patients within a defined geographical area. The North and West Trust provides residential care, and also contracts with the Bettercare Group to supply additional services. Thus, residents were offered a choice between publicly and privately provided services. It was this dual payer–provider function, creating competition between public and private facilities that tipped the analysis towards the trust acting as an undertaking.

The director general of fair trading, who is responsible for policing competition rules in the United Kingdom, rejected Bettercare's complaint. He ruled that competition rules did not apply in this case because North and West's provision of social services was not an economic activity. BetterCare, however, appealed against this ruling on the grounds, among others, that the European Court of Justice, which

[5] Case T-319/99, [2003] ECR II-357, Cases & Materials on UK &EC Competition Law, p194-195, 2009
[6] BetterCare Group v. Director General of Fair Trading: [2002] CAT 7 (CCAT), EC and UK Competition Law, p101-103, 2004

interprets European competition law, defines purchasing care as an economic activity, not one of the welfare state. On appeal, the Competition Appeal Tribunal (CAT) found that the Trust was an undertaking engaged in economic activities by providing services in the market, and sent the case back to the Office of Fair Trade (OFT) to rule on the merits of the case.

CDI is of the view that the Hong Kong government's proposed definition of "undertaking" is acceptable. We can learn from experience in foreign countries that "undertaking" as mentioned in competition legislation should be determined by whether commercial activities have taken place rather than the nature of the entity per se. If authorities need to issue a further explanation of "undertakings" or business entities, we believe it would be best for the Competition Commission to devise a definition and have this put forward for discussion in the Legislative Council in the form of a legislative amendment.

PART 2: NON-APPLICATION OF COMPETITION BILL TO STATUTORY BODIES

Schedule 1 of the Competition Bill lists the exemptions and exclusions from conduct rules. The bill proposes to provide that the first conduct rule will not apply to any agreement that enhances or would be likely to enhance overall economic efficiency. Also, any agreement to the extent that it is made to comply with a legal requirement, or any undertaking entrusted by the Hong Kong government with the operation of services may also be exempt from the Competition Bill. In relation to how this bill will apply to the government, it proposes not to apply the competition rules of the Bill to statutory bodies, as the activities of the public sector are almost invariably non-economic in nature. However, the bill may apply to those statutory bodies or their activities specified in regulations to be made after the commencement of the relevant empowering provisions in the Bill. The government will draw up a list of the functions of statutory bodies and present it to the Legislative Council. In other words, whether or not a statutory body becomes exempt from the bill will depend on the legislature.

Community Development Initiative believes that there are some government departments and statutory bodies which are engaged in economic activities and at times compete with the private sector as well, so strictly speaking, they can be considered as an entity engaged in economic activity. The most obvious examples of this are Hong Kong Post, Hong Kong Productivity Council and Hong Kong Trade Development Council.

The **Hong Kong Trade Development Council** is a statutory body established in 1966 and is responsible for promoting Hong Kong businesses overseas. It also provides support to Hong Kong's traders, manufacturers, service providers as well as Small and Medium-sized enterprises (SMEs). Its promotion of Hong Kong trade has amounted to a significant contribution towards the economy, and there is no doubt this should be exempt from the Competition Bill as this sort of promotion work does not fall within the definition of an undertaking of an economic nature. However, apart from promoting Hong Kong businesses to the world and assisting the development of Hong Kong's SMEs, the TDC also has another role to play, which is the organization of trade fairs and exhibitions. This amounts to an undertaking involved in economic activity - would this be in contravention of the Competition Bill, or will the TDC as a statutory body be completely exempted from the bill?

The Hong Kong Convention and Exhibition Centre (HKCEC) opened in 1988, with the aim of providing a different venue for major exhibitions. It is owned by the Hong Kong Trade Development Council and the Hong Kong government. The TDC is entrusted by the government to be responsible for the Centre's management and it has contracted with the Hong Kong and Convention Exhibition Centre (Management) Limited for management and operational aspects of the centre, including administrative duties, marketing, leasing of premises and co-ordination of human resources and manpower.

