

Detailed Proposals for a Competition Law in Hong Kong

Submission of the Hong Kong Bar Association

1. The following are the key observations of the Hong Kong Bar Association (“HKBA”) on the various proposals set out in the Public Consultation Paper issued by the Commerce and Economic Development Bureau in May 2008 in respect of the “Detailed Proposals for a Competition Law”.

Proposals 1 & 2 : Objective of legislation and Definition of Key Terms

2. There should be some guidance for the definition of key terms such as “abuse of substantial market power” or “substantially lessen competition” in light of the different approaches in the European Union and the United States courts as well as the authorities and experts on these matters.
3. As regards the question of objective, the HKBA takes the view that competition policy is to protect and facilitate competition, which is concerned with maximizing economic efficiency. Therefore the HKBA considers that the Administration is correct to emphasize that the objective of the Competition Ordinance is to enhance economic efficiency. However, the HKBA considers that while the Administration has been careful not to highlight benefiting consumers as an objective of the Competition Ordinance, the use of the words “and thus” may still carry such a connotation or belief, at least in terms of consumer benefit as an effect or consequence. In this connection, the HKBA wishes to make clear its views that the primary consequence of a competition law is the protection of competitors. In addition, the HKBA wishes to indicate its understanding that competition, in terms of economic efficiency, may best be promoted through a cross-sector competition law with a “small footprint”, prohibiting only the worst types of anti-competitive conduct.
4. The HKBA invites the Administration to bear in mind in selecting the institutional framework the following matters. Competition policy and

law are concerned to a very large extent with the study and interpretation of economic activities. Such economic activities cannot possibly be described in precise and restrictive language. The Competition Ordinance to be enacted may have to be in broad if not abstract terms so as to be capable of covering newly devised business strategies and not yet foreseen economic situations. The proper administration and enforcement of such policy and law requires professionals properly trained in the disciplines of law, economics and economic analysis of law in positions of advice, investigation, legal services and adjudication. Otherwise, such a law can readily be abusively interpreted. The selection of the suitable institutional framework should take full account of local circumstances, particularly the availability of professionals with the appropriate specialization to perform the different roles envisaged in the administrative, enforcement and review institutions.

Proposal 3: An independent Competition Commission in the form of a body corporate should be set up to enforce the new competition law. The Commission should have a “two-tier” structure, with an appointed board of Commission members overseeing a full-time executive arm

Proposal 4: The Commission should have a minimum of seven members, including a Chairman, appointed by the Chief Executive. At least one Commission member should have experience in SME matters. The actual number of Commission members appointed could be more than the minimum required so as to ensure that there was a sufficiently large “pool” of members to allow for the efficient conduct of the Commission’s business

5. The HKBA recalls the options on the regulatory framework put forward in the 2006 public discussion document: (1) The regulator having both investigatory and adjudicatory functions; (2) The regulator bringing cases before the Courts; and (3) The regulator bringing cases before a specialist tribunal to be charged with hearing and determining competition law cases. The Administration proposes a Competition Commission that is essentially based on the first model, subject to full merits review by the proposed Competition Tribunal. These proposals appear to follow an institutional framework that has been applied in Hong Kong on a sector-specific basis and also elsewhere.
6. The HKBA notes that the Administration could have adopted an incremental path of institutional development of first establishing a regulator having only an investigatory function and a specialist tribunal

hearing and determining applications for statutory sanctions from the regulator on cases it investigate. Such an approach has the merit of erring initially on the side of fairness and impartiality, giving the society time to gain experience with *cross-sector* competition law matters and the regulator the opportunity to build up its credibility.

