

撮要  
Executive Summary

# Grocery Market Study 雜貨市場研究

## 查考超市市場權勢情況

Market Power of Supermarket Chains Under Scrutiny



## 報告摘要

1. 消費者委員會就食品及家居日用品零售市場不時作出研究和分析，例如在 1994 年研究整體香港超市行業<sup>1</sup>和在 2003 年分析街市與超市之間的競爭情況<sup>2</sup>。隨後本會亦受政府委託調查兩宗有關雜貨零售業涉嫌反競爭行為的投訴<sup>3</sup>。
2. 在 2012 年，本會注意到多宗新聞報導，內容指有商戶投訴連鎖超市在雜貨銷售方面，實行限制性行為。有關指控涉及要求排斥競爭對手的專營行為 (exclusive dealing)、要求停止供貨予競爭對手、以及利誘規定零售價 (resale price maintenance)。因此為慎重起見，本會認為應進行一次全面的食品及日用品零售市場研究，評估現時的競爭情況，以及審視市場中是否存在限制競爭行為的表面證據，例如是否有大企業濫用其支配性的市場權勢<sup>4</sup>。
3. 本研究報告在 2012 年開展，旨在跟進以往的研究調查，更新對相關市場的資訊，以及透過業內人士的訪問和市場問卷調查，以推尋反競爭行為的指控。本研究的目的是如下：
  - (i) 就着地理環境因素、產品種類 / 選擇及服務特性等範疇，審視香港食品及日用品零售市場的競爭環境和狀況；
  - (ii) 評估在香港相關市場上有否存在擁有市場權勢的企業；及
  - (iii) 透過與業內人士的不記名訪問，推尋是否有表面證據支持相關的反競爭行為之指控。

## 研究結果

### 雜貨零售市場的競爭環境和狀況

4. 任何市場競爭環境和狀況的有效評估，必須建基於能否可靠地反映市場內競爭性選擇的市場資訊，以及消費者的行為和喜好。一般消費者購物行為的模式，會隨着營商環境、科技發展和人口因素的演變而轉變，因此，在過往研究中曾提出的關注需重新審視。

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<sup>1</sup> 「香港超級市場研究報告」，消費者委員會，1994 年 11 月。

<sup>2</sup> 「街市 vs 超市：食品及家居日用品零售市場競爭」，消費者委員會，2003 年 8 月。

<sup>3</sup> 有關個案於競爭政策諮詢委員會 2006-2007 及 2011-2012 工作報告中提及。

<sup>4</sup> 根據《競爭條例》(第 619 章) 第 21 (1) 條，第二行為守則：「在市場中具有相當程度的市場權勢的業務實體，不得藉從事目的或效果是妨礙、限制或扭曲在香港的競爭的行為，而濫用該權勢。」

### 相關市場

5. 要評估市場競爭情況，第一步必須確定在該市場內誰是相關的競爭對手。要鑑別哪些商戶屬同一市場上的競爭對手，關鍵在於衡量消費者在何種程度，視不同競爭者為有效的相互替代者。當消費者因為日常光顧的商店加價、貨品選擇減少或服務質素下降，而轉而光顧另一間提供同類服務的商店，該兩間商店可被視為同一市場上的競爭對手。
6. 本會從研究和商場外問卷調查所得的資料，顯示該市場存在兩種家庭日常購物模式：(1) 「一站式購物」；及 (2) 「次要購物」。「一站式購物」作為一種高度發展的零售模式，在經濟發展先進的城市十分普遍。它是一種便利購買家庭用品的模式，有別於零星消費。一站式購物的企業提供齊全的食品和日用品，使消費者無需到其他店舖搜羅不同類型貨品，為家庭日常購物提供便利。
7. 換言之，「一站式購物」是一種以單一次數或單一店舖內進行，定期購買相當數量的貨品的消費活動，以滿足家庭對雜貨的需要。至於「次要購物」，則指一些平均花費較少及購物以供即時使用的消費模式，例如在便利店購物。本研究認為在便利店的一般購買品，相比在其他銷售雜貨的零售商店，如個人護理連鎖店、連鎖超市、雜貨連鎖店和個別藥房的消費者平均消費模式會有差別。
8. 本會的商場外問卷調查和規劃署的問卷調查提供了有用資訊以分析，以「一站式購物」的概念應用於所有雜貨購物模式是否恰當。最終分析的結論是「兩個相關市場」的方案最為合適：
  - (i) 供應新鮮食品和預先包裝食品的超市和街市可被歸類為一個零售市場；而
  - (ii) 供應家居日常用品及必需品的超市、個人護理連鎖店和藥房可被歸類為另一個零售市場。
9. 連鎖超市在食品（預先包裝及新鮮）市場和家居日常用品的市場上與不同類型的商店競爭。在這兩個不同市場中，企業的市場權勢的強弱，取決於鄰近位置是否存在競爭對手及整體社會經濟等因素。