A study carried out by the Chinese University of Hong Kong and BMT Asia Pacific in October 2009 found that throughout the year 2008, the TDC organized 31 trade expos[7]. That is the equivalent of 38% of market share in trade events. The Hong Kong Convention and Exhibition Centre rented out gross exhibition space of 733,750 square metres – a 45% share in gross market space for trade exhibitions. In 2008, HKTDC held 93% of its trade fairs in the Convention and Exhibition Centre and only 7% of its events were held at the Asia World Expo. It seems that since TDC co-owns the HKCEC, it prefers to have exhibitions held there, especially during the peak season of trade fairs. This represents a vertical market structure.

Under the laws of Hong Kong, section 4 of the Trade Development Council Ordinance (Cap. 1114) states that the function of the TDC "shall be to promote, assist and develop Hong Kong's trade with places outside Hong Kong, with particular reference to exports, and to make such recommendations to the Government as it sees fit in relation to any measures which it considers would achieve an increase in Hong Kong's trade". However, TDC is also heavily involved in the expo business – while on one hand, it is a statutory body that receives its funds from the government, on the other it has an edge in the expo industry and uses its network including its contacts with SMEs to its advantage. Renting out exhibition space also bring in revenue for TDC, which is an economic benefit for them. There is no doubt that they enjoy a market advantage and their actions have a direct impact on other players in the expo industry.

The **Hong Kong Productivity Council** is a statutory body established in 1967. Its mission is to promote productivity excellence through the provision of integrated support across the value chain of Hong Kong firms, in order to achieve a more effective utilization of resources, to enhance value-added content of products and services, and to increase international competitiveness. In addition to the above statutory functions, the Productivity Council and its subsidiaries also provide a multitude of services in technology transfer, consultancy, training and other support services in the private sector. Therefore, in this instance there is direct competition on the part of the Productivity Council with the private sector.

Since its operation as a trading fund within the public sector, **Hongkong Post** offers the traditional postal service to the public, but it has also branched out in other areas, providing a wider and comprehensive range of services, including local courier services, Speedpost International courier service and a local express mail. Such services are also offered by the private sector, so this part of Hongkong Post's business is in direct competition with private courier and logistics companies.

CDI is worried about the prospect of all government departments and statutory bodies enjoying full immunity from competition laws, especially if they perform a

[7] Cheung Waiman, 2009, Hong Kong Trade Exhibition- An Industry Review, The Chinese University of Hong Kong http://www.ccl.baf.cuhk.edu.hk/download/HKEI_study.pdf

public service while at the same time engaging themselves in economic activities. This amounts to anti-competitive conduct and gives these bodies an unfair advantage over private companies.

OVERSEAS EXPERIENCE

In the United Kingdom, if an enterprise has been entrusted by the government with the operation of a public service, or acts to provide income/revenue for the state, that enterprise will be excluded from enforcement action under the grounds of public interest. As for other enterprises carrying out a national service which may be involved in economic or non-economic (administrative or social) activities, the Office of Fair trading will consider each case on its particular circumstances, keeping in mind the characteristics of the services provided by that particular enterprise.

In the European Union, the EC Treaty spells out that if there is an enterprise entrusted with the operation of public services they too may be exempt from competition legislation. However, this exemption is not a right or privilege that is granted automatically. If the European Commission happens to receive a complaint regarding these enterprises, it still has a duty to investigate the complaint.

