

GOVERNMENT RESPONSE

TO

CONSUMER COUNCIL'S REPORT ENTITLED

**“Competition Policy : The Key to Hong Kong’s
Future Economic Success”**

TRADE & INDUSTRY BUREAU

**THE GOVERNMENT OF THE HONG KONG SPECIAL
ADMINISTRATIVE GOVERNMENT**

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CHAPTER 1 INTRODUCTION

- 1.1 We thank the Consumer Council for having completed a most comprehensive report on the competition policy for Hong Kong. The report, entitled “Competition Policy : The Key to Hong Kong’s Future Economic Success”, is the last of the current series of competition studies the Government commissioned the Consumer Council to undertake in 1993. It is also the most important one.
- 1.2 Between 1993 and 1996, we commissioned and the Council completed six sectoral studies on the banking, supermarkets, gas supply, broadcasting, telecommunications and private residential property markets. These sectoral studies have pointed to positive measures to safeguard competition and the Government has been pleased to take on board many of the Council’s recommendations, key among which include -
 - (a) abolishing the interest rate cap on time deposits for seven days or more;
 - (b) setting up an Energy Advisory Committee to advise the Government on energy policy and related matters and commissioning a study on the feasibility of introducing a common carrier system for gas supply; and
 - (c) reducing the rate of royalty charges on advertising revenue to the two local broadcasting companies.
- 1.3 In November 1996, the Council issued the final report which contains an overall assessment of Hong Kong’s competition situation. The report reaffirms the importance of promoting competition to sustaining Hong Kong’s competitive edge and strongly recommends that the Government should -
 - (a) adopt a comprehensive competition policy;
 - (b) enact a competition law to cover horizontal and vertical collusive agreements and abuse of dominant position; and

- (c) establish a Competition Authority to enforce the competition law and advise the Government on competition policy and an Appeal Body to hear appeals against the Authority's decisions.
- 1.4 Since competition and restrictions on it basically affect all walks of life, we are keen to solicit advice and feedback from the public before deciding on the way forward. Between December 1996 and March 1997, we consulted over 110 organizations, including chambers of commerce, trade and professional associations, key players in various business sectors, and tertiary institutes. In total, we received 88 responses. Many of our respondents have treated the consultation exercise extremely seriously, and have shared with us most valuable insights. We take this opportunity to thank all organizations whose names are included in the Annex to this response.
- 1.5 Within the Government, we set up an inter-departmental working group to examine the recommendations. We have also reviewed the competition policy and law of a number of Asia-Pacific economies and discussed the issue with a number of internationally renowned experts on competition.
- 1.6 This booklet sets out the Government's response to the key issues and recommendations covered in Consumer Council's report. We appreciate that the promotion of competition is a very complicated subject and there is as yet no international consensus on what constitutes the best model. We are prepared to learn from the experience of other economies. We are also keen to take steps to promote competition and economic efficiency. We believe our proposed way forward sufficiently addresses many of the concerns the Consumer Council has raised and is fully consistent with the basic philosophies of free trade and minimum government intervention that have served Hong Kong very well in the past.
- 1.7 This response signifies a major and more proactive and transparent step forward in the formulation of a competition policy for Hong Kong. We welcome further discussions with the Consumer Council and within the economy and will keep reviewing our strategy for promoting competition as a means of enhancing economic efficiency.

CHAPTER 2 COMPETITION POLICY FOR HONG KONG

2.1 Before responding to Consumer Council's proposals, we would like to set out what the Government perceives as the objectives and scope of the competition policy for Hong Kong and how we have been implementing this policy.

OBJECTIVES

Economic efficiency

2.2 The ultimate objective of competition policy is to promote economic efficiency or the best use of resources from the society's perspective. Economic efficiency is a very broad concept in itself and carries various dimensions. For example, it may mean -

- (a) increasing the output obtained from a given input (technical efficiency);
- (b) improving the allocation of resources between different uses (allocative efficiency);
- (c) improving managerial or other kinds of efficiency; and/or
- (d) improving responsiveness to changing demand and supply conditions (dynamic efficiency).

2.3 Since economic efficiency is inherently dynamic in context, the interaction between competition and economic efficiency requires more careful study. For example, certain business behaviour which appears anti-competitive from a static angle may actually be driven by the dynamic forces of competition in the market, and hence not at variance with economic efficiency in the dynamic sense.

Market contestability

2.4 The common tests as to whether competition exists are to consider the ***market structure*** (mostly by reference to the size and number of participants in the market and its concentration ratio) and ***market performance*** (mostly by reference to the resulting allocation of resources, and the efficiency, technological progress, stability and equity of a particular market). A modern and preferred trend is to put greater emphasis on the ***conduct or behaviour test*** (so that firms acting in such a way as to restrict market access or contestability will be regarded as having acted in an anti-competitive manner). Thus, a market which appears to be monopolistic or the existence of a firm which dominates the market is not necessarily anti-competitive ***provided*** the market is accessible and contestable. Also, the presence of only a few firms in the market may not be automatically inferred as inadequate competition, as competition between those few firms may well be severe.

Other objectives

- 2.5 Many economies have included the following as objectives of their domestic competition policies -
- (a) promoting fair competition or fair trade (e.g. the mainland of China, Australia, Japan, New Zealand, UK);
 - (b) protecting consumers or enhancing consumer welfare (e.g. the mainland of China, Australia, Japan);
 - (c) ensuring small and medium-sized enterprises have an equitable opportunity to participate in the economy (e.g. Canada);
 - (d) maintaining “trading order”; protecting the lawful rights and interests of business operators; stimulating creative initiative of entrepreneurs, etc. (e.g. the mainland of China, Japan, South Korea);
 - (e) contributing to international competitiveness; promoting competitive prices, etc. (e.g. UK, USA); and
 - (f) enhancing economic stability and growth (e.g. Chinese Taipei).

