

有關競爭政策及制訂公平競爭法的研究第二號工作報告

A Study on Competition Policies and Competition Laws Work Report No. 2

# 公平競爭 造福民生

## Fair competition is our livelihood

立法會湯家驊議員辦事處

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公民黨  
Civic Party

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## **I. FOREWORD**

- 1.1 The debate on competition law has gone on for almost one and a half decade. It began when former Governor Chris Patten announced his intention to formulate a comprehensive competition policy in his inaugural policy address in 1992. The debate is still raging in Hong Kong today even though almost 100 nations have now enacted competition laws. Why is Hong Kong lagging so far behind the World?
  
- 1.2 A year and a half after I came to office in the Legislative Council, the debate on competition law finally began to gain momentum. The continuous effort in lobbying the business community and explaining the concept of a fair trading environment is beginning to bear fruit. As a result, notwithstanding a motion urging the government to review the existing competition policy and to study the feasibility of enacting a competition law was voted down by functional constituency members in the Legislative Council in October 2004, the Financial Secretary announced in his budget speech in March the following year that an independent review committee on the Competition Policy Advisory Group (“COMPAG”) and Competition Policy would be formed to review existing competition policy and COMPAG's composition, terms of reference and operations.
  
- 1.3 The international community both within and without Hong Kong is also questioning why it is Hong Kong is falling behind in maintaining a fair trading

environment here. We are ranked the freest economy in the World in terms of having no trade barriers to outside investors and yet, once the foreign investor is here, he faces substantial invisible barriers in breaking into various local markets.

1.4 The creation of a level playing field in business is consistent with the Civic Party's belief that everyone should be given a fair chance to succeed and work towards the fulfillment of his or her potential. Our society no longer believes that the existing competition policy, which has been in place since 1998, is effective. Now is the time for us to take one step further and formulate a competition regime which is compatible with our trading environment and in tune with the international experience.

1.5 During the LegCo election in 2004, I pledged to promote fair competition by studying and publishing reports on competition law and engaging the business community on the subject. The first report "*Fair Competition is essential to the Preservation of Free Enterprise*" was published in November 2004 and aimed at pointing out the flaws of the existing regime and the need to enact a competition law enforced by a competition authority.

1.6 Since the publication of my first report, I have been able to conduct a more in-depth study of the subject and at the same time engage in dialogues with academics and representatives of the business sector through participation and giving presentations in talks and forums organized by a large number of chambers of commerce. In December last year, I organized the "Asian Competition Law Conference 2005", a whole day forum, in collaboration with

the Hong Kong Polytechnic University. Representatives of national competition authorities, academics including legal experts and economists as well as private practitioners all over the World were invited to participate and share their experience with the business community and the academia in Hong Kong.

- 1.7 This report aims at summarizing the views collected in my consultations with the business community and the academia over the past year and a half and to recommend to the Review Committee and the Government the essential legal and institutional elements which ought to be covered in any proposed competition regime.

## II PARAMETERS OF A COMPETITION LAW

2.1 There are roughly 6 basic elements of any fair competition law:-

2.2.1 Scope of the law: this involves defining the kind of behaviour which the law wishes to target;

2.2.2 Investigative powers: this is necessary to ensure the enforcing authority can detect and identify anti-competitive behaviours in respect of which the law ought to apply;

2.2.3 Protective powers: this is necessary to ensure confidential trade information obtained will not be leaked to competitors of the subject under investigation or the outside world and also to protect the identity of informants;

2.2.4 Determination of infringement: there has to be a proper procedure in the determination of any breach of the law;

2.2.5 Sanctioning powers: this can come in a variety of forms:-

(a) Criminal sanction;

(b) Civil sanction;

(c) Administrative orders requiring certain acts be undone or done with criminal and/or civil sanctions to enforce the orders.

2.2.6 Educational duties: sometimes the law also requires the enforcing agent to educate the community as to the importance of a fair trading environment.

2.2 There is then the question of the identity of the enforcing agent. The enforcing agent who has the task of applying and ensuring compliance of the

law can sometimes be a department or agency of a government, a private citizen, or an independent authority. The difficulty with enforcement by a private citizen is that the latter has no power of investigation and it is unrealistic to expect a private citizen to challenge a substantial trading enterprise. The modern trend in a large number of jurisdictions is to entrust the enforcement of the law to an independent authority.

2.3 Let us now look at the international experience to see the alternatives which are open to us if we wish to enact a competition law.

### III AN OVERVIEW OF PROHIBITIVE PROVISIONS

3.1 The usual prohibitive provisions on the statute book vary between different jurisdictions. In some countries e.g. Australia and New Zealand, the legislation covers misleading and deceptive conduct which some may consider should fall within the area of consumer protection.

3.2 Common prohibitions nevertheless can be broadly classified into three categories, following the structure of the substantive provisions of prohibitions under the European Union system<sup>1</sup>:

- 3.2.1 Control of Anti-competitive Agreements,
- 3.2.2 Control of Abuses of Dominance,
- 3.2.3 Merger Control.

#### **Control of Anti-competitive Agreements**

3.3 The common prohibited conduct covered by this head includes:

- 3.3.1 Formation or maintenance of a cartel;
- 3.3.2 Bid-rigging;
- 3.3.3 Price-fixing;
- 3.3.4 Market Sharing;
- 3.3.5 Restriction of supply;
- 3.3.6 Price discrimination;
- 3.3.7 Bundling or tie-in;
- 3.3.8 Collective exclusive dealing;

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<sup>1</sup> Following the structure of the substantive provisions of prohibitions under the European Union system Articles 81 and 82 EC Treaty; There are similar classification systems under the U.K. Competition Act 1998 and the Singaporean Competition Act 2004.