CASE 4: EUROPEAN COURT OF JUSTICE RULING ON HOFNER v MACROTRON (1993)[8]

Employment in Germany is governed by the *Arbeitsfoerderungsgesetz* (Law on the promotion of employment, hereinafter referred to as "the AFG"). Measures taken under the AFG are intended, within the economic and social policy of the Federal Government, to achieve and maintain a high level of employment, constantly to improve job distribution and thus to promote economic growth. It entrusts the attainment of this general aim to the *Bundesanstalt fuer Arbeit* (Federal Office for Employment, hereinafter referred to as "the *Bundesanstalt*"), whose activity consists essentially in bringing prospective employees into contact with employers and administering unemployment benefits. This gave the *Bundesanstalt* a statutory monopoly on placing employees with employers. German law also allowed the *Bundesanstalt* after consulting with workers and employers associations to entrust other institutions or people with employment procurement services under its supervision. It had become the practice that a number of executive recruitment businesses developed, to which the *Bundesanstalt* turned a blind eye. However, without the explicit approval of the *Bundesanstalt*, acts, including contracts, which infringed the statutory provision were void under the German Civil Code. One of these executive recruitment businesses placed a candidate with a private company, but the company decided they didn't want the candidate after all and refused to pay the agency's service fee. The recruitment agency therefore sued the company for

[8] Case C-41/90, Hofner v. Macrotron [1991] ECR-I-1979, [1993] 4 CMLR 306, EC Competition Law, p438-440, 2001

breach of contract, while the company argued that the employment contract was void, in accordance with the German Civil Code. This prompted the executive recruitment agency to challenge the federal provision declaring the contract void, and used EC competition law to argue their point. The European Court of Justice held that the *Bundesanstalt*, even though it was a public body, could be subject to competition laws. It was an "undertaking", and therefore fell within the scope of the Treaty. Furthermore, by failing to satisfy demand for a good or service, the exclusive right of the German government to regulate employment services could amount to the abuse of a dominant position.

CASE 5: EUROPEAN COURT OF JUSTICE RULING ON RTT BELGIUM (1991) [9]

A leading EU competition law case, *RTT v. GB* involved a small telephone equipment maker, GB and the Belgian state telephone provider, RTT, which had the exclusive power to grant approved phones to connect to the tele-network. GB was selling its phones, which were unapproved by RTT, and at lower prices than RTT sold theirs. RTT sued them, demanding that GB inform customers that their phones were unapproved (which would lose GB many customers). GB argued that the special rights of RTT infringed Article 86 of the EC Treaty and took their case to the European Court of Justice. The ECJ pointed out that as a provider of a public service, RTT may fall under the exemption provided by Article 86(2) of the EC Treaty. However, it also held that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between various economic operators. To entrust an undertaking that markets terminal equipment [i.e., RTT] with the task of drawing up the specifications for such equipment is tantamount to placing that undertaking at an obvious advantage over its competitors [i.e. GB]. This extension of a previous monopoly to an ancillary activity on a neighbouring market can also be contrary to Article 86 in combination with Article 82. The court also recommended that if entities want to cite Article 86 in order to be exempt from competition legislation, such entities cannot mix their regulatory functions together with commercial activities.[10]

From these European Union competition law cases, we can see that not all government or statutory bodies enjoy full exemption from competition law. If the government or statutory body is involved in commercial activities and their conduct is in direct competition of other market operators, the European Commission will investigate whether this amounts to anti-competitive conduct immediately after receiving such a complaint. CDI believes the government should take reference to the approach taken in the European Union and there is no need for having to exempt all government and statutory bodies from competition legislation. Government departments and statutory bodies which are involved in the conduct of economic activities, such as Hongkong Post and the TDC, and are in direct competition with the private sectors should be regulated by law.