2.6 The foregoing considerations are all desirable; however, they are not the core objectives of the competition policy. For instance, consumer protection is a self-standing policy objective and does not always coincide with the competition policy objective (of promoting economic efficiency). In case there are conflicting objectives, whether within the broad purview of competition policy or between competition policy and other policies, we need to make a *policy judgement* based on what is best for the economy *as a whole*.

EXISTING POLICY

- 2.7 We are committed to the promotion of free trade and competition. We also subscribe to the economic philosophy of minimum government intervention in market forces. This is the best formula for enhancing economic efficiency, which is the ultimate, shared objective of our competition and trade policies. The accepted test of whether competition exists is whether the market is accessible and contestable.
- 2.8 We encourage competition in all sectors. We do not protect or subsidize traders or manufacturers and there are virtually no barriers to market access for local and international traders and manufacturers. Our attitude towards the service sector is no different from that on the manufacturing side. With the development in technology, the service sector is no longer immune to external competition. Given the lack of barrier to market entry in most service industries, service providers in Hong Kong are exposed to both domestic and international competition.
- 2.9 Although competition thrives best on the free forces of the market, we recognize that some degree of government intervention is sometimes called for. To discourage unfair business practices, safeguard competition and protect consumer interests, for instance, we have put in place a package of legislative measures, including the following -
- (a) the *Consumer Goods Safety Ordinance*, which imposes a statutory duty on manufacturers, importers and suppliers of consumer goods to ensure that the goods they supply for local consumption satisfy the general safety requirement;

- (b) the ***Unconscionable Contracts Ordinance***, which empowers Hong Kong courts to refuse to enforce or to revise unconscionable terms in consumer contracts for the sale of goods or supply of services;
 - (c) the ***Supply of Services (Implied Terms) Ordinance***, which stipulates that a supplier of service is obliged to carry out the service with reasonable care and skill and within reasonable time;
 - (d) the ***Sale of Goods Ordinance***, which provides that where a seller sells goods in the course of business, there is an implied condition that the goods supplied are of merchantable quality and that a buyer has the right to reject defective goods unless he/she has a reasonable opportunity to examine the goods; and
 - (e) the ***Trade Descriptions Ordinance***, which prohibits false trade descriptions, false marks and misstatements in respect of goods provided in the course of trade.
- 2.10 Besides, the Consumer Council administers a Consumer Legal Action Fund to assist consumers individually or collectively to take legal action against unscrupulous traders. We have also allocated resources to the Trade Practices Division of the Consumer Council to examine business practices which may prevent, restrict or distort competition with a view to tendering advice to the Government on measures to promote healthy competition.
- 2.11 Some degree of government regulation is also necessary where a very high level of investment is involved (as in the broadcasting business), where there is a need for prudential supervision or regulatory efficiency (as in the banking and financial sectors), or where the long-term interest of consumers is at stake (as in the provision of utility services). In such circumstances, the Government would ensure that the monopolistic or oligopolistic situation that is allowed to exist does not unduly compromise, amongst other things, the quality of services and the price that consumers have to pay.
- 2.12 The needs, requirements and characteristics of individual sectors vary. Accordingly, we adopt a sector-specific approach to safeguard competition. We periodically review the various sector-specific control mechanisms to ensure they still meet the

needs of prevailing circumstances. Where possible, we will undertake liberalization initiatives to promote competition in these areas. For example -

- (a) following a comprehensive policy review on telecommunications in 1992, the Government introduced competition into the local fixed network services. We believe this step will promote economic efficiency in the industry and position Hong Kong to serve as the preeminent communications hub for the region into the next century. Since July 1995, the Government has granted licences to four operators to provide local fixed telecommunications network services;
 - (b) the Government began in 1993 to amend domestic radio and television broadcasting licences, as and when they are due for renewal, to include a "free competition clause". Such clause ensures that broadcasters do not engage in unfair or anti-competitive trade practices; and
 - (c) since 1991, the Government has, where economically viable, granted bus and ferry franchises for a new network of routes through open tenders. With effect from September 1997, all bus routes have been operating on a non-exclusive basis and all franchisees are no longer subject to a profit control scheme.
- 2.13 Whilst promoting competition is important, it is a means rather than an end in itself. We do not press for free competition at all cost. Indeed, we often have to strike a balance between the promotion of competition and other government policies and weigh these against what is best for the economy as a whole.
- 2.14 Competition policy in general is under the ambit of the Secretary for Trade and Industry. In addition, individual policy bureaux are also responsible for promoting competition in the respective sectors under their purview. This set-up enables the Government to maintain an overview of the competition policy whilst taking care of the specific requirements of different sectors.
- 2.15 All in all, our competition policy is in line with our free trade and open market approach and has a pragmatic and sector-specific flavour. We aim to promote competition and create market conditions which will enhance the competitive process and economic efficiency in Hong Kong.

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- 2.16 This policy has served us well. In the last three years, the US Heritage Foundation named Hong Kong the freest economy in the world. The World Economic Forum, the Fraser Institute of Canada and the International Institute for Management Development all assigned very high rankings (top three) to Hong Kong's international competitiveness and economic freedom.