7. If the Administration is not minded to adopt the incremental approach above, the HKBA considers that, since the proposed Competition Commission will have a regulatory ambit that is larger and will affect Hong Kong's economy and everyday life more pervasively than any of the other existing regulatory agencies, it should have a "two-tier" structure with a supervisory board comprising at least a majority of independent or non-official members over its full-time executive or administrative arm.
8. Overseas jurisdictions have different requirements of the members of the supervisory board of the competition regulator. Some jurisdictions engage executive or full-time members and others appoint non-executive or part-time members. The HKBA considers that the proposed Competition Commission should have, if possible, a core of 7 executive or full-time members, including its Chairman. These executive or full-time members should all be professionals with specialization or exposure in legal, economics or economic analysis of law field. Further, every Investigation Committee should be chaired by one of the executive or full-time members. Further, the HKBA also considers that the proposed Competition Commission's core of executive or full-time members should be assisted by non-executive or part-time members and that the latter category of members should outnumber the former category of members.

Proposal 5: The Commission should have the power to investigate, determine and apply remedies in respect of infringements of the conduct rules under the competition law

Proposal 6: The Commission should have other functions directly related to the objective of the competition law, including educating the public and business about the competition law and promoting compliance programmes

9. The HKBA supports Proposals 5 and 6.

Proposal 7: The Commission should be able to commence an investigation either of its own initiative or in response to a complaint. It should be able to exercise its formal investigative powers when it has reasonable cause to believe that an infringement of the conduct rules has taken place

Proposal 8: The Commission should have the power to require a person, by notice in writing, to provide information and produce documents that it considers relevant to an investigation or to appear before the Commission to give evidence. The Commission should also have the power to conduct a physical search of premises if so empowered by a warrant issued by a magistrate

Proposal 9: There should be a formal separation within the Commission between the investigation and adjudication of infringements, through the establishment of an Investigation Committee, which is to be responsible for conducting the investigation. The Investigation Committee will be chaired by a Commission member who will not then participate in the decision on the complaint in question

Proposal 10: A Commission member who in any way, directly or indirectly, has interest in a matter being investigated by the Commission should be required to disclose the nature of his or her interest. The relevant member should thereafter not take part in any deliberation or decision of the Commission with respect to that matter

Proposal 11: Before the Commission makes a determination of infringement of the conduct rules, it should first notify the party concerned of the material facts and particulars of the conduct and its considerations in making such a determination. The party should be given the opportunity to provide information or documents and make submissions that it considers are relevant to the case, which the Commission should be required to take into account

10. The HKBA considers that the proposed Competition Commission may commence a formal investigation upon “reasonable grounds” that an infringement of the conduct rules has taken place. Leaving it to the regulator to decide which complaint to pursue does not mean the regulator is free to make arbitrary and/or unreasonable decisions. The case of *Ho Yuen Ki Winnie v. Securities and Futures Commission* (unreported, 2 November 2006, CACV 37/2006) shows that a regulatory agency’s decision not to pursue a complaint is potentially subject to judicial review.

11. The HKBA notes that formal investigations will nowadays usually be performed by institutionally distinct internal parts of the agency and expects this to be adopted by the proposed Competition Commission.
12. The HKBA accepts that the proposed Competition Commission should be vested with extensive investigatory powers. However, agents of the proposed Competition Commission may only enter premises with a warrant of a magistrate for search and seizure.
13. The HKBA supports Proposals 10 and 11.

Proposal 12: The Commission should have the power to enter into binding settlements with a party under investigation

14. While the HKBA accepts that it follows from the availability of leniency in return for cooperation that the proposed Competition Commission should have the authority to enter into binding settlement agreements and that in appropriate cases, the option of settlement can help save costs while providing a degree of enforcement effect, the availability of settlement should be made within a transparent regime. As a matter of policy, the proposed Competition Commission should issue detail guidelines in this regard.
15. Further, as a safeguard against abuse of investigatory powers, the Administration should consider providing jurisdiction for the proposed Competition Tribunal to review a binding settlement between the proposed Competition Commission and a party under investigation, including at the instance of a co-party in the same investigation.