Hong Kong's Competition Bill proposes to exempt all government departments and

[9] Case C-18/88, RTT v. GB-INNO-BM SA [1991] ECR I-5973, EC Competition Law, p444-446, 2001

[10] Jones & Sufrin (2001), EC Competition Law, p446

statutory bodies from this piece of legislation. The government will prepare a list of statutory bodies for the Legislative Council. Although the government has stressed there is no need for an exemption list since the activities of the public sector are almost non-economic in nature falling outside the scope of the bill, CDI believes there are government departments and statutory bodies which actually fall in the category of entities engaged in economic activity. We are of the view that perhaps Hong Kong should learn a lesson from the European Union and the government should not impose a blanket exemption on all government departments and statutory bodies. Like the EU's experience, the Competition Commission could investigate the conduct of government departments and statutory bodies after receiving a complaint. Rather than having the Legislative Council decide which statutory bodies should fall under the competition bill, it would be best to have the Competition Commission to take up this decision and to base their decisions from an economic and legal point of view. We hope the Competition Commission will adopt EU Competition law guidelines. The Commission should also view the acts of these bodies one by one in deciding whether or not they should be exempted from competition rules.

PART 3 – DEFINITION OF DOMINANT MARKET SHARE

Clause 21 of the Competition Bill states that an undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. In other words, obtaining a substantial market share may result in anti-competitive behaviour, which would be unlawful according to this clause. However, the Competition Bill fails to state exactly state what percentage would amount to a substantial degree of market power.

Competition laws elsewhere have also been looking at what constitutes a substantial market share and we will look at their examples as a reference.

For the European Union, Article 82 of the EC Treaty provides that "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States". There is no specific reference here, nor have the European Courts made specific references as to what percentage would amount to a dominant position within the common market. Some studies have indicated that a 40% market share threshold can be regarded as a dominant market share. 40% also seems to be the adopted threshold in some cases in Britain whereas the threshold in Singapore is as high as 60%. In the United States, there is no clear-cut percentage as to what constitutes a dominant market share.[11]

When determining a dominant market share, one must look to the definition of the given market under question by identifying a relevant product market. Again, there is no clear-cut definition of "market", but over the years case law has dealt with this issue, and CDI believes the proposed Competition Commission could refer to case law when identifying markets.

CASE 6: UNITED BRANDS AND CO v EUROPEAN COMMISSION (1976)[12]

United Brands is a company registered in the United States of America, which imported Latin American bananas. United Brands established United Brands Continental in Europe and supplied these bananas unripe and in bulk to distributors/ripeners operating in EC countries. The distributors would buy the unripe bananas, ripen them using their own facilities and distribute them to retailers across their national markets. In 1975, the European Commission found that the company had infringed article 82 of the EC treaty, which prohibits the abuse

[11] Wu Jackie (2010), p107

[12] Case 27/76, United Brands & Co and United Brands Continental BV v. Commission [1978]ECR207, [1978] 1 CMLR 429, EC Competition Law, p263-266, 2001

of a dominant position insofar as it may affect trade between Member States, through discriminatory pricing and controlling supplies. The Commission defined the relevant market as the retail market for the sale of fresh bananas to consumers. United Brands challenged the European Commission's decision and its definition of the relevant market, insisting that bananas were part of the fresh fruit market, so therefore it had no dominant position in respect of the fresh fruit trade, as there are other alternatives to bananas. But the European Court of Justice upheld the Commission's finding and reiterated that United Brands' product market was limited to fresh bananas only as opposed to fresh fruit generally – the demand for bananas is not the same as the demand for fresh fruits in general, and bananas meet specific demands for consumers like children and the elderly, so there are no "substitutes" or alternatives for them. Although this case emerged over 30 years ago, it remains highly relevant today as it still deals with key issues regarding competition regulation and continues to have far-reaching effects on European competition law.

In Hong Kong, the definition of "market" was put to the test in an investigation by the Competition Policy Advisory Group (COMPAG). In 2002, it looked into whether there was any monopolizing of Hong Kong's pork supply by Ng Fung Hong, one of Hong Kong's largest suppliers of fresh pork.[13] The Competition Policy Advisory Group found that there was a free play of market forces in the local pork market. COMPAG noted that pork from freshly slaughtered pigs was not the sole type of pork available in Hong Kong – there were also chilled pork and frozen pork – there is no restriction on the origin of live pigs, chilled pork and frozen pork and on the quantity of imported live pigs and live pigs supplied by local farms. Therefore pork from different origins are free to compete with each other.