CHAPTER 3 CONSUMER COUNCIL'S ASSESSMENT

- 3.1 In November 1996, the Consumer Council completed an overall assessment of the competition environment in Hong Kong. The report asserts that despite Hong Kong's economic success in recent decades, we face an enormous challenge in maintaining our competitive edge. This is prompted by the following factors -
- (a) Hong Kong losing our geographical advantage with the advent of telecommunication technology and other forms of communication;
 - (b) other less developed economies adopting open door policies to attract foreign trade and investment and cutting into the competitive lead that Hong Kong enjoyed previously in foreign trade;
 - (c) Hong Kong transforming from a manufacturing-based to a service economy. The Council believes that some service sectors are non-tradable and thus insulated from international competition. It contends that retail banking, supermarket, gas supply, telephone and local broadcasting are among some of the sectors having a low level of competition. This phenomenon will eventually hurt Hong Kong's international competitiveness because these non-tradable services provide key production input for the tradable sectors and directly affect the cost of their end products; and
 - (d) international organizations such as the World Trade Organization (WTO) increasingly making links between trade and competition policies. The Council considers that a comprehensive domestic competition policy is becoming a prerequisite for full and equal participation in global trading fora such as WTO and the Asia-Pacific Economic Cooperation (APEC). The absence of anti-trust rules may compromise our ability to argue for improvements in trade policy.

- 3.2 The Council believes that the Government's sector-specific approach to the promotion of competition is not adequate to allow us to cope with the enormous challenges ahead. More specifically, the Council criticizes the sector-specific approach as -
- (a) failing to provide comprehensive guidelines for the Government to promote competitive market structures in a consistent manner;
 - (b) lacking uniformity and duplicating resources amongst different government departments; and
 - (c) covering very few industries.
- 3.3 The Council asserts that without overall guiding legislation and an overseeing authority, the problem of fairness and consistency across sectors and industries may become serious, as different sectors lobby the relevant departments or agencies for regulatory changes to defend their own interests.
- 3.4 The Consumer Council contends that it has identified industries where imperfections in the market have raised prices to consumers and businesses. And since most developed as well as newly industrialized economies have competition laws (including the mainland of China, South Korea, and Chinese Taipei), the Consumer Council contends that the absence of a competition law will hamper Hong Kong's ability to argue in the international forum for improvements in trade policy and against measures which may damage our interests. The Council believes that international bodies and other states are starting to perceive problems both in particular areas of Hong Kong's economy and in the general absence of a competition law.
- 3.5 The Consumer Council strongly recommends -
- (a) adopting a comprehensive competition policy;
 - (b) enacting a general competition law to cover horizontal and vertical agreements and abuse of dominant position. The Council believes that legal enforcement is the only transparent and effective way to prevent and deal with restrictive conduct;
 - (c) establishing a Competition Authority to investigate possible breaches of the law; and

- (d) establishing an Appeal Body to hear appeals against decisions by the Competition Authority.
- 3.6 The Consumer Council believes that a well-designed and pragmatic competition framework with suitable checks and balances would provide -
- (a) less bureaucracy and less need for regulation;
 - (b) consistency, predictability and clarity for market participants; and
 - (c) adaptability.
- 3.7 Overall, the Consumer Council considers that a competition policy should not lead to more resources being absorbed by the Government, but should set out ground rules for fair competition and protection of consumers.

CHAPTER 4 GOVERNMENT RESPONSE

CHALLENGES AHEAD

- 4.1 We entirely agree that we would need to keep sharpening our tools to maintain the competitive edge for Hong Kong. This is indeed the thrust of Government's overall economic policy and covers principles well beyond the mere promotion of competition. For instance, a dedicated Business and Services Promotion Unit has been in place since April 1997 to take forward specific helping business and services promotion initiatives. One of the tasks of the Unit is to cut red tape and eliminate over regulation; it also deals with proposals to develop Hong Kong as a service economy and as the preeminent services centre in Asia. We have also developed a proactive industrial support policy aimed at facilitating our overall productivity and international competitiveness. In particular, we are committed to enhancing the development and application of science and technology so that Hong Kong's globalised production network will be able to maintain its competitive edge. Our strategy covers the provision of suitable physical infrastructural facilities, investment in human resources, and support for research and development activities.
- 4.2 We do not believe our services sector is insulated from international competition. The efficient provision of services such as telecommunications, financial services, and professional services is of critical importance to the overall development of all economies. Factors such as the similarity of service needs, greater mobility of service personnel and consumers, and greater degree of consumer knowledge are forcing service providers to face international competition. The basic trading principles like the most favoured nation provision, national treatment and removal of market barriers, are also binding on the services sector. And so long as new entrants are free to enter a market, incumbent players will have to behave competitively. Thus while trade in services at present may not be as open to competition as trade in goods, there is no reason to believe that it would not be subject to the same degree of competition in future.

4.3 We do not believe our existing competition policy has compromised our level of participation in international fora. There is no overwhelming international pressure or clear international recognition for the need to introduce a competition law in every economy. There is no APEC consensus that a general competition law is essential to a competition policy. In the WTO context, although there are provisions scattered in various agreements obliging members to ensure that certain anti-competitive business practices do not occur, they do not specify the means to do so. Indeed, discussions on competition have only started rather recently and invariably focus on the interrelationship between trade and competition policies. It is unlikely that any form of harmonised international competition rules will emerge in the near future.