Proposal 13: Confidential information provided to the Commission by complainants or persons under investigation, or acquired by the Commission using its formal investigative powers should be protected under the law

16. The HKBA considers that competition investigations can be extensive exercises, involving many parties and delving into their business operations and business plans in great detail. The general principle should be that the regulator may not disclose information obtained in an investigation, and which relates to an individual or any business of an undertaking, unless with the consent of both the provider of the information and the individual or business undertaking. There should be procedures for an information provider to indicate expressly what

information is confidential. The law could also require the regulator to have due regard to deleting information concerning commercially sensitive matters and/or private affairs from the intended disclosure. Such statutory requirements should be supported by appropriate internal decision-making procedures of the regulator.

17. The Administration has asked for comments on controls over the proposed Competition Commission's disclosure, but missed an equally important aspect of disclosure. There ought to be requirements on the regulator to disclose information to targets of enforcement action. This is not only a basic requirement of fairness, but especially important because the regulator will have collected information about market structure and the competitive landscape that are likely essential to mounting any defence.

Proposal 14: The Commission should keep proper accounts and records of transactions, and prepare financial statements which give a true and fair view of its financial status

Proposal 15: The Commission should furnish an annual report to the Secretary once a year. The Secretary should table this annual report in the Legislative Council no later than six months after the end of the previous financial year

18. The HKBA supports Proposals 14 and 15.

Proposal 16: A Competition Tribunal should be established to hear, among other things, applications for review of the decisions of the Commission and private actions under the competition law

Proposal 17: Tribunal members would be either "judicial" members (i.e., judges or former judges), or "non-judicial" members with expert knowledge of economics, commerce or competition law. One of the judicial members would be the President of the Tribunal. Both the President and other judicial members would be appointed by the Chief Executive on the recommendation of the Chief Justice. Non-judicial members would be appointed by the Chief Executive

19. The HKBA agrees that a right to full merits review is legally necessary considering that the first-instance decision-making body has performed both the investigatory and the adjudicatory functions. Further the HKBA considers that the same review body should adjudicate on private action

cases, bearing in mind the areas of specialized knowledge and know how required to properly adjudicate competition law cases.

20. While the HKBA agrees that the proposed Competition Tribunal should have two categories of members, namely judicial and non-judicial members, it is further suggested that non-judicial members should not be confined to local talents but should include overseas experts.

Proposal 18: When hearing reviews, the Tribunal should sit as a three-member panel, chaired by a judicial member, and comprising at least one non-judicial member with expertise in economics. The Tribunal should have the power to review cases on their merits on the same evidence as was before the Commission, and should have the power to admit new evidence if it considers this appropriate

Proposal 19: The Tribunal should possess the necessary powers for discharging its functions effectively and efficiently. The Tribunal proceedings should be conducted as informally and expeditiously as possible. The Tribunal should not be bound by rules of evidence

21. The HKBA supports in principle Proposals 18 and 19. On the other hand, the proposal that the proposed Competition Tribunal should not be bound by rules of evidence may be a matter of concern unless the basic procedural safeguards are incorporated in subsidiary legislation so as to ensure that the tribunal conducts its proceedings fairly.

Proposal 20: Any person aggrieved by a determination by the Commission should have the right to seek a review by the Tribunal of the determination, including the penalty imposed by the Commission

Proposal 21: The Tribunal should have the power to decide whether or not to suspend a Commission decision before determining a review application

Proposal 22: An appeal against a decision of the Tribunal should be available. Such an appeal should be heard by the Court of Appeal and should be limited to points of law or any remedy applied in respect of an infringement, including the amount of any fine

22. The HKBA supports Proposals 20 and 21.

23. The HKBA supports in principle Proposal 22. However, it is suggested that there be vested with the Court of Appeal and by that token, the Court of Final Appeal, the flexibility of inviting prominent economist(s) in the relevant field of economics and drawn from a pre-approved list to sit as lay adviser(s).