### 市場操守

10. 本會與供應商訪談揭示了一些值得深入探究的營商手法的問題：首先，與零售商談判供應合約時，似乎供應商相對地處於較為不利的位置。供應商經常沒有議價能力去加入保障自身的利益的條款，而似乎零售商一方卻則在續約時加入不平等和透明度低的條款。

11. 報告同時發現部份大型零售商有時會在訂定新的供應合約條款的時候、或之後透過電郵或其他通訊渠道施加壓力，要求對售賣的貨品享有獨家銷售權（獨賣）。獨賣是否會限制消費者在市場中的選擇，要視乎獨賣持續的時間，以及供應商及其他零售商會否為消費者提供替代選擇，以供購買。
12. 雖然沒有資料顯示有企業具體地示意施行規定零售價，而供應商只傾向於建議零售價及容許提供折扣，但有零售商為阻止其競爭對手提供折扣優惠，向供應商投訴，並威脅如供應商不阻止其競爭對手以低價售貨，可能停止與他們進行交易。就此，有些零售商有可能嘗試透過供應商與其他零售商一起協調訂價。
13. 大型零售商（尤其超級市場）亦經常參與生產其自家品牌，與其供應商的牌競爭。那些零售商（亦是供應商的競爭對手）向供應商收取各類費用，包括上架費、分擔零售商廣告開支的費用及損壞貨品的津貼等，並強迫供應商取回未能賣出的貨品或承擔其所需成本。最終供應商的貨品相對於零售商所生產的貨品而言，處於一個不利競爭的位置。

### 市場權勢的可能存在

14. 是否存在市場權勢（一些司法區稱之為「市場壟斷」）一般會參考下列各項的具體情況：(i)市場進入障礙(barriers to entry)；(ii) 有關市場參與者的市場佔有率；及 (iii) 懷疑有市場權勢者的市場操守。

#### 市場進入障礙

15. 根據政府統計處於 1999 年及 2011 年<sup>5</sup>的統計數字，小型超級市場營運者(分店數目少於 2 間)在過去 12 年間大幅下跌 16%。另外，2011 年的統計數字顯示，相對於大型營運者，小型超級市場營運者所佔的行業整體樓面面積非常少，少於 1%。
16. 現時香港很多零售物業都是由領匯房地產投資信託基金(「領匯」)管理。其物業組合擁有興建於商場內而作零售用途的內部樓面面積約 1100 萬平方呎。若大型連鎖超級市場營運者及「領匯」作捆綁式租務安排，大型連鎖超市就得享大幅度的價格優勢，但個別店舖營運者就未必有能力與「領匯」作相同的租務優惠安排。可以想像，這亦限制了市場新參與者在嘗試以與大型營運者相若的租賃成本，去得到合適的零售空間而引入新超級市場的機會。
17. 連鎖零售店的選址策略是形成競爭的重要因素。政府的土地使用政策在某程度上影響某一區域中商場的數目，繼而影響零售店舖的數目和位置分佈。零售業的發展主要是市場主導，而商場和零售店舖的地理位置是容易受到其他經濟因素所影響。

<sup>5</sup> 「批發、零售、進口與出口貿易、食肆及酒店按年統計調查報告」，政府統計處，2000 - 2012 年。

18. 然而，人流規劃可為經營街舖的小型或獨立零售商開闢商場以外的空間，從而協助個別雜貨零售商與連鎖店（包括超級市場連鎖店）競爭。並且在集中於商場；有利於大型競爭者的競爭環境以外，發展另一個競爭環境。

#### 市場佔有率

19. 考慮到本報告認為這業界的競爭可基於「一站式購物」及「次要購物」模式而分辨出兩個相關市場（有關食品及家居日常用品），市場佔有率對市場權勢的影響亦相對減低。若以零售店的數目，當中包括大型連鎖超級市場、中型雜貨店、售賣各式貨品的折扣店、街市、個人護理用品連鎖店及獨立藥房／藥行，去評核行業集中指數，按海外競爭監管機構的標準，指數屬於低。單以食品零售市場的集中度而言，競爭程度可假設為中度。基於兩大連鎖超級市場在此市場內的市場佔有率各屬 25% 至 40% 之間，是否存在相當程度的市場權勢，應與以密切監察。在家居日常用品市場方面，研究沒有證據顯示兩大超市擁有重大的市場權勢，除非同一集團內連鎖超級市場和個人護理用品不同的業務在家居日常用品零售市場中被視為單一個體<sup>6</sup>。