3.3.9 Resale Price Maintenance; and

3.3.10 Collective Boycott.

3.4 This regulated form of conduct is not limited to express or implied consensual agreements in the normal sense but also covers collusive conduct, decisions of association and concerted practices. Agreement here is also not restricted to legally binding and enforceable agreements or the concept of privity of parties. Jurisprudence on competition law in the European Union has established that existence of an agreement may be inferred by the enforcing agency where a seemingly unilateral behaviour appears to confer a benefit on another undertaking and there is concurrence of will between the parties.<sup>2</sup> The term “concerted practice” has also been broadly interpreted. Recommendations made by a trade association to its members, even if they are not binding, have been held by the European Court of Justice as covered by this head.<sup>3</sup>

3.5 Due to difficulty in proving the existence of collusion, it is generally accepted that the enforcing agency should seek to avoid adopting a formalistic approach in interpreting the prohibitive provisions. The economic effect of the agreement or practice on the market is recognized to be more important than their form.

3.6 The agreement or practices in question must have the object of restricting competition or have the effect of doing so. The process of determining whether this is so requires a rigorous and detailed analysis of the economic

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<sup>2</sup> Ford Werke v Commission (Cases 25 and 26/84 [1985] ECR 2725; [1985] 2 CMLR 528) and Bayer v Commission (Case T-41/96 [2000] ECR II-3383; [2001] 4 CMLR 4.

<sup>3</sup> Vereeniging van Cementhandelaren v Commission (8/72) [1972] ECR 977, paras 18-22.

effect or potential economic effect of the agreement as well as the structure and circumstances of the relevant market. For example, while a single agreement can be of limited impact, a network of agreements of similar nature across a national market can have the effect of foreclosing competition.<sup>4</sup>

3.7 Agreements promoting prohibited anti-competitive conduct are usually regarded as void and therefore not binding on the contracting parties under competition laws. Sometimes, agreements which have already been implemented can be ordered to be reversed and a fair trading environment restored.

3.8 In Hong Kong, there already exist similar provisions prohibiting anti-competitive practices in the telecommunications sector under the existing Telecommunications Ordinance (Cap. 106). Section 7K of ordinance prohibits a telecommunication operator from engaging in conduct which has the purpose or effect of preventing or substantially restricting competition in the telecommunications market. A non-exhaustive list of prohibited conduct, which includes price-fixing, restriction of supply, market-sharing agreement and the imposition of ancillary conditions, is provided in the statute.

3.9 On the other hand, Sections 6 and 7 of the Prevention of Bribery Ordinance (Cap. 201) criminalizes bid-rigging but only in relation to public auction or tender.

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<sup>4</sup> Case C-234/89 *Delimitis v Henniger Bräu* [1991] ECR I-935; [1992] 5 CMLR 210.

## **Control of Abuse of Dominance**

3.10 While the first head generally covers collusive conduct or concerted practices, the second head targets unilateral anti-competitive conduct imposed or demanded by a controlling interest in a particular market.

3.11 Common anti-competitive practices covered by this head are:

- 3.11.1 Restriction of supply;
- 3.11.2 Discriminatory pricing or supply conditions;
- 3.11.3 Predatory Pricing;
- 3.11.4 Imposition of Unfair or ancillary Trading Conditions;
- 3.11.5 Bundling or tie-in arrangements; and
- 3.11.6 Resale Price Maintenance.

3.12 In considering whether an undertaking is in a dominant position in the relevant market, it is important to identify the relevant market in which that undertaking is participating. The extent of interchangeability between substitutes and the geographical extent of the market will have to be examined in detail. Various tests have been developed in different jurisdictions to determine the existence of dominance. The test adopted in the European Union is that if the firm enjoys a position of economic strength which, by affording it the power to behave to an appreciable extent independently of its competitors and customers, may enable it to prevent effective competition being maintained in the relevant market, then the firm is in a dominant position.<sup>5</sup> Factors like market strength as measured by the market share and

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<sup>5</sup> Case 27/76 United Brands Continental BV v Commission [1978] ECR 207; [1978] 1 CMLR 429.

other indicators such as whether the market structure is vertically integrated, whether there are barriers to entry, access to technology, product differentiation, financial resources and economies scale of the production process, etc will all have to be examined in detail.

3.13 A dominant position in the market is not necessarily anti-competitive. But abuse of that position often is. The key here is to define “abuse”. An example of an abuse is the imposition of unfair trading conditions on trading partners<sup>6</sup> Exclusionary abuses are also harmful to competition in that they allow dominant undertakings to protect their market power, usually by discouraging or making it more difficult for new entrants to challenge them in the market. They distort the process of competition itself. The rationale behind is that a dominant undertaking should not be allowed to drive out existing weaker competitors using methods other than normal competition. Examples of exclusionary abuses are price discrimination, predatory pricing and tie-ins.

3.14 The concept of abuse is recognized to be an objective one. The enforcing agency will concentrate on the effect of a practice on the structure of the market itself, and not simply on the benefits derived therefrom by the dominant undertaking.<sup>7</sup>

3.15 In Hong Kong, Section 7L of the Telecommunications Ordinance and section 14 of the Broadcasting Ordinance (Cap. 562) also contains prohibitions against

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<sup>6</sup> BRT v SABAM Case 127/173 [1974] ECR 313; [1974] 2 CMLR 238.

<sup>7</sup> Michelin Case 322/81 [1983] ECR 3461; [1988] 1 CMLR 282, para 70.

abusive conduct by telecommunication operators and radio licensees respectively who are in a dominant position of the market.

## **Merger Control**

3.16 The last head of common prohibitive provisions is merger control.

3.17 In most countries which have a competition law, it is common to find prohibitions against mergers and acquisitions which would result in a substantial lessening of competition.

3.18 The purpose of merger control is widely recognized as the maintenance of competitive market structure, and not merely a pre-emptive measure of preventing a merged-entity from abusing its dominant position in the future. The test commonly adopted is whether the proposed merger will have the effect of “substantially lessening competition”. It is necessary under such a test to consider the market conditions both before and after the proposed merger.

3.19 Section 7P of the Telecommunications Ordinance, which was added by the Telecommunications (Amendment) Ordinance 2003, provides a post merger review control regime on the telecommunication operators. The review is supplemented by a voluntary pre-notification system, and the test of “substantially lessening of competition” is adopted. If the merger is found to be anti-competitive, the Telecommunication Authority can order the licensee to eliminate the anti-competitive effect of the merger.