Proposal 23: The conduct rules should apply to “undertakings”, which may be defined as individuals, companies or other entities engaging in economic activities

24. The HKBA accepts in principle Proposal 23, though there may be a need to cater the situation of corporate entities subject to substantial voting control by a parent or third corporate entity.

Proposal 24: There should be a general prohibition on agreements and concerted practices that have the purpose or effect of substantially lessening competition

Proposal 25: The Ordinance should not give a list of examples of anti-competitive agreements. However, the Commission should be required to issue guidelines that would give examples of the types of conduct that would commonly be considered anti-competitive

25. The HKBA supports in principle Proposal 24, which appears to be consistent with the approach of having a piece of “small footprint” legislation. On the other hand, in so far as the proposal seeks to prohibit agreements or concerted practices that have the *purpose* of substantially lessening competition, that might amount to a provision of per se illegality that the HKBA does not favour.
26. The Administration should on the other hand seriously consider the possible extraterritorial effect of the proposed conduct rules, bearing in mind that the general terms of Proposal 24 do not specify the market in which competition would be substantially lessened. The Administration may as a result have to spell out more clearly the intended jurisdiction of the proposed competition regulatory regime by putting in place certain limiting principles.
27. While the HKBA sees guidelines to be beneficial, it must be pointed out they remain administrative interpretations and cannot possibly bind the Courts. Accordingly self-discipline does not necessarily ensue. Yet, to

some, particularly the SMEs, such guidelines will be inhibitive, bearing in mind the strong likelihood of the regulating agency to mount enforcement action if a business engages in an activity that the guidelines advise against. The discipline that might ensue is thus more akin to self-censorship. The concerns of SMEs are genuine, bearing in mind the proposal to address practices, and not firms segregated by size.

Proposal 26: The focus of the prohibition on agreements should be on horizontal agreements. Vertical agreements should only be addressed in the context of abuse of substantial market power

28. The HKBA finds Proposal 26 lacking flexibility when the key test proposed requires examination of the purpose or effect of the conduct as to whether competition is substantially lessened. Such an examination would presumably require all circumstances to be taken into account.

Proposal 27: There should be a general prohibition on an undertaking that has a substantial degree of market power from abusing that power with the purpose or effect of substantially lessening competition

29. The HKBA has reservations about Proposal 27, which in so far as it seeks to penalize an undertaking having a substantial degree of market power for conduct that has the *purpose* of substantially lessening competition, appears to introduce a provision of per se illegality that the HKBA does not favour. The HKBA further considers that the proposed threshold for “substantial degree of market power” is debatable.

Proposal 28: There should be no per se infringements and the Commission would be required to conclude that conduct had the purpose or effect of substantially lessening competition before it could determine that an infringement had taken place.

30. As indicated, the HKBA supports the approach of having no per se infringements. However, the HKBA considers that if the Administration does support this approach, it should remove any reference to *purpose* from the proposed Competition Ordinance since the corresponding language in EC law of “object of restricting competition” has been interpreted to provide for a rule of per se infringement.

Proposal 29: Infringement of the conduct rules should be subject to civil, but not criminal, penalties. Fines of up to \$10 million could be imposed by the

Commission. More serious penalties, including higher fines and disqualification from holding a directorship or a management role in any company for up to five years, could be imposed by the Tribunal, on application by the Commission

Proposal 30: The Commission should have the power to make such directions as it considers appropriate to (a) bring the infringement of the conduct rules to an end; (b) eliminate the harmful effect of such infringement; (c) prevent the re-occurrence of such infringement

Proposal 31: On application by the Commission, the Tribunal should have the power to make an interim “cease and desist” order before a decision is made on whether conduct constitutes an infringement