If this approach to markets is adopted in Hong Kong's broadcasting industry, it is not difficult for us to find instances of abusing a dominant position. An example of this is the long-running dominance of Television Broadcasts Limited (TVB) in Hong Kong's entertainment industry. When signing up new artistes and singers, the broadcaster forbids them from appearing on shows made by other television stations. If they accept a television interview, they can only respond in a language other than Cantonese. These practices constitute a prima facie case that TVB has abused its dominant position. TVB may try to retaliate by relying on the same argument that United Brands used by insisting that in light of Hong Kong's flourishing television market which has made room for more free TV and pay TV broadcasters, TVB's presence does not constitute a dominant market share. But when we look at the issue carefully and if free-to-air TV is defined as a particular market, and pay TV is a different market, then TVB's market share of the free-to-air TV market constitutes a dominant market share in that industry.

[13] Competition Policy Advisory Group, Competition in the Supply Chain of Pork, 2002 http://www.compag.gov.hk/cgi-bin/compag/frame.cgi

In European countries, the question of how large a market share should be in order to qualify for a dominant position is not mentioned in the EC Treaty. However, the European Comission has issued a notice indicating that a market share of major business entities can refer to the product sales in the relevant area, amount of revenue, the number of competitors and their market share. However, looking back at European case law, it seems like 40% or more has been a key figure in determining a dominant market share. A business entity which has a market share that is less than 40% is not likely to be considered to have a dominant position. But if an undertaking is found to have a market share of more than 40%, it is very likely this will amount to a dominant market share. In addition to market share, even if a business entity has a market share that is smaller than 40%, the European Commission will also take into account other factors to determine whether or not a business entity has a dominant market position.

For those other factors, we can refer once again to the European Court of Justice's decision on the United Brands case. That company had a 45% share in the banana market – twice the size of the market share enjoyed by its competitors. The court stressed that United Brands did abuse its dominant position not just based on the size of its market share, but also because of individual factors which also influence their presence in the market. In terms of corporate structure, United Brands took advantage of its huge resources in the production, packaging, transportation, sales and marketing of its products – their operations were vertically integrated to a high degree. United Brands also had huge plantations across South and Latin America – even if production failed to meet demand in one of the plantations, the company could always rely on other plantations to fill the void. It could also grow different types of bananas in different plantations to mitigate the impact that natural disasters may have on its banana supplies. In addition, the company has its own packaging line and manpower to handle goods independently, with products delivered through the company's train terminal, and then regularly through the fleet and on time delivery to European countries. Furthermore, the company has scientific and technological knowledge to help improve the productivity of the company. Other competitors cannot create the same degree of improvement in productivity, such as drainage systems or against plant viruses. United Brands also has strict quality control standards, even for when their goods have been passed on to retailers. In terms of publicity, the company carried out advertising on a large scale in order to attract customers to their products, which in turn ensures that distributors make sure they have such products available for their customers. The court also found that regardless of the state of their business, whether it is at a profit or a loss, customers continue to buy their products in stores and this turned out to be one of the most decisive factors in the United Brands case.

From the above case, we can gather that understanding the market share of an entity is important in determining a dominant market share. But there is also a need to consider other elements, such as the existence of vertical linkages, technological

advances, economic activity, if they have enough resources to make it hard for competitors to enter the market, advertising and their impact on customers. All these factors are worthy of the Competition Commission's consideration, as well as the Competition Tribunal. In terms of establishing a threshold to determine what constitutes a dominant market share, Community Development Initiative suggests the Competition Bill should impose a market share threshold in line with the European Union's standard, which is set at 40%.