## **Exemptions**

3.20 Last but not least, it is not uncommon to find enforcing agencies sometimes being given a power for various reasons to exempt certain conduct even though the conduct falls within one or more of the above stated categories. The issue of what kind of conduct shall be exempted from the prohibitions must be carefully considered. If there are too many exemptions, the whole purpose of the law can be frustrated, as often been criticized in the case of Singapore. The most often accepted ground of exemption is if the conduct will result in substantial benefit to the community as a whole or some other desired benefit in some other way.

## **What Choices Do We Have?**

3.21 Any competition legislation to be introduced in Hong Kong should at least cover the above first two heads. My consultation with the business community here suggests to me there is considerable objection in certain quarters to prohibition of mergers and acquisitions. I also note that hostile takeovers are extremely rare in the past few decades. It is an open question as to whether there is any imminent necessity to have a fully-fledged merger control system in Hong Kong.

## IV. INSTITUTIONAL DESIGN

### Jurisdiction

- 4.1 In most places, competition laws are rarely enforced by way of private right. Most jurisdictions prefer an administrative body with investigatory and regulatory functions. Please refer to the summary table of the institutional design of national competition authorities in various jurisdictions set out in the Appendix.
- 4.2 Such an administrative body, be it a government department or an independent body established by statute, often takes the role of a public enforcement agency and performs various additional investigative, advisory and advocacy functions.
- 4.3 Many of these authorities have a dual role in the enforcement of both competition laws and consumer laws and regulations. Examples include the United Kingdom Office of Fair Trading and the Australian Competition and Consumer Commission.
- 4.4 In certain jurisdictions, the competition authorities do not have an adjudicative role but only act as prosecutors in either civil or criminal proceedings against offenders.<sup>8</sup> Such proceedings are either initiated in normal courts with competent jurisdictions or in a specialist court specially established to handle competition cases (e.g. the Canadian Competition Tribunal). In such cases, it is the court or the specialist tribunal and not the competition authority which has the power to

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<sup>8</sup> Nevertheless, the Australian Consumer and Competition Commission and the New Zealand Commerce Commission do have adjudication roles in relation to mergers and acquisitions.

impose penalties on or make binding orders against the offenders.

4.5 For example, dual adjudication systems are adopted in Australia and New Zealand. In Australia, the Federal Court is given the exclusive jurisdiction to decide whether a practice lessens competition, either *per se* or subject to some specified competition test set by statute, and the Australian Competition and Consumer Commission is responsible for deciding whether, exceptionally, a particular proposed practice would likely result in a benefit to the public that would outweigh any likely anti-competitive detriment.

4.6 In other jurisdictions, for example, the European Union, the United Kingdom and Singapore, the administrative enforcement model adopted is that competition authorities are given administrative authority to determine whether there is a breach of competition laws in a particular case, and if there is, to decide on the appropriate remedies.

4.7 In such cases, usually an investigative hearing will be conducted by the authority and the relevant parties will be given an opportunity to defend and make representations. Due process or rules of natural justices would, of course, have to be observed in these hearings to ensure fairness to all parties concerned.

4.8 Very often, the competition authority also has a role in advising the government on competition matters. Some of them might even take an active part in the formulation of competition policy by the government. For example, the Taiwan Fair Trade Commission, an organ established under the Executive Yuan of the

Taiwanese government, has a statutory role in the formation of policy and law-reform measures on trade under the Taiwanese Fair Trade Law 1992. However, in other jurisdictions e.g. New Zealand, the New Zealand Commerce Commission does not advise the government on policy matters for the sake of maintaining its independence.

## **Independence**

4.9 Since competition enforcement often touches upon the business interests of conglomerates who are influential in relation to a government's decision making, it is very important to ensure the independence of the enforcement agency so that it can properly enforce the law without fear or favour and without being subject to any pressure be it from the government, business conglomerates, the general public or the legislature.

4.10 Various institutional and procedural measures can be adopted to protect the operational independence of the competition authorities. These measures include: (i) a body corporate status of the competition authority which is separate from the government structure; (ii) express statutory provisions setting out both the principles of independence<sup>9</sup> and the procedures to be followed for any communications or interactions between the government and the authority; and (iii) Sufficient length of the terms of the members of the authority together with procedural safeguards in relation to their removal.

4.11 Competition authorities should not be subject to government's direction or

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<sup>9</sup> An example is s29(3) of the Irish Competition Act 2002.

intervention in the performance of their duties and functions. Although in some jurisdictions e.g. Australia and Singapore, the government officials or ministers who are in charge of competition matters might have the power to give general directions in relation to the broad general policies which are to be observed by the competition authorities, the scope within which such directions may be given is limited.

4.12 Finally, in some jurisdictions, the government may sometimes request the competition authority to carry out investigations or studies in relation to certain sectors.<sup>10</sup>

### **Accountability**

4.13 While it is important to preserve independence, the competition authority, which is an institution financed by public funds and exercising an important public function, should be accountable to the public.

4.14 In most jurisdictions, it is common for the competition authority to be accountable to the democratically constituted parliament through regular submission of business plans and annual reports. Very often, submissions are made to the government official who is in charge of competition policy and presented to the legislature by the latter. To facilitate the process of monitoring, it is common to set out various key performance indicators in the annual report.

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<sup>10</sup> Examples are the United Kingdom and the Republic of Ireland.

## V ENFORCEMENT MECHANISM

### Investigatory Powers

5.1 Much anti-competitive behaviour, e.g. price-fixing or restrictive agreements often involve subtle or secret business dealings which cannot be easily detected.

It is important for the competition authority to be armed with sufficient investigatory powers in order to uncover such behaviour.

5.2 It is widely known that one of the fundamental weaknesses of the former competition law regime in the United Kingdom was that it did not confer on the competition authority effective powers to obtain information and to conduct investigations<sup>11</sup>. The same problem existed in the Republic of Ireland where the Irish Competition Authority continuously complained about its lack of adequate enforcement powers before the enactment of the Irish Competition Act 1996.<sup>12</sup>

5.3 The most typical investigatory powers possessed by competition authorities are (1) the power to obtain information and (2) the power of entry, search and seizure.

### Power to obtain information

5.4 Competition authorities often have the power to obtain information either by giving a written request to a person for the production of specified documents or information which the authority considers relevant to the investigation, or by ordering a person to appear before the authority to give evidence and to produce

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<sup>11</sup> Whish, Richard, 2003. *Competition Law*, LexisNexis Butterworths.