IMPROVEMENTS TO OUR EXISTING COMPETITION POLICY

- 4.4 Despite the above, we accept that the Consumer Council has pointed to possible room for improvements to the Government's existing competition policy. We are happy to take on the constructive advice of the Council.
- 4.5 We agree that our existing competition policy can be more proactive, transparent and comprehensive. We take upon ourselves the task of setting a role model for our traders and trading partners in ensuring that the government machinery is itself conducive to competition. To this end, we will -
- (a) issue a ***policy statement*** on the objectives of and guiding principles on promoting competition. We will require all government bureaux and departments to comply with these and encourage organizations under their purview to observe these. This ensures consistency and transparency;
 - (b) require all bureaux to ***give due regard to the competition angle*** by specifying the implications on competition in all major policy submissions to the Executive Council and the Provisional Legislative Council. We will also request policy bureaux to critically ***review*** existing regulations and policies to minimize barrier to market contestability and to refrain from specified restrictive practices. This ensures that the Government policies will not contribute to any anti-competitive conditions in the economy; and

- (c) request all bureaux and departments to submit *new initiatives* for promoting competition in their fields, having regard to other policy considerations. This reflects the Government's commitment to take the lead in promoting competition.
- 4.6 To provide a coordinated and focused forum to discuss policy issues on the promotion of competition, we will establish a Competition Policy Advisory Group (COMPAG) under the chairmanship of the Financial Secretary. The COMPAG will monitor the degree of compliance and the progress of reviews and assess the feasibility of new initiatives. We will invite the Consumer Council and relevant private sector organizations to participate in the deliberations on a need basis. We plan to activate the Advisory Group as soon as possible.
- 4.7 To complement the Government's efforts, we will-
 - (a) request the Trade Practices Division of the Consumer Council to continue to monitor and *review trade practices* in sectors that appear to be prone to unfair trading activities which affect consumers. We will request the Council to continue its good work, consult the relevant bureaux and departments and refer those recommendations having competition policy implications to COMPAG for consideration; and
 - (b) request the Consumer Council to assist and encourage trade associations to establish *codes of conduct* for promoting competition amongst various businesses in Hong Kong. This is in line with the Council's statutory obligations.
- 4.8 The foregoing will go a long way in furthering our efforts to promote competition in Hong Kong. With the Government taking the lead and the Consumer Council in support, we hope to disseminate a clear message that restrictive or unfair trade practices will not be condoned.

CHAPTER 5 DO WE NEED A COMPETITION LAW?

- 5.1 The Consumer Council believes that an effective competition policy must be supported by a legal framework to ensure anti-competitive practices are dealt with in a transparent and consistent manner and that the Government will have effective powers to investigate, stop or prevent such practices that stifle or distort competition. The Council also proposes that, as a start, the competition law should cover horizontal¹ and vertical² collusive agreements and abuse of dominant position³.
- 5.2 To enforce the proposed law, the Consumer Council has proposed setting up an independent Competition Authority outside the civil service. The Authority would advise the Government on competition policy, ensure compliance with the law, consider and suggest reforms to the relevant legislation, and recommend to the Government changes to regulation to facilitate competition in the public interest. The decisions of the Competition Authority would be subject to review by an Appeal Body (as against the courts).

ADVANTAGES OF A COMPETITION LAW

- 5.3 We have critically reviewed the pros and cons of legislating against anti-competitive acts. The advantages that we may get out of this would be -

¹ **Horizontal agreements** are agreements among competitors, typically for the purpose of raising or fixing prices (so-called “price-fixing”); compressing bid prices (“bid-rigging”); allocating specific customers or sales territories to particular firms and not competing over the territory or customers of other firms (“market sharing”); or not dealing with firms that supply other firms in their market (“collective boycott”).

² **Vertical agreements** are agreements among suppliers and distributors or retailers, typically for the purpose of setting a minimum price at which the product may be sold to customers (so-called “resale price maintenance”); requiring a retailer or distributor not to sell products competing with the supplier’s products (“exclusive dealing”); or requiring purchasers of one product to purchase other products from the same supplier (“tie-in sales”).

³ **Abuse of market dominance** would typically come in the form of price-cutting for the sake of driving out competitors (“predatory pricing”) or selling to some customers on different terms (“discriminatory behaviour”).

- (a) to demonstrate Government's commitment to promoting competition in Hong Kong and ensure that the requirements are applied consistently to all sectors, not just the Government;
- (b) to outlaw "unfair" business practices, promote healthy competition and protect consumer interests. We already have laws to protect consumers against unsafe consumer goods, unconscionable trading terms, etc. Enacting a law to restrict "unfair" trading practices is only consistent with the Government's committed policy of "protecting the legitimate interest of consumers";
- (c) to put in place legally enforceable sanctions against the outlawed activities; and
- (d) to place Hong Kong on a par with other trading partners in WTO and APEC, many of whom have domestic competition laws.

