



Civic Party

Submission on the Government's Detailed Proposals for a Competition Law

August 2008

1. The Civic Party is pleased that the government has brought forward a set of generally workable proposals for a general competition law for Hong Kong. However, this is long overdue and the proposals, as they stand, have significant weaknesses especially in relation to:

- the detailed mechanism for the appointment of the Competition Commissioners and members of the Competition Tribunal;
- the use of discretionary power by the Chief Executive to exempt conduct or undertakings from the application of the law;
- the complete exemption of all government and statutory bodies from the provisions of the law;
- the wide and imprecise exclusion from the ambit of the law of privately owned monopoly utility providers and transport undertakings;
- the omission of any reference to the jurisdictional reach of the law;
- the interplay between the proposed Hong Kong competition regime and the new Mainland Antimonopoly Law; and
- the lack of discussion of the legal relationship with the de facto integration of the Hong Kong and Pearl River Delta economies.

2. The Civic Party (CP) supports the swift introduction of a general competition law subject to the matters mentioned in paragraph 1 above being adequately addressed and improvements being made to the proposed regime as outlined in the following paragraphs.

3. Statutory Objective

CP agrees with the inclusion of an economic efficiency objective for the law provided that this must mean that consumer welfare is the goal of the objective through the promotion of competition.

4. Definitions

'Undertakings' must be defined to include government or statutory bodies that compete in the market place for customers or undertake activities that are not governmental or regulatory in function but commercial in nature. This makes clear that the law applies equally to all who engage in commercial activities.

5. The Competition Commission

CP supports the creation of a single competition enforcement agency with powers to investigate, adjudicate and sanction subject to the proper protections of the procedural rights of accused undertakings. This point is particularly important given the Court of Final Appeal decision in *Koon Wing Yee v Insider dealing Tribunal* (FACV No.10 of 2007). All relevant safeguards must be employed as required under the Bill of Rights Ordinance. The body that adjudicates must be clearly independent of the investigatory and prosecutorial functions and the criminal standard of proof must be satisfied. These requirements will not make 'prosecutions' easy but the rule of law must be upheld.

6. The appointment of suitable qualified Commissioners should be as open and transparent as possible. Candidates should be subject to confirmation by the Legislative Council and not the sole prerogative of the Chief Executive so as to enhance public confidence in the integrity of the nominees.

7. CP considers that some Commissioners should be full time appointments to ensure that the establishment and initial operations of the Commission are conducted expeditiously and professionally. Adequate resources of sufficiently well trained personnel are vital to ensure the successful implementation of the new law.

8. CP believes that the Commission should have sufficient powers to investigate and cure all impediments to competition whether they are caused by conduct or the very structure of the industry concerned. CP considers that the Commission needs the power to investigate anticompetitive structures. This appears to be conceded by the government in the proposal to give the Commission to undertake market investigations. However without the ability to require appropriate remedies this power of investigation will be toothless should such structural defects be found. In the UK, the authorities are provided with such powers in s.131 and Schedule 8 of the Enterprise Act 2002. Without such powers the Commission will not be able to achieve

its objective of ensuring the attainment of economic efficiencies through competitive markets. Government should carefully consider the need to adopt a similar regime to that of the UK in this regard.

9. The Tribunal

The establishment of this body is appropriate but care should be given to ensure that the President is a full time appointment in the first instance to ensure that appeals and private suits are dealt with efficiently and in the first phase that appropriate rules of procedure are established. The President must have detailed knowledge and experience of competition law in other jurisdictions so as to be able to use overseas experience to ensure that the Hong Kong ordinance is applied in accordance with best practice standards.

10. CP supports the proposed powers of the Tribunal to hear appeals and private actions but thinks the sanctioning power of the commission can be raised as suggested below in paragraph 16 to HK\$100million.