<sup>12</sup> Pg. 289, Power, Vincent J. G., 2001. *Competition Law and Practice*, Dublin Butterworths.

specified documents. The authority may make copies or extracts from a document produced and may ask for further explanation.<sup>13</sup>

5.5 In most cases, there are criminal sanctions for non-compliance with the exercise of these powers. A person who refuses to comply with such request or intentionally gives false or mistaken information to the authority commits an offence.

### **Powers of Entry, Search and Seizure**

5.6 There are also other investigatory powers to be exercised during on-site investigations. These powers include the power to enter premises, the power to search the premises and the power to seize and make copies of any information or documents which are relevant to the investigation. These powers may be exercised with or without a warrant issued by the court. Usually the scope of the power will be more extensive if the power is exercised with a court warrant.

5.7 The scope of such powers also depends on the identity of the occupier of the premises. For example, under the English Competition Act 1998, if the subject premises are occupied by a suspect under investigation, the Office of Fair Trading may authorize the investigating officer to enter the suspect's premises. However, in case the premises are occupied by a third party who is not suspected of an offence, the investigating officer must take all reasonable steps to give two working days' prior written notice before exercising the power of entry.<sup>14</sup> The enabling legislation will normally set out detailed procedures which need to be

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<sup>13</sup> e.g s26 of the U.K. Competition Act 1998, s155 Australian Trade Practices Act 1974 and s63 of the Singaporean Competition Act 2004.

<sup>14</sup> s27 English Competition Act 1998 and s64 of the Singaporean Competition Act 2004.

followed in exercising these powers e.g. the specification of the details of the subject matter and the purpose of the investigation on the necessary document to be produced to the occupiers. These statutory procedures are often supplemented by enforcement guidelines published by competition authorities.

5.8 The exercise of these powers is subject to certain restrictions. Privileged documents which are recognized as such under normal court procedures are exempted. In some jurisdictions, the authority cannot compel a person to provide self-incriminating answers.<sup>15</sup> However, in other jurisdictions<sup>16</sup>, it is not a ground for refusing to provide the requested information or to testify before the authorities. Lastly, the person who is subject to the investigation may identify any confidential part in the information or document that is supplied to the authority and request for non-publication of these parts.

### **Confidentiality**

5.9 Information obtained in the investigation often contains business secrets or sensitive market information. Leakage or improper disclosure of such information to a competitor will prejudice the investigated person and result in unfair competition to the advantage of his rivals.

5.10 It is therefore important to protect the confidentiality of the information obtained in the investigation. Various measures are devised for this purpose.

5.11 There is always a statutory prohibition on officers of the competition authority

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<sup>15</sup> e.g. Powers of the Office of Fair Trading under the U.K. Competition Act 1998.

<sup>16</sup> e.g. s155(7) of the Australian Trade Practices Act 1974.

from disclosing information obtained in the investigation. For example, European Union Regulation 1/2003 provides that officials of the European Commission and member states are not permitted to disclose confidential information obtained in the investigation<sup>17</sup>. Section 32 of the Irish Competition Act also contains similar provisions prohibiting improper disclosure of information obtained from investigation.

5.12 Competition authorities may also be given more extensive powers to protect the confidentiality of information. Sometimes, leakage of information may obstruct the investigation. For example, the New Zealand Commerce Commission, which is the national competition authority of New Zealand, has the power to order people not to disclose specified information given to the Commission during an investigation<sup>18</sup>. It is an offence for a person, including the Commission itself or the owner of the information, to publish or communicate information covered by such order.

5.13 International experiences have shown that a lack of obligations and procedural safeguards on the protection of confidentiality will inevitably undermine the credibility of the competition authority. The investigated party will very likely be unwilling to cooperate with the authority and facilitate the investigation without such protection.

5.14 A local example is the recent consultancy study on the auto-fuel retail market in Hong Kong commissioned by the COMPAG. The consultant who conducted the

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<sup>17</sup> Article 28(2) Regulation 1/2003.

<sup>18</sup> s100 New Zealand Commerce Act.

study had neither the necessary investigatory powers nor a statutory obligation in preserving confidentiality. During the investigation, only aggregate or average market data were disclosed by the consultant. However, one of the participants complained that, since there only exists a handful of participants in the market, it is not difficult for its competitors to deduce sensitive information of its own cost structure from the information released by the consultant. The consequence is persons who are cooperative in the investigation will nevertheless be punished by its cooperative behaviour.

### **Interim Orders**

5.15 Before reaching any final decision on whether there is an infringement, the authority should have the power to make interim orders on the basis of a *prima facie* finding of infringement in cases of urgency due to the risk of serious and irreparable damage to competition. Such orders are effective until a final decision is reached.<sup>19</sup>

5.16 The parties should, however, be given reasonable opportunities to make representations and to oppose the making of interim orders. There should also be an appeal mechanism which allows the parties to challenge such interim orders.

### **Sanction Powers**

5.17 Competition authorities shall be equipped with necessary sanction powers in order to successfully stop the infringement and prevent its recurrence. Typical enforcement powers are the power to impose penalties and to order cessation of

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<sup>19</sup> Both the European Commission and the Singaporean Competition Commission have the powers to order interim measures.

the infringing acts.

5.18 Penalties are usually fines. However, sometimes it is difficult to measure creation of obstacles to competition in money terms. Hence, fines are mostly imposed as a deterrent. If so, they will vary depending on the financial might of the infringer. Other times, penalties can take the form of compensation to the party who has been prejudiced by the wrongful act or omission.

5.19 Apart from penalties, competition authorities also have power to order specific acts to be carried out for the purpose of bringing an infringement to an end or for the purpose of restoring a level playing field.

5.20 For example, a competition authority may order parties to an anti-competitive agreement to modify the agreement or even to terminate the whole agreement.<sup>20</sup> Where the infringement in question is an act, the authority may direct the perpetrator to modify or terminate such act.<sup>21</sup> The direction may require the person to take any other action to eliminate the harmful effect of the infringement and to prevent the recurrence of the infringement.