5.4 Against the foregoing, however, we note that -

- (a) there are clear examples whereby policy objectives can be applied consistently and in a transparent manner even without legislative backing, e.g. our free trade and open market doctrines. A competition law is not essential to a successful competition policy;
- (b) there are no clear rules or international standards on what constitute "fair" or "unfair" trade practices. Many jurisdictions assume that collusive agreements are *per se* bad and hence illegal; some subject these to the rule of reason. If we apply the market accessibility and contestability tests, the scope of activities that we would like and need to outlaw may not be in line with that of some other jurisdictions. Much of the finer details of the proposed competition law is bound to be subjective and debatable, opening up the possibility of legal challenges and protracted litigation;
- (c) an all-embracing law is not as flexible as administrative guides or sector-specific codes of conduct. A guide or code issued by an association can still be binding on members. We can still find ways to exert "teeth" short of draconian legislative measures;

- (d) we have examined the extent to which the absence of a competition law could, as the Consumer Council has argued, compromise Hong Kong's international standing in world fora like the WTO and APEC. While there is a view in these fora that Hong Kong and a few other economies should introduce some form of competition law, we believe we have a strong defensible case. A competition law is not the only means of achieving the WTO/APEC objectives of promoting free and open trade. We have been achieving our trade and competition policy objectives, rather successfully, despite the absence of a general competition law. We also note that most other APEC economies (e.g. Korea and New Zealand) that have enacted a competition law have done so when their economies were about to be transformed from a highly-regulated to a more liberalized mode. Our economy has been in a liberalized mode for a long time. Free market forces have worked well for Hong Kong. We should be very careful not to upset the business environment that has served us well.

DISADVANTAGES OF A COMPETITION LAW

5.5 We have considered the disadvantages or constraints of a legislative approach. These would include -

- (a) ***An apparent overkill*** : Because of the diversity of factual circumstances in a market, the impact of business practices on competition cannot usually be pre-judged. We accept that certain forms of horizontal restraints like price fixing and bid-rigging may not be fair to consumers or other market participants. We would discourage these. However, their actual impact on economic efficiency or market contestability is less clear. An all-embracing competition law will not be able to take into account the specific concerns and reaction of individual sectors. For instance -
- (i) many firms entering into collusive agreements, which will be seen as anti-competitive, may have done so for the purpose of attaining economies of scale or scope, or for strengthening the quality of service, which is itself a form of allocative efficiency and should not be indiscreetly deterred by a narrow form of competition policy; and

- (ii) even though dominance of the market by established players tends to make it more difficult for newcomers to compete, it is not the Government's objective to specifically favour newcomers. We seek to protect the competitive process, not competitors. So long as the market is accessible and contestable, the free market forces will operate to determine who can enter, stay and leave the market.

In short, acts that appear to have the effect of preventing, restricting or distorting competition are *not* invariably unjustified. We have to analyze them more thoroughly in their particular context to ascertain whether they restrict market access or contestability, whether they are calculated to gain monopolistic power rather than to practise competition or raise efficiency from a different perspective. Restricting all of them in a blanket manner by law would be an overkill.

- (b) ***Create uncertainty*** : If an all-embracing competition law were to be drafted, it would probably have to limit certain acts first and authorize an investigation into the intention and effects of these acts before deciding on the sanctions. Since it is meant to apply across the board, it will not be able to pinpoint the particular sectors of concern. In practical terms, this will create a great deal of uncertainty amongst businessmen. Indeed, many chambers of commerce have expressed concern that a competition law would create uncertainty for them.
- (c) ***Implementation concerns and conflicts*** : The administration of anti-trust laws requires expertise and a large organization to support enforcement efforts. Given the uncertainties even over what exactly we want to outlaw, it is difficult to anticipate and justify a bureaucracy right from the start. Proliferation of protracted court cases is likely to occur, as very often the defendant will counter fiercely given the substantial business interest at stake. We will also need to examine how the proposed Competition Authority would co-exist with the other regulatory bodies. We prefer a step-by-step approach to a blanket hit.
- (d) ***Compromise free and open trade principles*** : If the Government were to introduce an all-embracing law to restrict certain forms of business activities across the board,

this would risk undermining our free and open trade policy and ultimately our competitiveness. Judging from experience overseas, the extent of anti-trust legislation and related set-ups does **not** seem to be directly proportionate to the competitiveness of the economy. It is salutary that neither Singapore nor Hong Kong, often quoted as the most competitive economies in the world, has a general competition law. This is because free market forces have been allowed to operate in both.

- 5.6 We believe that, on balance, given the uncertainties that a general competition law will create, especially amongst the business sector, the merits of adopting Consumer Council's proposed package are outweighed by its demerits.
- 5.7 In line with our free trade and minimum intervention approach, we prefer a less intrusive but more in-depth alternative to promoting competition. This involves promulgating self-regulatory codes of conduct to monitor the practices of different sectors; and considering sector-specific legislative changes, if necessary, to deal with anti-competitive problems. We are not averse to legislative changes, but we do **not** believe the extent of horizontal and vertical restraints or abuse of market dominance is so pervasive as to merit general outlawing. Our alternative also has an additional merit of not having to be encumbered with a bureaucratic set-up in the form of a Competition Authority and Appeal Body.

CHAPTER 6 SYNOPSIS OF PUBLIC FEEDBACK

- 6.1 In view of the far reaching implications of Consumer Council's report on the overall competition environment in Hong Kong, we consulted over 110 representative bodies between December 1996 and March 1997 and received 88 responses. This section summarizes the mainstream opinion expressed.
- 6.2 A full list of the organizations we consulted or have received response from is at the Annex to this response.

SYNOPSIS OF GENERAL FEEDBACK

(A) Adopting a comprehensive competition policy?

