Hong Kong Institute of
Certified Public Accountants
香港會計師公會

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By email (competition@cedb.gov.hk) and by post

Our Ref.: C/CITF, M58020

Commerce, Industry and Tourism Branch (Division 2)
Commerce and Economic Development Bureau
Level 29, One Pacific Place
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Dear Sirs,

Consultation on Detailed Proposals for a Competition Law

General comments

1. The Hong Kong Institute of CPAs ("Institute") broadly supports the initiative of the Hong Kong SAR Government to introduce a general competition law in Hong Kong. The introduction of statutory provisions to deal with anti-competitive practices in specific industry sectors has proved to be effective in helping to maintain a commercial environment in which competition has been able to thrive.

2. Most developed economies and a number of developing economies, including the Mainland, have competition laws and, while this is not sufficient justification in itself for Hong Kong to follow suit, it is indicative of the view taken by many countries around the world that, without additional support, market mechanisms are not able to safeguard against anti-competitive behaviour that is disadvantageous to consumers.

3. Recent surveys tend to suggest that Hong Kong is performing relatively less well in the world competitiveness rankings. This will not have gone unnoticed by prospective investors and could potentially have an adverse effect on Hong Kong's reputation internationally. It is important, therefore, that steps are taken to demonstrate that Hong Kong is committed to maintaining a business environment that welcomes competition and in which swift and effective action will be taken where competition is stifled or undermined by illegitimate means.

4. The argument is sometimes made that the Hong Kong market is different because it is a (geographically) small market. It follows that there is limited scope for multiple service providers in such a market and the public can benefit from the economies of scale that result from having fewer service providers. Such arguments are not really tenable. No substantive evidence has been adduced to support the argument that public has benefited from an environment with limited competition, while there may be evidence to suggest that, at least in some cases, the public has not benefited from such a situation. In addition, where there has been a competitive market, e.g., in the

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telecommunications or mortgage loan markets, it seems that the public has benefited on, e.g., pricing and range of services. Furthermore, Hong Kong cannot be regarded as being a particularly small market, in terms of either GDP or population, and competition laws exist in a number of markets that are both geographically small and also significantly smaller than Hong Kong in terms of GDP and population, including Luxembourg, Singapore and Mauritius.

5. Given that Hong Kong has come to this subject later than many other jurisdictions, it should be able to benefit from the lessons that others have learned. We should be in a position to establish a legal and administrative framework that is effective, not unnecessarily bureaucratic and unwieldy, broad enough in scope so as not to be easily avoided or circumvented, and not open to abuse.

6. Below, we offer views on some of the more specific issues raised in the consultation paper. References in brackets are to proposals or paragraph numbers in the consultation paper.

Purpose of the legislation and definitions (Chapter I)

7. The proposed purpose of the legislation – to enhance economic efficiency and thus benefit consumers through promoting sustainable competition, while being a worthy intention, is rather nebulous and detached from the immediate aim of the law, which is to discourage and, where necessary, take action against anti-competitive practices. Under the circumstances, we would suggest making the statement of the purpose of the law more self-explanatory.

8. No indication is given of how the concept of "market" will be defined. It has been pointed out that the way in which this is construed will have very significant consequences, given that the proposed competition law will target conduct that has "the purpose or effect of substantially lessening competition", or undertakings that have "a substantial degree of market power" and which abuse that power with the purpose or effect of substantially lessening competition. We understand that this issue has been raised, for example, in relation to the supermarket chains in Hong Kong, as their position may be substantially different depending upon whether the market in which they are regarded as operating is grocery stores or food markets generally (including wet markets). A small or medium-sized enterprise ("SME") may, for example, be considered as having a substantial share of a niche market making a bracket for a particular car part, but a small share of the market for brackets generally. More information should be provided about how this matter is dealt with elsewhere and what is being proposed in the case of Hong Kong.

The Competition Commission ("Commission) (Chapter II)

9. It is noted that that the Investigation Committee ("IC") would be chaired by a Commission member, who will not then participate in the decision on the complaint in question. In order to ensure that there is an effective segregation of duties, and minimise the risk of conflicts of interest arising, other outside parties and staff of the executive, who participated in a particular IC or

conducted investigation work, etc., should also, as far as possible, not take part in adjudicating on the complaint in question (re. proposal 9).

10. If it is intended that there should be separation between the oversight and executive functions of the Commission, i.e., the roles of the board and the executive, and it is reasonable that there should be, staff of the executive should not be members of the IC, although they would be expected to be involved in conducting investigations and writing up reports for the IC (re. paras. 6 and 11).

11. In relation to co-operating with, and providing assistance to, competition authorities or organisations on competition matters, whether in Hong Kong or elsewhere, consideration need to be given as to whether those overseas bodies are subject to laws and safeguards similar to those applying in Hong Kong.