5.21 In certain jurisdictions e.g. the European Union, the competition authority may impose “behavioural remedies” or “structural remedies” on the infringer. The former type of remedy may be available where there is an abuse of dominant position and the dominant firm may be ordered to resume supply to a competitor

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<sup>20</sup> e.g. s32 English Competition Act 1998.

<sup>21</sup> s33 English Competition Act.

or former customer.<sup>22</sup> Structural remedies e.g. an order of divestiture, which is more drastic in nature might be imposed where there is no equally effective behavioural remedy or where a behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy and where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking. An example is where a vertically-integrated undertaking that consistently discriminated against downstream competitors in relation to a vital input.<sup>23</sup>

### **Power to settle**

5.22 Apart from exercising the above typical sanction powers, the competition authority should also have powers to exempt infringers from or settle with infringers on sanctions. This is an important power. Experience has shown that negotiating for a settlement is a highly effective way of solving a competition problem without resorting to a full enforcement process.

### **Policy on Informers**

5.23 It is also important for the competition authority to have the power to implement a leniency programme or policy for encouraging whistle-blowers in relation to anti-competitive behaviour. Such policy has been proven to be extremely effective in breaking cartels which involve secretive and collusive behaviour such as price-fixing or market sharing that is difficult to detect. Such a programme must involve strict confidentiality as to the identity of the informer.

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<sup>22</sup> Commercial Solvents Co v Commission, Cases 6/73 and 7/73 [1974] ECR 223, [1974] 1 CMLR 309.

<sup>23</sup> Page 255, Whish, Richard, 2003. *Competition Law*, 5<sup>th</sup> Edition, LexisNexis Butterworths.

## **Appeal Mechanism**

5.24 Lastly, in view of the extensive powers possessed by the competition authority and the significant impact of such powers, it is necessary to have an appeal mechanism in order to ensure the proper exercise and review of these powers.

5.25 Since competition issues often involve economic and market analysis which require the expertise of economists, a competition appeal board or tribunal, normally comprises of both legal professionals and economists. Usually, members with legal qualification or even a member of judiciary himself will preside over the board or tribunal.

5.26 Hearing of appeals can be conducted in an informal manner as the board/tribunal considers appropriate.<sup>24</sup> Further, the tribunal may have the power to order hearing to be conducted in private if it considers necessary to protect confidentiality of the information involved or to prevent harmful impact on the market. Even in the case of public hearings, the tribunal may order any document produced to be kept confidential upon application by the parties.<sup>25</sup>

5.27 Further, decisions of the competition authority are also subject to Judicial Review which provides an additional safeguard to ensure proper exercise of powers by the authority.

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<sup>24</sup> e.g. Rule 51(2) of The Competition Appeal Tribunal Rules 2003; S103 Australian Trade Practices Act.

<sup>25</sup> e.g. Rule 53(1) of The Competition Appeal Tribunal Rules 2003.

## **VI. KEY RECOMMENDATIONS**

### **An all-embracing Competition Law**

6.1 Competition Law has become an international standard. It is a necessary safeguard for a free economy. To facilitate the maintenance and functioning of the free market in Hong Kong and to ensure an equal and fair opportunity for all to participate and compete in our market, it is strongly recommended there shall be enacted a general and all embracing competition law and the establishment of a competition authority to enforce such a law.

6.2 Except for certain specific sectors of the economy which are normally and justifiably exempt from its application according to international standards, the law shall be applicable to all sectors of our economy.

### **Substantive Prohibitive Provisions**

6.3 There shall be at least two major prohibitive provisions, namely: (1) control of restrictive agreements<sup>26</sup> and (2) control of abuses of dominance<sup>27</sup> as set out above in chapter III hereof. These two prohibitions will cover most of the common types of anti-competitive behaviour recognized internationally.

6.4 For reasons set out in paragraph 3.21 above, we do not consider, at this stage, there is an immediate necessity to implement a merger control regime in Hong Kong, notwithstanding that such a regime is often regarded internationally as an

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<sup>26</sup> Analogous to that of Art 81 of the EC Treaty and Chapter I prohibition of the English Competition Act 1998.

<sup>27</sup> Analogous to that of Art 82 of the EC Treaty and Chapter II prohibition of the English Competition Act 1998.

important integral part of any competition law.

### **Competition Authority**

6.5 Any competition law is toothless if it is not or cannot be properly enforced.

Experience in other countries shows that the ineffectiveness of competition policies are largely due to the lack of adequate enforcement mechanisms. This is so in the case of COMPAG in Hong Kong. Thus, the design and adoption of an effective enforcement mechanism is of utmost importance.

6.6 We recommend the establishment of an enforcement agency responsible for the enforcement of the law in this regard (“The Authority”).

### **Powers of the Authority**

6.7 The Authority shall be equipped with adequate investigatory and adjudicative powers which include:

6.7.1 the power to obtain information;

6.7.2 the powers of entry, search and seizure;

6.7.3 the power to make interim and final decisions;

6.7.4 the power to make interim and final orders with a view to restore, maintain and enhance competition in any particular market;

6.7.5 the power to impose sanctions;

6.7.6 the power to grant exemptions and to run leniency programs;

6.7.7 the power to maintain and ensure confidentiality in information collected by it and of informants or complainants;

6.7.8 the power and responsibility to advocate fair competition and to

educate the public in this regard; and

- 6.7.9 other ancillary powers which are necessary for the performance of its enforcement and advocacy role (e.g. the power to publish sectoral enforcement guidelines from time to time).

### **Independence and Checks and Balances**

6.8 The Authority shall be a statutory body and be independent in its operations and decision making. Any permissible directions from the executive shall be given via prescribed statutory procedures. The length of appointment of its members shall be sufficiently adequate and shall not depend on the decision of the executive.

6.9 The powers of the Authority shall be counter-balanced by adequate measures of checks and balances. There shall be proper appeal mechanisms for parties to challenge the decisions of the Authority. Notwithstanding its independence in operation, the Authority will be accountable to the legislature through submission of annual reports and work plans on a regular basis.

### **Constitution of the Authority**

6.10 The board of the Authority shall be constituted by suitable members of the public knowledgeable or experienced in economics and law or competition matters.