- 6.3 Most respondents agree that we should continue our efforts to sharpen Hong Kong's competitive edge. However, *views are divided* on whether the Government's existing non-interventionist and sector-specific approach to promoting competition calls for any change at all, and whether we need or want to introduce legislative and structural changes to improve the competition environment.
- 6.4 Many respondents firmly believe that the basic philosophy of free trade has served Hong Kong well and there is no evidence to suggest that unfair trading is rampant. They caution that replacing the sector-specific approach with a comprehensive policy may weaken the Government's ability to efficiently and effectively deal with the special situations each individual industry faces. A few attribute the real threat to Hong Kong's competitive edge to the high cost of land and labour, inflation and government intervention. They do not see a need for fundamental policy and legislative changes as the Consumer Council proposes. Nor do they consider it desirable to interfere with the operations of a free economy. They also doubt if enacting a general competition legislation would actually enhance Hong Kong's negotiating position in international fora.

- 6.5 On the other hand, a few respondents, including some new market entrants, tend to favour a more thorough review of the general competition environment in Hong Kong, stressing that some existing market players are in fact dominating the market.
- 6.6 ***Specific suggestions:*** Specific suggestions that have been reflected to us include -
- (a) the Government should establish a more formal policy on competition by promoting understanding of competition, ensuring that government decisions give regard to competition and reviewing existing regulations to increase competition;
 - (b) where the Consumer Council identifies specific market sectors where imperfections in the market operate to the disadvantage of the community, the Council should, with government backing, discuss a solution with the market players on a voluntary or self-regulated basis;
 - (c) the formulation and implementation of any formal competition policy should be done in a judicious and balanced manner without compromising the current non-interventionist environment;
 - (d) a competition policy for Hong Kong should not merely focus on consumer protection but should seek to eliminate high cost structures with a view to making our exports in goods and services competitive;
 - (e) the Government should take no precipitate action but should consider very carefully the scope of the problem and the implications of any changes before adopting the Consumer Council's recommendations for change;
 - (f) any policy on competition must be in line with global trends (e.g. having a large number of small container terminal operators in Hong Kong goes against industrial logic within the territory); maintain competition within sectors at a realistic level; and allow Hong Kong to maintain its strategic position within the region; and
 - (g) intellectual property protection requirements from non-Hong Kong programme suppliers ought to be taken into account in setting the details of competition policy.

(B) Enacting a general competition law?

- 6.7 A clear majority of respondents *express reservation* on the proposal to introduce a general competition law and remind the Government to *think twice* before deciding on it.
- 6.8 Many respondents do not believe the extent of unfair trade practices in Hong Kong warrants legislative changes at this stage. Some others admit a problem but query whether legislating is the right solution. More specifically, they express the following key reservations -
- (a) that the proposed legislation is highly interventionist and very costly to the public and consumer. Over-regulation and unnecessary intervention by the Government will only stifle investment and business activities;
 - (b) that legislating would increase the complexity and regulatory costs to doing business in Hong Kong, and would either duplicate or substantially overlap with the current regulatory regimes;
 - (c) that the proposed legislation will be either so general as to be unenforceable or too specific as to discourage investment;
 - (d) that vertical and horizontal agreements can be economically efficient and justifiable, and that therefore a general competition law will catch into the legal net perfectly harmless activities. It will encourage unfounded or unnecessary disruptive actions, and can be counter-productive;
 - (e) that a competition law may undermine the ability of Hong Kong business to respond quickly to market changes and form barriers for development in certain industry sectors where mergers and acquisitions are common commercial practices;
 - (f) that introducing legislation to control abuse of collective dominance and mergers and acquisitions can weaken the competitiveness of Hong Kong's industries;

- (g) that it is doubtful whether the introduction of competition laws will, as intended, enhance fairness, consistency, reduce regulation and enhance our negotiating position in relevant world fora to any significant degree; and
 - (h) that the enforcement costs of a competition law could be potentially excessive.
- 6.9 On the other hand, those respondents who are prepared to consider the proposal to legislate point out -
- (a) that establishing a competition policy and introducing a competition legislation would be conducive to attracting further investment and reinforcing Hong Kong's position in trade negotiations;
 - (b) that we should carefully target regulations on competition to avoid adding undue burden on those sectors of the economy which are already very competitive, and to avoid misconceptions of the Government penalizing success and big business;
 - (c) that we should use existing guidelines against unfair trading, as applied in the banking, telecommunications, broadcasting sectors, etc., as a basis to develop some common ground rules for application across the board;
 - (d) that we should establish guidelines for the business community to control mergers and acquisition. Mergers and acquisitions are an indication of growing competition and are not, by definition, harmful to consumers or competition;
 - (e) that vague terms proposed in the competition law (like "distorting competition") could lead to unintended consequences;
 - (f) that if a competition law were to be drafted, we should, in the banking field, exempt the Hong Kong Association of Banks from the proposed legislation;
 - (g) that, in the telecommunications industry, the general principles of the competition law should apply but the Competition Authority should complement (rather than substitute) the efforts of the Office of the

Telecommunications Authority in dealing with unfair practices;

- (h) that the competition law should apply a common set of provisions to different broadcasting or telecommunications bodies in order to facilitate monitoring and execution;
- (i) that sanctions under the fair trading legislation should only be confined to an injunction on prohibited acts and should not cover financial penalties or compensation to the aggrieved party;
- (j) that the law should protect Hong Kong companies from unfair treatment by international competitors; and
- (k) that Hong Kong should consider adopting some form of legislation to prevent state-owned enterprises of the mainland of China from using their official or semi-official status to tilt competition towards their favour.

(C) Establishing a Competition Authority?