31. The HKBA agrees with the Administration that criminal penalties should not be considered at the present stage. The HKBA invites the Administration to consider the impact of *Koon Wing Yee & Anor v Insider Dealing Tribunal* [2008] 3 HKLRD 372, CFA on its proposed scheme of penalties that the proposed Competition Commission and the proposed Competition Tribunal in turn may impose. The Administration should also take legal advice and enter into a dialogue with the Judiciary on the constitutional position of the proposed Competition Tribunal, bearing in mind that the recent judgment in *Luk Ka Cheung v Market Misconduct Tribunal & Anor* (unreported, 18 November 2008, HCAL 49/2008), CFI is a first instance decision.
32. The HKBA considers that “cease and desist” orders are the administrative equivalent to court injunctions. They are fundamentally different from, and more severe in nature than, other civil sanctions in that they compel behaviour and their effects are often irreversible. (Monetary fines can be paid back.) The presumption, therefore, ought to be that a regulatory agency, without going through the court process, should not wield such a draconian power over the general public. The Administration mentioned two potential justifications. First, the power to issue “cease and desist” orders would enable the regulator to minimize harm to markets as soon as possible after the anti-competitive conduct had been detected. But surely it would have taken some time already for the regulator to become aware of and investigate the conduct and to conclude that it is in violation of the law. The step of applying to the Courts for an injunction would hardly add any significant time. Second, the Administration mentioned that the Broadcasting Authority is already empowered to issue directions to licensees to cease and desist from any

action prohibited. But the proposed Competition Commission would differ fundamentally from the Broadcasting Authority (and the Telecommunications Authority) in that it would regulate the general public, not only a small number of licensees. The HKBA believes that it is inappropriate to vest in the proposed Competition Commission any ability to issue “cease and desist” orders. The better place for such a power would be the Courts or the proposed Competition Tribunal. In the latter case, if efficiency is important, it can be provided in the new law that interim orders may be made by the President of the tribunal sitting alone.

Proposal 32: The Commission should introduce a leniency programme, under which a party to a prohibited agreement that comes forward with information that is helpful to an investigation may have any subsequent penalty waived or reduced

33. The HKBA accepts that successful enforcement of competition law often depends on the provision of information and co-operation by one or more members within an anti-competitive cartel. Indeed, this general point applies beyond cartel members and extends to individual executives who have participated in decisions for their corporations’ anti-competitive conduct. But the offer of leniency to one or a few in return for information and co-operation is a controversial matter. It raises questions of fairness, effectiveness, sometimes even favoritism and corruption. To be effective and to gain public confidence, the leniency programme must be transparent and credible. It must also allow time to a potential whistleblower to seek legal advice, so that the person is not hurried into providing self-incriminating information without immunity or reasonable treatment. In addition, the programme should afford the whistleblower some assurance of anonymity in case the regulator does not bring any action and the individual has to continue in his employment position.
34. The HKBA notes that the Office of Fair Trading of the United Kingdom has published extensive guidelines in regard of its leniency programme, including procedures for applying for leniency, factors the Office would take into account, and circumstances of immunity to be granted or withdrawn. The HKBA urges the Administration to refer to these guidelines and to discuss with local legal practitioners and other stakeholders when designing a leniency programme.

Merger Regime

35. The HKBA appreciates that the question of whether merger should be regulated by our competition legislation is controversial. However, the HKBA considers that the Administration should seriously consider including in the proposed Competition Ordinance provisions regulating mergers, bearing in mind that some mergers are not improving economic efficiency. As to whether the proper approach should be requiring all mergers passing a specified threshold of market share to obtain governmental approval or only vesting with the proposed Competition Commission with a power of intervention, further study and discussion is necessary.