11. Prohibited Conduct and Guidelines

CP agrees with the proposals that agreements or concerted practices that have the purpose or effect of substantially lessening competition and the abuse of substantial market power should be prohibited. These provisions are similar to those used in other jurisdictions but with the caveat that the abuse provision can be used at a lower threshold than an abuse of dominance provision in other jurisdictions. This is appropriate given Hong Kong's concentrated market structures in capital intensive sectors and the existence of a conglomerate that wield a disproportionate degree of market power that may adversely affect competition.

12. CP considers that these prohibitions should apply to all undertakings as defined above in paragraph 4 including government and statutory bodies that engage in commercial activities.

13. CP agrees that the Ordinance should not include a restrictive list of anti competitive conduct as this would merely facilitate evasion of the law by undertakings who structured their operations or conduct in such a way to avoid the law but they would still be able to achieve an anti competitive objective. A formulistic

approach to competition law has failed to energize competition in various jurisdictions and so Hong Kong should not fall into this trap. The Commission should have power to issue statutory guidance to more precisely delimit the ambit of the law as is currently the case in the telecommunications and broadcasting sectors and is the common practice in overseas jurisdictions.

14. Cartels clearly cause significant harm and their activities should be a primary target for the new Hong Kong Competition Commission. Vertical agreements are more problematic. The proposal that only vertical agreements imposed by undertakings with substantial market power should be caught is controversial. This limitation may be inappropriate in Hong Kong given the particular characteristics of the domestic market and the existence of conglomerate enterprises. CP proposes that the issue of which vertical agreements should be subject to sanction should be left to the detailed consideration by the Commission after enactment of the Ordinance.

15. As regards per se prohibitions, the argument in favor of them is that they provide legal certainty but that may mean that the economic effect of per se offenses is not carefully assessed. On balance, CP supports the proposal that the Ordinance should not contain per se infringements.

16. CP considers that the investigatory and sanctioning powers of the Commission are adequate although the limit of \$10 million on the fining powers of the Commission appears to be too low. CP supports the conclusion that this figure should be raised to \$100 million and that higher sums of up to 10 per cent of turnover and the disqualification powers should be exercisable by the Tribunal.

17. CP strongly supports the introduction of a carefully crafted leniency program with adequate check against abuses as this will undoubtedly assist in the discovery of harmful Cartels. However, the granting of leniency should not prejudice the rights of private parties to claim damages against the infringing party.

18. Merger Control

CP considers that the inclusion of an appropriate but potentially light touch merger control regime is essential for the proper functioning of any comprehensive competition regime. There is no example world wide of a developed economy with a competition regime not having a merger control mechanism. Without a merger control

regime unlawful cartels or duopolies could combine to create monopolies. Legitimate and harmless mergers may be inhibited or delayed or made more costly by legal uncertainty as the conduct powers could be used by the Commission as a blunt weapon of control as occurred in the European Union pre 1990. Lack of a general merger control regime would leave telecommunication in an anomalous position as it already has a specific regime. There is no logical reason not to have a merger control regime tailored to Hong Kong's specific circumstances and this should be included in the competition Ordinance. Matters of detail such as thresholds and procedure cannot be addressed here given the absence of firm proposals by government. CP would advocate a relatively light touch regime but some caution should be exercised given the high concentration levels already seen in many Hong Kong domestic markets and the often high but invisible de facto barriers to entry that exist.

19. Private rights of action

CP fully supports the government's proposal to allow individuals or undertakings who have suffered loss or damage as a result of anti competitive conduct to claim damages and injunctions against wrong doers. Not only does this protect the legitimate expectations of law abiding citizens and companies but it also provides an additional mechanism to ensure that market competition is promoted and anti competitive activities are suppressed.

20. The provisions of stand alone and follow on claims to the Tribunal and for mixed cases to be initiated in the Civil Courts with a transfer mechanism in appropriate cases are appropriate.

21. The concerns expressed by some in Hong Kong of frivolous, vexatious, malicious and excessive litigation are unfounded and CP welcomes the proposed powers to be granted to the Commission and the Tribunal to prevent the abusive use of private actions against blameless enterprises whilst protecting the rights of legitimate plaintiffs to take action to defend their rights.