6.11 In this study, we had evaluated the feasibility of three possible options as regards the establishment of the Authority, namely:

**OPTION 1:** By divestiture of the Competition Affairs Branch from the Office

of Telecommunications Authority (“OFTA”) and by expanding its role accordingly;

**OPTION 2:** By expanding the Consumer Council to cover competition matters; and

**OPTION 3:** By transforming the COMPAG into a fully powered Authority as stated above.

6.12 As regards OPTION 1, it is submitted that the Competition Affairs Branch is the only existing government office who has the experience and expertise in competition enforcement. Its work has been proved to be quite successful in past years in view of the present intense competition in the telecommunications market.

6.13 As compared to OPTION 1, OPTION 2 is not preferred as the work nature of the Consumer Council is relatively different from competition enforcement. Further, its dual role in both consumer protection and competition enforcement might compromise its neutrality in the eyes of the public.

6.14 We submit that OPTION 3 carries the least advantage as COMPAG has been widely criticized as a mere inept forum. It possesses neither the practical experience of competition enforcement nor any expertise in competition matters.

6.15 We therefore submit that OPTION 1 is a feasible option for consideration.

## **Estimated Size and Cost of the Authority**

6.16 The Consumer Council envisaged, in its report “Competition Policy – The Key to Hong Kong’s Future Economic Success” published in 1996<sup>28</sup>, that the Authority should be a small organization similar in size to the Office of the Ombudsman (the then Office of the Commissioner for Administrative Complaints) with small ad hoc expert committees assisted by the Authority’s staff to carry out investigations. In this regard, the estimated amount of appropriation for the Office of the Ombudsman is HK\$81.4 million for the financial year ended 31st March 2006.

6.17 Internationally, reference might be made to the respective sizes and budgets of the Singaporean Competition Commission and the Irish Competition Authority as the size of these two economies are comparatively similar to ours.

6.18 The total operating cost of the Irish Competition Authority in 2004 amounts to approximately EUR4,269 million which is equivalent to HK\$40 million.<sup>29</sup> It employs a total of 48 staff members as at March 2006.

6.19 The total estimated expenditure of the Singaporean Competition Commission for the financial year of 2006 is approximately SGD15.37 million which is equivalent to HK\$75 million.<sup>30</sup> The estimated size of staff is 53 in the same financial year.<sup>31</sup>

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<sup>28</sup> At page 79.

<sup>29</sup> Irish Competition Authority 2005 Annual Report.

<sup>30</sup> 2006 Budget of the Singaporean Government.

<sup>31</sup> Ibid.

6.20 Reference might also be made locally to the size and budget of the Competition Affairs Branch of the Office of Telecommunications Authority (the “Branch”) which is responsible for enforcing the competition provisions of the Telecommunications Ordinance in Hong Kong.

6.21 As of April 2006, the Branch has a staff size of 14 with backgrounds in law, economics, accounting, engineering and other business-related areas and is also supported by the in-house legal team and regulatory and technical staff from other branches of the Telecommunications Authority. The annual operating cost for the year 2005-2006 amounts to HK\$19.1 million, half of which being staff expense and the other half being operating costs, consultancy fees and miscellaneous expenses.<sup>32</sup>

6.22 It is, therefore, reasonable to estimate that the annual operating cost of the Authority can be in the range of HK\$40 million at its full operating capacity.

## **Conclusion**

6.23 The public discussion on an all-embracing competition law has gone on for almost one and a half decade. There are signs showing that our economy is losing its competitiveness amid its integration with Mainland China and the process of globalization. Now is time to take a step further to preserve our core value of fair competition as well as the competitiveness of our economy.

-END-

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<sup>32</sup> The author is grateful for the information provided by Mr. C.S. Wong of the Competition Affairs Branch of the Office of the Telecommunications Authority.

## Appendix

### Summary Table of Institutional Design of National Competition Authorities in Various Jurisdictions

#### (a) Enabling Treaties/Legislations and Legal Status

	National Competition Authorit(ies)	Enabling Treat(ies)/Legislation(s)	Legal Status
<b>The United Kingdom</b>	<b>Office of Fair Trading</b>	Competition Act 1998 Enterprise Act 2002	Body corporate established by statute
	<b>Competition Commission</b>	Competition Act 1998 Enterprise Act 2002	Body corporate established by statute and an executive Non-Departmental Public Body
<b>European Union</b>	<b>Competition Directorate General (DG COMP) of the European Commission (“EC”)</b>	EC Treaty	An EC directorate specifically responsible for Competition Policy
<b>Singapore</b>	<b>Competition Commission of Singapore</b>	Competition Act 2004	Body corporate established by statute
<b>Australia</b>	<b>Australian Competition and Consumer Council (ACCC)</b>	Trade Practices Act 1974	Body Corporate established by statute
<b>New Zealand</b>	<b>New Zealand Commerce Commission</b>	Commerce Act 1986	Body Corporate and established by statute (also an Independent Crown Entity)
<b>Canada</b>	<b>Competition Bureau</b>	Competition Act	Independent Law Enforcement Agency with its status stemmed from the statutory role of the Commissioner for Competition
<b>The United States</b>	<b>Federal Trade Commission</b>	Federal Trade Commission Act	Body Corporate established by statute
<b>Ireland</b>	<b>Competition Authority</b>	Competition Act 1991 (amended and supplemented by Competition Acts 1996 and 2002)	Body corporate established by statute
<b>Taiwan</b>	<b>Fair Trade Commission</b>	Fair Trade Law 1992 Organic Statute of the Fair Trade Commission 1992	Established under the Executive Yuan (行政院) (the Cabinet of the Taiwan Government)