Proposal 33: Parties should have the right to take both “follow-on” and “stand-alone” private action

Proposal 34: Any person who has suffered loss or damage from a breach of the Ordinance should have the right to bring private proceedings seeking damages

36. The HKBA agrees that parties should have the right to take “follow-on” private action. As anti-competitive conduct injures consumers and/or competitors, it would be logical for the legislation that penalizes such conduct to also provide the victims with an avenue of redress.
37. The HKBA also considers that the proposed Competition Ordinance should provide a “stand-alone” private right of action for a person who has suffered loss or damage “as a result” of another person’s violation of the law to claim against the other person for damages or other monetary compensation.
38. The HKBA wishes to point out that, even if the new competition law does not expressly provide a statutory right of action, such a right for an injured person to make civil claims still exist. There are three potential causes of action in tort for: (1) Breach of statutory duty; (2) Intentional damage to business; and (3) Conspiracy (especially recalling *Norris v. USA* [2007] EWHC 71 (Admin)). On the other hand, it is far more preferable to provide for a statutory cause of action so that a person who has suffer loss or damage as a result of another person’s anti-competitive acts be able to claim recompense by simply showing the other person’s unlawful conduct, rather than needing to fashion his claim in tort. This approach is simpler as well as more logical and transparent.

Proposal 35: Private cases that involve only competition matters should be heard solely by the Tribunal

Proposal 36: For “composite” claims that involve both competition and non-competition matters, the courts should have the power to transfer competition matters to the Tribunal for determination. When a court decides that it would hear a composite case in full, it would have the power to issue remedies in respect of all aspects of the case, including matters related to the competition law

39. The HKBA supports the general approach that the proposed Competition Tribunal should hear and determine all competition law issues and accordingly finds the Administration’s proposal regarding “composite” claims with the possibility that a court in the classic sense may assume jurisdiction to hear and determine competition matters potentially problematic. The Administration should take legal advice and enter into a dialogue with the Judiciary on how this proposal might impact on the constitutional position of the tribunal.

Proposal 37: The Tribunal, of its own motion or on application by a party or the Commission, may strike out any action which the Tribunal considers to be without merit or vexatious

Proposal 38: Where a matter is being investigated by the Commission and a third party commences a private action on the same matter, the Tribunal may adjourn the private case pending the outcome of the Commission’s investigation if the Tribunal considers that the matter would be better handled by the Commission

Proposal 39: With the agreement of the Tribunal or the courts, the Commission may intervene in any private proceedings relating to a contravention of the competition conduct rules

40. The HKBA in principle supports Proposals 37 to 39 but will comment further when the detailed provisions are published.

Proposal 40: With the permission of the Tribunal, representative actions, such as on behalf of consumers or SMEs should be permitted. In granting such permission, the Tribunal must have reached the view that the representative can fairly and adequately represent the interests of the parties concerned

41. The HKBA has reservations on the merits of Proposal 40 since its terms apparently misunderstand the concept of “representative actions” presently permitted under the rules of court. Rather the proposal in substance seeks to introduce legal action more akin to “class actions” conducted in some overseas jurisdictions, at a time when Civil Justice Reform has not deemed fit to introduce into Hong Kong such form of legal action, be it through the English mechanism of a group litigation order or otherwise.

Proposal 41: The Tribunal should have power to apply the following remedies in cases of stand-alone private action (a) injunction or declaration; (b) award of damages; (c) termination or variation of an agreement; (d) such other relief as the Tribunal deems appropriate

42. The HKBA notes that the remedies that the proposed Competition Tribunal may award are traditional remedies in civil litigation. In adjudicating a private action, the tribunal appears to differ very little from an ordinary court even though it may not be vested with the power to enforce its own remedies. This again raises the question of the proper constitutional position of the tribunal. The HKBA cannot stress more of the need to take legal advice and enter a dialogue with the Judiciary on this question, bearing in mind the recent views expressed by the Judiciary of the unsatisfactory set up of the Obscene Articles Tribunal.

Proposal 42: Any leniency granted to a party by the Commission should have no impact on rights of private action. Information provided to the Commission by a party granted leniency should not be discoverable in private proceedings

43. The HKBA agrees that the leniency granted to a party by the proposed Competition Commission should have no impact on rights of private action. However, the Administration should fine tune the provisions providing for non-disclosure of information provided to the commission by a party granted leniency so that they would not be used by the party as a shield to stifle legitimate claims from harmed competitors or consumers.