PART 4 – SMEs CONCERNS OVER COMPETITION BILL

The Competition Bill's first conduct rule covers agreements, decisions and concerted practices and states that an undertaking must not make or give effect to an agreement, decision, or concerted practices, if the object or effect is to prevent, restrict or distort competition in Hong Kong (Clause 6 (1)(a) & (b)). This means that practices such as price fixing or "hidden conspiracy" behaviour, would go from being tolerated to being illegal under this Bill. It is this provision in the Competition Bill which is causing some concern for Small and Medium-sized Enterprises (SMEs). Because SMEs are small in nature, say if two vegetable vendors at a street market raise their prices on the same day – their actions may not make up a dominant market force, but according to this bill they could be punished for this practice. Some SMEs have express doubts as to whether the Competition Bill will serve its purpose and whether it could reign in the "big players" in the market, letting big cooperations continue to monopolize various sectors. A number of trade associations and local organizations representing SMEs have therefore requested that SMEs should be exempt from competition legislation.

In western countries which have competition laws in place, SMEs are not expressly exempted from the competition regulations. In reality, SMEs are rarely the target of competition legislation at all. Western countries tend to adopt a "de minimis" approach and would rarely take action against SMEs unless they collectively agree on anti-competitive behavior such as bid-rigs, price fixing or imposing restrictions on production quotas and market allocation. The European Commission issued a notice on Agreements of Minor Importance, which states that some types of anti-competitive agreements will not be investigated if the agreement between small firms collectively have a very low market share of 10% or 15%. But even so, hard-core agreements such as price fixing and bid-rigging are not exempted.

Here in Hong Kong, a study by the Legislative Council Secretariat revealed that the government may look into the economic importance of creating a threshold for an exemption as long as it is not too high.[14] For example, if the parties to the agreement have a market share that falls below a certain level, that agreement would not be subject to further investigation. But this exemption would not apply to agreements that are riddled with core violations of competitive behaviour such as price manipulation.

Community Development Initiative agrees with this direction set by the government, and the administration could make minor adjustments in this respect. We believe that if law enforcement agencies spend their time investigating each and every case of potential anti-competitive behavior this will swallow up a lot of resources. SMEs may also be faced with having to spend large sums dealing with litigation, without any benefit to them. Our think-tank proposes that if the combined market share of the parties to the agreement is not higher than 20%, such cases should not be

[14] Wu Jackie (2010), p101

investigated, unless they involve serious irregularities such as price manipulation, collusion and limiting production. This may help to allay some of the anxiety and concerns expressed by SMEs in Hong Kong. At the same time, we also suggest adding this threshold to the bill, as done by Western countries.

To mitigate the concerns towards the competition law by the SMEs, we try to cite the following example about concerted practices for the sake of giving a clear picture to the SMEs that the target of the law is the illegal commercial behaviours conducted by the big enterprises.

Employers' Federation of Hong Kong is used to announce the suggestion on salary adjustment every year, and this practice can be deemed to violate the competition law and it is one of the concerted practices. But we think that it may be difficult to prove they violate the law. Firstly, we need to understand whether the Federation is an undertaking or not. Moreover, we do not know how many employers follow the announcement of the federation. In addition, evidence should be provided to prove that the concrete agreement is formed between the employers, such as minutes or sound record, otherwise, from the perspective of enforcement, it is not a easy task to declare this is an illegal conduct.

Our think-tank do not deliberately encourage the Employers' Federation and the SMEs acting more that is similar to the above-mentioned behavior, we only try to make them understand after the legislation of the Competition Bill will not become the "Article 23" on business field that easily convicts the similar behaviours. On the contrary, the SMEs should be well-prepared for the sake of avoiding violate the law, such as enhancing the knowledge of the staff towards the ordinance, or put effort on education for the staff.

PART 5 - INVESTIGATIVE POWERS AND PENALTIES

The Competition Bill provides for a judicial enforcement model. An independent statutory Competition Commission will be established to investigate and bring proceedings before the Competition Tribunal in respect of anti-competitive conduct. A Competition Tribunal will be established within the Judiciary to hear and adjudicate competition cases brought by the Commission, private actions as wells as reviews of determination of the Competition Commission.