**(b) Functions, Roles and Private Rights of Action**

	<b>National Competition Authorit(ies)</b>	<b>Functions and Roles</b>	<b>Private Rights of Action</b>
<b>The United Kingdom</b>	<b>Office of Fair Trading</b>	Advocacy, Advisory, Investigation, Adjudication and Imposition of Sanctions; refer merger cases to Competition Commission	Available (S47A Competition Act inserted by S18 Enterprise Act 2002)
	<b>Competition Commission</b>	To conduct merger and market investigations; makes decisions on mergers and remedies in the case of an adverse findings	
<b>European Union</b>	<b>Competition Directorate General (DG COMP) of the European Commission (“EC”)</b>	Advocacy, Advisory, Investigation, Adjudication and Imposition of Sanctions	Available through national courts of the member states
<b>Singapore</b>	<b>Competition Commission of Singapore</b>	Advocacy, Advisory, Investigation, Adjudication and Imposition of sanctions	Only available after the Commission has made a decision (s86 of the Act) Infringement decision made by the Commission has binding effect on court.
<b>Australia</b>	<b>Australian Competition and Consumer Council (ACCC)</b>	Advocacy, Investigator, prosecutor in civil action in relation to anti-competitive practices; adjudication in relation to authorization of certain prohibited practices and mergers and acquisitions	Available under S82 Trade Practices Act 1974
<b>New Zealand</b>	<b>New Zealand Commerce Commission</b>	Advocacy, Investigator, prosecutor in civil action in relation to anti-competitive practices; adjudication in relation to authorization of certain prohibited practices and mergers and acquisitions	Available
<b>Canada</b>	<b>Competition Bureau</b>	Advocacy, Investigator, referring criminal matters to AG for prosecution, bringing civil matters before Competition Tribunal	Limited to certain criminalized practices e.g. bid-rigging and predatory pricing (S36 Competition Act)
<b>The United States</b>	<b>Federal Trade Commission</b>	Advocacy, Investigation, Prosecution, Issuance of administrative complaints by administrative law judges, Issuance of Trade Regulation Rules for a specific industry	Available
<b>Ireland</b>	<b>Competition Authority</b>	Advocacy, Advisory, Investigation, Authorisation, Prosecution (No power to impose sanctions; no role in policy formation)	Available (S14 Competition Act 2002)
<b>Taiwan</b>	<b>Fair Trade Commission</b>	Investigation, Adjudication, Policies and law reform measures	Available (under Art 30 and 31 of the Fair Trade Law 1992)

**(c) Board of Governance and Size of Establishment**

	<b>National Competition Authorit(ies)</b>	<b>Board of Governance</b>	<b>Size of Establishments</b>
<b>The United Kingdom</b>	<b>Office of Fair Trading</b>	A board consisting of a Chairperson and 6 other board members	150 staff (as of 2006)
	<b>Competition Commission</b>	1 Chairperson, 3 deputy chairpersons and up to 50 part-time members.	631 permanent staff (end of March 2003)
<b>European Union</b>	<b>Competition Directorate General (DG COMP) of the European Commission (“EC”)</b>	<ul style="list-style-type: none"> <li>● European Commissioner for Competition</li> <li>● Director General and 3 Deputy Directors General</li> <li>● Two independent Hearing Officers to ensure the observation of due process</li> </ul>	608 A grade and support staff (2002)
<b>Singapore</b>	<b>Competition Commission of Singapore</b>	1 Chairperson and 2 to 16 members	Information not available
<b>Australia</b>	<b>Australian Competition and Consumer Council (ACCC)</b>	1 Chairman,1 Deputy Chair, 5 full-time Commissioners and several associate and ex-officio members and a Chief Executive Officer	519 staff (as of June 2005)
<b>New Zealand</b>	<b>New Zealand Commerce Commission</b>	<ul style="list-style-type: none"> <li>● 1 Chairperson, 1 Deputy Chairperson and up to 4 Commissioners one of whom being the Telecommunications Commissioner</li> <li>● At least one must be a barrister or solicitor.)</li> <li>● Up to two Cease and Desist Commissioners for hearing and determining applications for cease and desist orders (must be barristers or solicitors)</li> <li>● Certain Associate members (in relation to a matter or a class of matters)</li> </ul>	141 staff (as of Oct 2005)
<b>Canada</b>	<b>Competition Bureau</b>	<ul style="list-style-type: none"> <li>● Commissioner of Competition being the head of the Bureau.</li> <li>● Several Deputy Commissioners for various branches</li> </ul>	440 staff (in year 03-04)
<b>The United States</b>	<b>Federal Trade Commission</b>	5 Commissioners including the Chairman	1019 Full-time equivalent employment (as of 2005)
<b>Ireland</b>	<b>Competition Authority</b>	1 Chairman and 2 to 4 other members (one of whom appointed as the Director of Competition Enforcement).	48 staff (as of Mar 2006)
<b>Taiwan</b>	<b>Fair Trade Commission</b>	Chairman of FTC (holds cabinet rank in the Executive Yuan) , Vice Chairman and 7 Commissioners	217 staff (as of end of 1994)

**(d) Method of Appointment and Length of Term**

	<b>National Competition Authorit(ies)</b>	<b>Method of Appointment</b>	<b>Length of Term</b>
<b>The United Kingdom</b>	Office of Fair Trading	By the Secretary of State for Trade and Industry	Determined by the appointer but may not exceed five years.
	Competition Commission	By the Secretary of State for Trade and Industry following open competition.	8 years in each term
<b>European Union</b>	Competition Directorate General (DG COMP) of the European Commission ("EC")	By the European Commission	Information not available
<b>Singapore</b>	Competition Commission of Singapore	By Minister of Trade and Industry ("MTI")	To be determined by MTI of not less than 3 years and not more than 5 years
<b>Australia</b>	Australian Competition and Consumer Council (ACCC)	By the Governor-General with support from a majority of state and territory government.	Not exceeding 5 years as determined by the appointer for Chairperson and Commissioners; eligible for re-appointment
<b>New Zealand</b>	New Zealand Commerce Commission	By the Governor-General on the recommendation of Minister of Commerce	Determined by the appointer
<b>Canada</b>	Competition Bureau	Appointed by Governor in Council	Determined by the appointer
<b>The United States</b>	Federal Trade Commission	Nominated by the President and confirmed by Senate. No more than three Commissioners can be of the same political party.	A term of 7 years for each Commissioner
<b>Ireland</b>	Competition Authority	By the Minister for Enterprise, Trade and Employment	Determined by the appointer and shall not exceed 5 years. Eligible for re-appointment.
<b>Taiwan</b>	Fair Trade Commission	By the President on recommendation by the Premier	3 years and eligible for reappointment.