Proposal 43: The Commission should be required in its guidelines to clarify that it would not pursue an agreement where the aggregate market share of the parties to the agreement did not exceed a certain level, except where “hard core”

conduct was involved. The guidelines should give clear examples of what would be considered “hard core” conduct

44. While the HKBA accepts that the proposed Competition Commission should be required to indicate its enforcement policy in guidelines and that it is permissible to state that no action would be taken where the aggregate market share of the parties to an agreement does not exceed a certain level, the HKBA takes exception at the approach deeming certain conduct as “hard core” since the Administration claims that such conduct to be having a *purpose* of substantially lessening competition, thus tending to approach the matter in terms of per se infringement.

Proposal 44: The Competition Ordinance should apply to all sectors, including the telecommunications and broadcasting sectors. The competition provisions in the Telecommunications and Broadcasting Ordinances that duplicate those in the Competition Ordinance should be repealed

Proposal 45: The Telecommunications Authority and the Broadcasting Authority should share with the Competition Commission jurisdiction over competition matters in their respective sectors

45. Telecommunications and broadcasting are special industries. The structure and competitive landscape of these markets owe in large parts to their regulatory rules and requirements. There has been an ongoing policy initiative to merge the regulatory framework for the two industries in light of the convergence in technologies. The HKBA does not see that a competition regulator with a general mandate could add significantly to the regulation by the Telecommunications Authority or the Broadcasting Authority, each with their specialist knowledge; or a future Communications Authority. The HKBA suggests that these two sectors be exempted from any cross-sector competition law.
46. As for other sectors that have specialist regulators but without special competition regulation, e.g., the securities and futures industry, the HKBA agrees with the Administration’s suggestion that the competition regulator be directed to work with the sectoral regulators to promulgate guidance on competition law matters in the respective industries and markets.

Proposal 46: An agreement may be exempted from the prohibition on anti-competitive agreements if it yields economic benefits that outweigh the potential anti-competitive harm. A party to an anti-competitive agreement may apply to

the Commission for an exemption if it has grounds to believe that such an exemption should be granted

Proposal 47: The Commission may issue a block exemption in respect of a category of agreement that is likely to yield economic benefit that outweighs any anti-competitive harm

47. The HKBA recognizes that every regulatory scheme must allow for exclusions or exemptions, be it granted at the beginning under the primary legislation, or by virtue of block exemption or case-by-case exemption subsequently. The proposed Competition Commission will wield a very significant gate-keeping role in economic regulation when administering this scheme of exclusions and exemptions. The Administration should provide sufficient resources for the administrative workload.

Proposal 48: The conduct rules should not apply to any undertaking entrusted with the operation of services of general economic interest, such as essential public services of an economic nature

Proposal 49: The Chief Executive-in-Council may exclude conduct from the prohibition on anti-competitive conduct if he considers that there are sound reasons of public policy for so doing

48. Unless the legislation is properly worded, the HKBA considers that both Proposal 48 and Proposal 49 are potentially problematic. Proposal 48 is in very general terms and capable of being abused even though one might suggest that public utilities are the intended undertakings (and in this respect, a separate question arises as to whether the Administration should ask the Legislative Council to pre-determine the competition law questions on an undertaking basis when the proposed legislation works on a conduct basis). Proposal 49 can be described as a “backdoor” provision and places the Chief Executive in Council in an invidious position with regard to lobbying by corporate commercial interests.

Proposal 50: The conduct rules should not apply to the Government or statutory bodies. The Government would conduct a review of the issue in the light of actual experience in implementing the competition law

49. The HKBA considers that Proposal 50 takes an overly broad-brush approach. The proper approach is for the conduct rules to apply to the Government and statutory bodies and to exempt specified conduct of the Government or statutory bodies by subsidiary legislation.

Hong Kong Bar Association
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