- 6.10 Most respondents *express reservation* about the proposal. In essence, they argue that -
- (a) it is not clear why the proposed Competition Authority rather than the Government should assume responsibility for competition matters;
 - (b) the proposed Competition Authority will have conflicting roles and will confuse the responsibilities and authorities between the existing government policy bureaux and regulatory bodies;
 - (c) it will evolve into a mammoth bureaucracy hindering the competitiveness of Hong Kong;
 - (d) it will not have the expertise and flexibility to deal with the technical requirements of individual sectors, especially those involving rapid technological advancements (for instance, broadcasting and telecommunications); and
 - (e) the proposal to confer upon the proposed Competition Authority advisory, investigative and judicial powers would leave the Authority too powerful.

6.11 ***Specific suggestions*** : Some respondents are prepared to consider having a Competition Authority and have put forward specific suggestions, including the following -

- (a) the proposed Competition Authority should be small and capable of down-sizing to avoid unnecessary bureaucracy and public expenditure;
- (b) the proposed Competition Authority must be transparent and open to public scrutiny;
- (c) we should adopt an evolutionary approach to the setting up of the Competition Authority by confining the coverage first to collusive agreements and abuse of dominant position such as monopoly pricing;
- (d) the Competition Authority should cooperate with other government departments and existing regulatory bodies (e.g. Broadcasting Authority, Office of the Telecommunications Authority, Securities and Futures Commission) and should not be bureaucratic. It should advise the Government on competition policy and consider and suggest reforms to relevant legislation;
- (e) the Authority must be independent, effective, and have enough resources to deal with complaints quickly and power to investigate possible breaches of law; and
- (f) the proposed Competition Authority should not undermine or complicate the powers of the Office of the Telecommunications Authority within the telecommunications industry.

(D) Establishing an Appeal Body?

6.12 The majority of the respondents either ***do not have or reserve their comments*** on the proposed Appeal Body. For those who have comments, they tend to question why an appeal body should be preferred to the judiciary. One respondent suggests that sanctions under the proposed regulatory system should be confined to prohibiting certain acts and should not cover financial penalties or compensation to the aggrieved party; another suggests confining sanctions to financial remedies rather than criminal penalties.

MAINSTREAM OPINION

6.13 The weight of the public opinion is more in favour of -

- (a) maintaining and sharpening Hong Kong's competitive edge;
- (b) promoting a better understanding of competition and encouraging fair trade practices **within** the existing framework;
- (c) reviewing more carefully the need for and scope of the proposed competition law and consulting the public more widely before deciding on these;
- (d) adopting an evolutionary approach to any proposed structural change, and avoiding the proposed Competition Authority from developing into an unnecessary bureaucracy or duplicating efforts of other control bodies (e.g. Office of the Telecommunications Authority) and regulatory mechanisms (e.g. Schemes of Control); and
- (e) reviewing the propriety of setting up a statutory Appeal Body, as against relying on the existing judicial system.

6.14 Many of the organizations which responded to Consumer Council's report have done so in a highly professional and thorough manner. Although we cannot take on board each and every piece of their valuable advice, we would like to formally record our sincere appreciation for all the positive contribution which has helped us chart our way forward.

CHAPTER 7 CONCLUSION

- 7.1 The Consumer Council's report on Hong Kong's competition policy and the previous sectoral studies have stimulated healthy discussions on the state of competition in Hong Kong and on what we should do to ensure that our competition policy will continue to serve us well.
- 7.2 We believe the appropriate competition policy for Hong Kong should have the objective of promoting economic efficiency, principally in terms of fostering competition, economic strength and competitiveness. A test of whether competition exists is whether the market is accessible and contestable.
- 7.3 Having regard to the suggestions of the Consumer Council, we are pleased to agree to adopt a comprehensive policy for Hong Kong. This involves -
 - (a) issuing a clear policy statement on the objectives of promoting competition and discouraging various forms of restrictive business practices;
 - (b) requiring all bureaux to give due regard to the competition angle in setting new policies or reviewing these;
 - (c) requesting all bureaux and departments to submit new initiatives for promoting competition;
 - (d) establishing a high-level Competition Policy Advisory Group (COMPAG), with non-official participation as well, to be chaired by the Financial Secretary. The advisory group may take a proactive role in critically vetting existing government policies and practices to ensure they are not anti-competitive; or, if they have to remain so, there are solid defensible reasons for such. COMPAG may also review other competition policy matters as appropriate;
 - (e) requesting the Trade Practices Division of the Consumer Council to continue to monitor and review trade practices in sectors prone to "unfair" trading activities; and

- (f) urging the Consumer Council to direct more efforts to help businesses draw up codes of practices that are pro-competition.
- 7.4 We have carefully reviewed the arguments for and against the enactment of a competition law for Hong Kong at this stage. We believe that a non-legislative approach is more appropriate for the economy.
- 7.5 How best to promote competition is a subject of much heated debates amongst economists, lawyers and not least businessmen. We believe a non-interventionist comprehensive competition policy, moderated with need-based sector-specific regulations, best suits the needs of Hong Kong at this stage of economic development. We are confident that the measures outlined above suffice as a solid step forward.