12. In order to ensure the confidentiality, and to avoid the misuse, of information, where a conflict of interest involving a Commission member or staff member of the executive exists in relation to a matter being investigated, that person should not only not take part in any deliberation or decision on the case, but should also be prevented from learning about the details of the case as soon as possible after the conflict becomes known (re. proposal 10 and para.16).

Competition Tribunal ("Tribunal") (Chapter II)

13. It has been proposed that the Tribunal would not be bound by the rules of evidence, so that it could function expeditiously with little formality and technicality (re. para. 23). While we can see the attraction of keeping the procedures as straightforward and as expeditious as possible, the case of *Koon Wing Yee v. Insider Dealing Tribunal and the Financial Secretary* (FACV No. 19 of 2007) indicates that, if the Tribunal is empowered to impose fines that are intended to serve as a deterrent, and fines of up to 10% of total turnover during the period that the infringement occurred (re. para. 26) could be seen in this light, then it may not be possible from a legal point of view to a adopt a simple administrative procedure. Rather, if the penalties are regarded as criminal in nature, more extensive legal safeguards may be required, including adopting the burden and standard of proof applicable in a criminal prosecution. This is clearly an important issue that needs to be addressed if the competition law is to be effective.

Conduct Rules (Chapter III)

14. The conduct rules apply to " 'undertakings', which may be defined as individuals, companies or other entities engaging in economic activities" (re. proposal 23). This definition may not be sufficiently self-explanatory. "Economic activities" is itself a somewhat opaque term and, given the fundamental importance of this concept to the scope of the proposed law, it may require further elaboration.

Merger regulation (Chapter III)

15. Existing merger provisions are contained in the Telecommunications Ordinance. There seems to be no clear rationale for taking the view that such provisions should be confined only to the telecommunications sector. While we understand that it should not be the role of the competition authorities to investigate existing situations of market dominance, monopolies, etc., unless abuses take place, excluding future mergers from the scope of the law altogether could allow new developments to occur that would, in practice, result in substantially reducing competition in particular markets, even where there is a clear intention to bypass the law through a merger. However, if merger provisions are introduced without any implementation timetable (re. option (b), para. 25), this could encourage the speeding up of any prospective merger activities to avoid the scrutiny of the law.

Penalties for engaging in anti-competitive conduct (Chapter III)

16. More information should be provided as to the basis and rationale for the proposed level of fines, maximum caps and other penalties.

17. The consultation document suggests, at Chapter II, paragraph 13, that requiring the Commission to inform a party that it is under investigation could obstruct the course of the investigation by, for example, allowing the party the opportunity to destroy relevant documents. We would suggest that, while the basic penalty regime under the proposed law would be civil in nature, criminal penalties might also be needed as a deterrent against certain types of conduct, e.g., deliberate destruction of documents in order to undermine an investigation or refusal to comply with requirements imposed by the Commission or Tribunal.

Private actions (Chapter IV)

18. For various reasons, we believe that, at the outset, it might be preferable to confine private actions to follow-on actions, and decide whether to extend this right to stand-alone actions only after the law has been in operation for an appropriate period and the Commission has established itself and its modus operandi.

19. Our reasons for suggesting this include the following:

- Permitting stand-alone private actions could act as disincentive to the Commission to take up anything other than high profile and/or straightforward cases.

- It could make it more difficult for the Commission to obtain adequate resources if it is not seen as solely its responsibility to initiate actions against anti-competitive conduct.

- The proposed procedure confuses the roles of the Tribunal and makes it unclear whether it is an appeals/oversight body or a body that hears first instance cases.

- Given the potential consequences of the *Koon Wing Yee* case, referred to above, it is not clear that the procedural advantages mentioned in Chapter IV, paragraph 10, would apply and, if the alternative forum for private stand-alone cases were to be the court, this would discourage all but large, very well-resourced applicants from initiating claims. It would not be seen as viable option by many SMEs.

- The possibility of the Commission and private parties commencing actions in relation to the same conduct adds complexity to the procedures, which would not beneficial in the early stages of the Commission's existence.

Exemptions and exclusions (Chapter VII)

20. We agree that there should be provision in the law for exemptions and exclusions in the public interest and on other grounds (e.g., where an entity undertakes market regulatory functions). Wide, blanket exemptions may be more difficult to justify. While the activities of the government and statutory bodies may generally fall under the criteria for exemption, there are some fairly clear exceptions to this, which are essentially commercial and non-regulatory in nature and operating in markets where private sector service suppliers also operate.

If you have any questions on the Institute's submission, please do not hesitate to contact me on 2287 7084 or peter@hkicpa.org.hk.

Yours faithfully,

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