### (e) Relationship with Government

	National Competition Authorit(ies)	Relationship with Government
<b>The United Kingdom</b>	Office of Fair Trading	Independent in operation but accountable to the Government and the Parliament
	Competition Commission	<ul style="list-style-type: none"> <li>● Market and industry inquiries are conducted in response to references by OFT, Secretary of State or sectoral regulators. (no power to conduct enquiries on its own initiatives)</li> <li>● Meetings and contacts between Department of Trade and Industry (“DTI”) and the Commission for general exchange of views on procedures and lessons learnt from completed enquiries (substance of active enquiries will not be discussed)</li> </ul>
<b>European Union</b>	Competition Directorate General (DG COMP) of the European Commission (“EC”)	Part of the EC which is the executive arm of the European Union
<b>Singapore</b>	Competition Commission of Singapore	<ul style="list-style-type: none"> <li>● Affiliated under the Ministry of Trade and Industry</li> <li>● Minister of Trade and Industry (“MTI”) has power to give general directions relating to the policy which the Commission has to observe (S8 Competition Act)</li> </ul>
<b>Australia</b>	Australian Competition and Consumer Council (ACCC)	<ul style="list-style-type: none"> <li>● The Treasurer may give ACCC certain limited directions connected with the performance of its functions or the exercise of its powers to which ACCC must comply</li> <li>● ACCC has to furnish any information concerning the performance of its functions upon request by the Parliament. (S29 Trade Practices Act)</li> </ul>
<b>New Zealand</b>	New Zealand Commerce Commission	<ul style="list-style-type: none"> <li>● Not subject to direction from Ministers or the Executive in its enforcement and regulatory control activities</li> <li>● Minister can communicate to the Commission statements of economic policy, under a set of formal and transparent statutory procedures, which the Commission must have regard to in its decisions (S26 Commerce Act)</li> </ul>
<b>Canada</b>	Competition Bureau	Independence in enforcement
<b>The United States</b>	Federal Trade Commission	Reports to the Congress
<b>Ireland</b>	Competition Authority	<ul style="list-style-type: none"> <li>● The Authority is independence in the performance of its functions (S29(3) Competition Act 2002)</li> <li>● Minister has the right to request the Authority to carry out any study or analysis into any practice in regard to competition.</li> <li>● Minister may direct the Authority to carry out an investigation on abuse of dominance (S14), to be followed by a report published by the former.</li> <li>● The Authority’s administrative and operational aspects (but not the decision making process) are in part under the jurisdiction of the Competition Policy Section of the Department of Enterprise, Trade and Employment</li> </ul>
<b>Taiwan</b>	Fair Trade Commission	The Commission is committee of the Executive Yuan which is the cabinet of the Taiwanese Government headed by the Premier

## (f) Accountability

	<b>National Competition Authorit(ies)</b>	<b>Accountability</b>
<b>The United Kingdom</b>	Office of Fair Trading	Annual plan and report to be submitted to Government and laid before the Parliament
	Competition Commission	<ul style="list-style-type: none"> <li>● Submission of Annual plan and report to SS and be laid before the Parliament.</li> <li>● Provision of key performance indicators to DTI for monitoring purpose.</li> </ul>
<b>European Union</b>	Competition Directorate General (DG COMP) of the European Commission (“EC”)	Accountable to the Commissioner for Competition of EC
<b>Singapore</b>	Competition Commission of Singapore	Information not available
<b>Australia</b>	Australian Competition and Consumer Council (ACCC)	Annual Report to be furnished to the Treasurer for presentation to the Parliament
<b>New Zealand</b>	New Zealand Commerce Commission	<ul style="list-style-type: none"> <li>● Reports to the Parliament annually</li> <li>● Confidential Quarterly Reports to Minister of Economic Development</li> <li>● Output Agreements entered with Ministers in relation to funding and outputs</li> <li>● Publication of a Statement of Intent of intended activities in next 3 years</li> </ul>
<b>Canada</b>	Competition Bureau	Annual Reports be submitted to the Minister of Industry and to be laid before the Parliament (S127 Competition Act)
<b>The United States</b>	Federal Trade Commission	Information not available
<b>Ireland</b>	Competition Authority	<ul style="list-style-type: none"> <li>● Submission of annual reports to Minister</li> <li>● Submission of Strategic Plan to the Minister in every 3 years</li> <li>●</li> </ul>
<b>Taiwan</b>	Fair Trade Commission	Answerable to the Executive Yuan

### (g) Appeals and Specialist Courts

	National Competition Authorit(ies)	Appeals	Further Appeals	Specialist Court to handle competition cases
<b>The United Kingdom</b>	Office of Fair Trading	Competition Appeal Tribunal	Court of Appeal and then to the House of Lords	Nil
	Competition Commission	Competition Appeal Tribunal	Court of Appeal and then to the House of Lords	Nil
<b>European Union</b>	Competition Directorate General (DG COMP) of the European Commission (“EC”)	Court of First Instance	European Court of Justice (on questions of law only)	Nil
<b>Singapore</b>	Competition Commission of Singapore	Competition Appeal Board	High Court and then to the Court of Appeal on a point of law	Nil
<b>Australia</b>	Australian Competition and Consumer Council (ACCC)	Australian Competition Tribunal	Federal Court	Nil
<b>New Zealand</b>	New Zealand Commerce Commission	High Court (augmented to include 1 lay member)	Court of Appeal	Nil
<b>Canada</b>	Competition Bureau	Federal Court of Appeal (on appeal from decisions of Competition Tribunal)	N/A	Competition Tribunal (composed of both judges and lay members knowledgeable in economics, industry, commerce and public affairs)
<b>The United States</b>	Federal Trade Commission	<ul style="list-style-type: none"> <li>● Full Commission (on appeal from decision by an administrative judge)</li> <li>● Court of Appeal (for challenge to the Trade Regulation Rules)</li> </ul>	Court of Appeal and then the Supreme Court	Nil
<b>Ireland</b>	Competition Authority	High Court (against determination of the Authority)	Supreme Court	Nil
<b>Taiwan</b>	Fair Trade Commission	Information not available	Information not available	Nil

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