Consumer Council's Report on Competition Policy :

Consultation list

(A) Chambers of Commerce

(8 of 12 responded, as highlighted in italics)

The American Chamber of Commerce in Hong Kong

The Australian Chamber of Commerce in Hong Kong

The British Chamber of Commerce in Hong Kong

The Canadian Chamber of Commerce in Hong Kong

The Chinese General Chamber of Commerce

The Chinese Manufacturers' Association of Hong Kong

The Hong Kong General Chamber of Commerce

The Indian Chamber of Commerce Hong Kong

The Hong Kong Japanese Chamber of Commerce & Industry

The Korean Chamber of Commerce in Hong Kong

The Swedish Chamber of Commerce in Hong Kong

The Singapore Chamber of Commerce (Hong Kong)

(B) Trade Commissions and Business Associations

(6 of 12 responded, as highlighted in italics)

British Trade Commission

Italian Business Association

Mexican Business Association of Hong Kong Limited

The Finnish Business Council

The Dutch Business Association

The German Business Association of Hong Kong Limited

Hong Kong French Business Association

New Zealand - Hong Kong Business Association

Swiss Business Council in Hong Kong

The Japan External Trade Organisation of Hong Kong

The Spanish Business Association

The Hong Kong Exporters' Association

(C) **Trade and Industry Bodies**

- (1) **General**
(all 10 responded)

*Trade Advisory Board
Hong Kong Retail Management Association
Federation of Hong Kong Industries
Hong Kong Productivity Council
Hong Kong Trade Development Council
Hong Kong Association of Freight Forwarding Agents Limited
Small and Medium Enterprises Committee
Hong Kong Committee for Pacific Economic Cooperation
Textile Advisory Board
Rice Advisory Committee*

- (2) **Financial Services**
(all 6 responded)

*The Hong Kong Association of Banks
Hong Kong Monetary Authority
Securities and Futures Commission
The Stock Exchange of Hong Kong
Hong Kong Futures Exchange Limited
The Hong Kong Association of Restricted Licence Banks & Deposit-taking Companies*

- (3) **Gas and Power Supply**
(6 of 7 responded, as highlighted in italics)

*China Light & Power Company, Limited
The Hong Kong and China Gas Company Limited
The Hongkong Electric Company Limited
Caltex Oil Hong Kong Limited
Esso Hong Kong Limited
Mobil Oil Hong Kong Limited
Shell Hong Kong Limited*

- (4) **Shipping**
(All 6 responded)

*Modern Terminals Limited
Sea-Land Orient Terminals Limited
COSCO-HIT Terminals (Hong Kong) Limited
Hongkong International Terminals Limited
The Hong Kong Shippers' Council
Hong Kong Liner Shipping Association*

- (5) Telecommunications
(all 6 responded)

*Office of the Telecommunications Authority
Hong Kong Telecommunications Limited
Hutchison Telecommunications (Hong Kong) Limited
New T&T Hong Kong Limited
New World Telephone
Hong Kong Telecom Association*

- (6) Broadcasting
(all 9 responded)

*Broadcasting Authority
Television and Entertainment Licensing Authority
Radio Television Hong Kong
Asia Television Limited
Satellite Television Asian Region Limited
Television Broadcasts Limited
Wharf Communications Investments Limited
Metro Broadcast Corporation Limited
Hong Kong Commercial Broadcasting Company, Limited*

- (7) Residential Property Market
(9 of 13 responded, as highlighted in italics)

*Land Development Corporation
Hong Kong Housing Society
Hong Kong Housing Authority
Land and Building Advisory Committee
Long Term Housing Strategy Review Steering Group
Hong Kong Association of Property Management Company
Chartered Institute of Housing Hong Kong Branch
Chartered Institute of Building
Hong Kong Real Estate Agencies Association
The Real Estate Developers Association of Hong Kong
Property Agencies Association Limited
Hong Kong Institute of Real Estate Administration
Society of Hong Kong Real Estate Agents*

- (8) *Transport*
(3 of 9 responded, as highlighted in italics)

Transport Advisory Committee
Mass Transit Railway Corporation
Kowloon Canton Railway Corporation
Citybus Company Limited
KMB Company Limited
CMB Company Limited
New Lantau Bus Company Limited
Star Ferry Company, Limited
Hong Kong Ferry (Holdings) Company Limited

- (9) *Travel Industry*
(both responded)

Travel Industry Council of Hong Kong
Hong Kong Tourist Association

- (10) *Insurance Industry*
(1 responded)

The Hong Kong Federation of Insurers

- (11) *Supermarkets*
(2 of 6 responded, as highlighted in italics)

Wellcome Company Limited
Hong Kong Convenience Stores Limited
Guangnan (KK) Supermarket Limited
Park'N Shop Limited
Circle K Convenience Stores (HK) Limited
China Resources Purchasing Company Limited

(D) **Professional Associations**

(8 of 10 responded, as highlighted in italics)

The Law Society of Hong Kong

The Hong Kong Bar Association

Hong Kong Institute of Architects

The Hong Kong Institute of Engineers

Hong Kong Institute of Planners

The Hong Kong Institute of Surveyors

The Hong Kong Management Association

Hong Kong Society of Accountants

The Hong Kong Medical Association

The Hong Kong Association of the Pharmaceutical Industry

(E) **Tertiary Institutes**

(6 of 7 responded, as highlighted in italics)

Hong Kong Centre for Economic Research and

School of Economics and Finance, the University of Hong Kong

Department of Economics, the Chinese University of Hong Kong

Department of Economics and Finance, City University of Hong Kong

*Department of Economics, the Hong Kong University of
Science and Technology*

Department of Economics, Hong Kong Baptist University

Department of Business Studies, Hong Kong Polytechnic University

Centre for Public Policy Studies, Lingnan College

(F) **Others** (6 submissions)

Hong Kong Democratic Foundation

Members of Alumni of Class of 94, 95 & 97, Property Agency

Programme, City University of Hong Kong

Kwai Tsing District Board

Kowloon City District Board

Shatin District Board

Kwun Tong District Board