The third clause of the bill (Clause 3 Sub-Clause 2) states that the Competition Commission will be vested with investigatory powers, including the power to require production of documents and information and attendance before the Commission to give evidence, power to enter and search premises as well as power to seize and retain evidence and property under a court warrant.

Law enforcement agencies in western countries also have similar powers, such as the Czech Republic. In 2001, Czech authorities found that six companies reached an agreement were they raise the price of oil at the same price level. Authorities did not find sufficient economic reasons for this price increase. In a surprise raid, they seized email messages and electronic documents detailing the collusion between the six companies. In the end, the six companies had to pay a joint fine of 10 million Euros or 16 million US dollars.

As for penalties for anti-competitive behavior, the Competition Bill proposes that sanctions against such conduct should be limited to civil law and it proposes to set the maximum proposed penalty of 10 million Hong Kong dollars or a pecuniary penalty not exceeding 10% of the entity's turnover (including global turnover).

Looking at the experience of western countries, the European Union only adopts civil remedies for violations of competition law. However in the United Kingdom and the United States, in addition to civil penalties, undertakings may also be subject to criminal sanctions, including fines and imprisonment. The highest penalty laid down by the European Union amount to 10 percent of an entity's total turnover. In the UK, authorities imposed a maximum penalty of an average annual turnover of 10% over a three-year period and a maximum prison sentence of five year. Authorities in the US can impose a maximum penalty of USD100 million and a 10 years imprisonment.

Case 7 European Commission's Decision on Microsoft (2004)[15]
At March 2004, The European Commission found that Microsoft violated Article 82 that abused the dominant position in the computer operating system market to refuse the provision of interoperability information to other competitors that leaded

[15] The judgement of the Court of First Instance in the Microsoft case, Competition Policy Newsletter, 2007 No. 3,
http://ec.europa.eu/competition/publications/cpn/2007_3_39.pdf

to incapable competition of other undertakings , and tied its Windows Media Player with the Windows PC operating system. When the customers bought Windows PC operating system, they were also forced to buy the tied product, Windows Media Player. European Commission imposed a fine of EUR 497 million, and ordered Microsoft to provide the interoperability information to other undertakings and offer a version of the Windows computer operating system without Windows Media Player. Microsoft refused to comply the decision and seeked the judgment from the Court of First Instance and applied for annulment of the decision.

The Court turned down the application from Microsoft and pointed out that as an undertaking with leading role in the market, Microsoft was responsible for ensuring her business did not impede competition of other undertakings, and hinder innovation or jeopardize the consumers' interest. However, Microsoft sold the product that should have competitive market through tying effect, it may affect the normal competition of the same products. In addition, Microsoft refused to provide the interoperability information to other competitors, this was a mode of crowding out competitors.

Last November, the European Commission fined Cathay Pacific 57,100,000 Euros for breaching European competition laws from May 2004 to February 2006. The European Commission's Competition Commissioner found that more than 20 airlines, including Cathay Pacific colluded on air cargo price fixing, which in turn harmed business competitiveness as well as consumers. Other airlines which were also found to have taken part in this deal included KLM, British Airways, Japan Airways, Quantas and Singapore Airlines. Lufthansa was also a party to this collusion but it was not subject to punishment.

The proposed penalty in the Competition Bill to fine an entity of a financial amount not exceeding 10 percent of its annual turnover (including global turnover) is a harsh pecuniary penalty. However, through registering businesses overseas, many large enterprises may have different companies running independently of each other, so this proposed fine may not be a strong deterrent effect to the "big players" of the market. In determining penalties for competition law violations, CDI suggests amending the penalty to the "relevant business acquired during the illegal turnover of 10%". If the defendant has overseas business interests, a fine of turnover on their foreign operations should also be included. In addition, our think-tank proposes that legislative provisions should not be too strict in the beginning but in the long run the government should consider increasing penalties as an effective deterrent.