22. Small and medium sized enterprises (SME)

CP welcomes the government's proposals to allay the concerns of the SME sector. The provision of a Commissioner with SME experience, the power of the Commission to stipulate in guidance that businesses with low market shares would

not be subject to the prohibition agreements save where they contributed hard core Cartel provisions is welcomed.

23. Telecommunications and broadcasting

CP welcomes the proposal that the existing sector specific competition rules will be repealed and be replaced by the new generic rules in the Competition Ordinance. As regards enforcement of the new rules in these two sectors, the Competition Commission should be given the leading role with the ability to seek specialized assistance from the new sectoral communications authority as appropriate. Hong Kong is too small to support a multiplicity of competition regulators and a one stop shop would benefit both the public and the industry.

24. Exemptions and Exclusions

The proposals to give the commission power to exempt specific agreements where the net economic benefit outweighs potentially anti competitive effect is to be welcomed as are the proposals to allow the creation of block exemptions.

25. However, the suggested exemptions in proposals 48, 49 and 50, are not supported by CP in their current form as they will effectively undermine the appropriate working of the Competition Ordinance by providing that large areas of economic activity in Hong Kong are not within the purview of the Ordinance and the Commission will be unable to achieve its principle objective which is to ensure economic efficiency in the Hong Kong economy through sustainable competition. The proposed exemptions are far too wide and undefined and lack any coherent justification.

26. Most public utilities and the transport sector in Hong Kong are effective monopolies in private hands that are profit maximizing enterprises for the benefit of their shareholders. They are not subject to comprehensive regulatory regimes as is the case in other developed economies and thus exempting them from the operation of the Competition law is totally inappropriate in the particular circumstances of Hong Kong. In addition to being grossly unfair to other enterprises there will be no level playing field in relation to the allocation of capital and this could create significant distortions when investment decisions are made. Public utilities and the transport sector must be subject to the general provisions of the Competition Ordinance unless they are

controlled by comprehensive regulatory regimes. CP strongly objects to the proposed exemption of these sectors.

27. The proposed power of the Chief Executive to exempt conduct or undertakings in the 'public interest' is too wide and not subject to ratification by the legislative council and there is no provision for consultation by the CE with the competition commission or other interested parties when such a power is exercised. CP is in favor of a procedure that involves other stakeholders and the positive approval of the legislative council of such exemptions.

28. The exemption of Government and statutory bodies is entirely unacceptable to CP. Government itself and many statutory bodies compete in the market place with private sector businesses. CP supports exemption of pure governmental or regulatory functions from the conduct rules in the proposed Ordinance but CP strongly opposes the suggestion that all government and statutory bodies should be exempt. Ensuring an efficient and pro-competitive domestic economy must include the scrutiny of commercial activity by government or public sector bodies. It is also contrary to the Rule of Law to exempt commercial activities of government from the law. Thus CP proposes that the definition of undertakings subject to the law should include government or statutory bodies that engage in commercial activities.

29. Government is the monopoly supplier of development land in Hong Kong and is also the ultimate owner of all real estate. Government exercises not only the powers of a property owner but also regulatory functions in the public interest such as town planning. CP proposes that where the government acts as the seller of real estate or exercises the powers of a commercial landlord, for example in relation to the variation of lease terms, which only have revenue considerations rather than public welfare considerations, then government real estate activities should also be covered by the conduct provisions of the Competition Ordinance. This will ensure that government commercial activities in relation to real estate are governed on the same basis as the activities of private sector landlords.

30. Conclusion

CP welcomes the introduction of a comprehensive competition law with minimal exemptions in Hong Kong at the earliest opportunity and the establishment of an independent expert Competition Commission in accordance with the government's



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general scheme as outlined in it Detailed Proposals but subject to the matters referred to in this submission being fully addressed.