PART 6 – FEASIBILITY OF CLASS ACTION LAWSUITS

Part 7 of the Competition Bill provides for the private enforcement of the conduct rules and sets out the related procedures. It provides for private actions to be brought by persons who have suffered loss or damage as a result of a contravention of a conduct rule. Such private actions could either follow on from a determination, or a stand-alone action seeking a judgment on particular conduct and remedies. However, there is no mention in the bill about a class action lawsuit.

This is a form of lawsuit in which a large group of people collectively bring a claim to court and/or in which a class of defendants is being sued. In the Commerce and Economic Development Bureau's 2008 public consultation document on competition law, class action lawsuits were mentioned but the current version of the Competition Bill ultimately did not adopt this proposal, CDI believes that the Competition Bill's only mechanism for remedies in the form of private court actions is not enough to fully uphold and protect the interests of consumers.

The United States is a pioneer when it comes to class action lawsuits. This practice has been around in the US for decades. The advantages of class action lawsuits include improving efficiency and reducing the cost of court proceedings. To cite the United States as an example, if a case has numerosity, commonality, typicality and adequacy of representation, it has achieved the basic requirement of class action.

Case 8: Brand Name Prescription Drugs Antitrust Litigation
In the 1990s, the manufacturers of brand name prescription drugs production and their wholesalers in the US refused to provide discounts to the pharmaceutical retailers, and only provided discounts for the hospitals and managed care organizations. This initiated the litigation from the pharmaceutical retailers through class action. The case was settled by the manufacturers ultimately.

Retail pharmacies and chain drug stores are the plaintiff of this antitrust case. The plaintiff claimed that the manufacturers and wholesalers conspired and agreed mutually to refuse giving discounts to the retail pharmacies and this violated Sherman Act. On the other hand, the defendants provided discounts for the hospitals and managed care organizations, that leaded to price discrimination and violated Robinson-Patman Act. The defendants did not admit the allegation. The refuted that Hospitals and managed care centers can develop the new product market for them, but the retailers cannot. As the doctors in hospitals and managed care centers can prescribe a new drug for their patients and indirectly transferred to a new drug market of the manufacturers. However, there were no doctors' prescriptions in the retailers and they can only sell the drugs to customers with their doctors' prescriptions. Therefore, according to the perspective of the manufacturers and wholesalers, retailers were incapable in expanding the market share for them or transferring market for new products. This was the main reason for the manufacturers to refuse the provision of discounts to the retailers.

Although this class action lawsuit was settled by the amount of US$4.08 million, it reflected that the function of class action not only consolidates the affected but powerless masses, but also gives a warning signal to the enterprises for compliance of the law.

Although the Competition Bill paves the way for private actions to be brought by persons who have suffered loss or damage as a result of a contravention of a conduct rule, one wonders if a lone challenger has a chance in taking a large enterprise to court which has abused its dominant position in the market. If ordinary citizens go through separate lawsuits to take action against these large enterprises, this is bound to be a big financial burden for them and high cost of legal fees may force some ordinary citizens to think twice about going through a lawsuit. However, a class action lawsuit that provides room for collective action and give many ordinary people a chance to stand up to those who practice anti-competitive behavior, whilst not having to burn a hole in their pockets.

SUMMARY

With the Competition Bill in the Second Reading Debate stage, there may be little room to make changes to the current bill but Community Development Initiative believes that as long as both the government and the business community can make minor concessions on the proposed bill, this could break the current deadlock between the two sides. We also hope that both sides will keep the public interest in mind, so that the Competiton Bill can be passed as soon as possible, thereby creating a more favourable business environment through fair competition and benefitting consumers.

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Advisors:
Mr. Ronny Ka-wah Tong
Dr. Fernando Cheung
Mr. Chi-yuen Tik

Researchers
Dr. Cheung-kwok Law
Dr. George Cautherley
Mr. Jeff Au
Mr. Terman Wong
Mr. Michael Mo
Mr. Siu-man Chow
Mr. Terry Leung

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