#### 行使市場權勢

20. 有跡象顯示大型連鎖超市有能力向供應商指定某些條款（如上文所述），並可影響供應商向超市較小型的競爭對手所提出的合約條款。
21. 然而，消委會根據 10 個區內 120 間超市零售店所收集的資料作出分析，當考慮到需求、觀察地區價格和非價格的競爭和競爭環境等因素後，沒有充分證據可以證明，大型連鎖超級市場利用其市場權勢在地區市場層面上影響產品價格、質量及產品和服務類別範圍。

#### 是否有表面證據顯示反競爭行為存在？

22. 透過與作出有關反競爭行為指控的供應商通信及會面，本會嘗試確定指控的真確性。這些指控包括連鎖零售商有否企圖誘使供應商訂立獨賣協議，操縱產品售價以及要求供應商拒絕供應給其他零售商。
23. 由於本會沒有調查權力去獲取資料，作為總結本會只能以有軼事證據 (anecdotal evidence) 證明部分供應商曾受到零售商的壓力去干預競爭者行使進取的價格競爭，威脅零售商的市場地位。然而，儘管本會在獲取資料方面受到限制，根據本會的價格調查結果，沒有顯示大型零售商有利用其市場權勢去操縱價格。
24. 在《競爭條例》的框架下，競爭事務委員會將擁有具透明度的規則和程序，以及調查權，而被投訴和牽涉反競爭行為的商戶亦可以作出詳細解釋或自辯。而競爭事務委員會亦會就競爭議題，例如相關市場的問題，闡明觀點和說明反競爭行為是否確實存在。

<sup>6</sup> 在香港就家居日常用品市場而言，兩大集團分別擁有和營運連鎖超市和個人護理連鎖店。

25. 若果有零售商被發現具有相當程度的市場權勢，可能需要受競爭事務委員會進一步的調查，以確定《競爭條例》第二行為守則是否適用於本報告籌備中所悉聞的有關反競爭行為的指控。

## 報告建議

### 反競爭行為的指控

26. 隨著《競爭條例》的實施，本會相信具調查權的競爭事務委員會可以遠超本會在這報告的工作，報告已得的資料可以為委員會在調查相類的反競爭行為為指控中提供參考，從而得出更重要的結論。

### 行業自律

27. 雖然本報告未能找到有力證據證明大型連鎖超級市場曾作出任何具體的反競爭行為，消委會仍建議競爭事務委員會在競爭條例實施後對這行業作出調查。即使競委會經調查後未有發現有任何個案違反第一行為守則和第二行為守則的情況，消委會認為行業亦應同步引入自律措施。外國經驗證明行業自律計劃對提供滿意的濟助方式很有幫助，使市場參與者能就其認為是不公平的手段所蒙受的侵損，表達其關注，以及得到公平的聆訊，讓它有機會就算在未能證實有任何違反競爭法的行為的情況下，仍可得到某些濟助。舉例來說，指控稱，零售商對供應商施行高壓手段，這雖然違反供應商的利益，但卻不是違反競爭法，但始終是不公平，以及對行業有效運作來說是有問題，有需要透過具透明度的程序以調解處理。
28. 在 2003 年的報告中，本會研究是否可以在雜貨市場中制定行為守則，透過行業自律機制，以改善供應商和零售商之間的關係。這不單能回應行業中某些商戶的強烈關注，亦照顧政府喜以市場自律機制作為優先選擇，以解決企業糾紛，最終改善營商環境和提升消費者權益。然而，就本會所見，行業至今並沒有採納本會的建議，具體而有效的自我監管機制仍然欠奉。
29. 本會認為行業自律模式值得優先考慮。作為第一步，由香港零售管理協會（HKRMA）主持一個業內投訴的平台，不失為行業各方所能接受和具建設性的建議。
30. 消委會會認為一套自律機制有助行業集體遵從《競爭條例》。例如，澳洲及英國的超市行業自律機制對當地的競爭法起着輔助而非取替的作用。若果市場對香港零售管理協會採用，處理反競爭投訴的自律模式有信心，這就可能足夠而毋須政府干預。除非有明顯違法行為，導致競爭事務委員認為有必要採取法律行動。
31. 將來行業可以參考英國的模式，在雜貨市場推出一些行業必須遵守的守則，由競爭事務委員會或其他公共機構管理和審核。

### *合併與收購*

32. 在香港，現在已有跨行業的競爭法禁止在法律訂明的反競爭行為。然而，除了電訊市場外，值得注意的是法例並未有包含有關合併和收購監管的條款。因此，若現有超市投資者試圖透過收購其他超市資產，去減低新投資者進入市場的機會、或增加自身在市場的佔有率時，由於沒有相關條文，競爭事務委員會會無權規管或防止相關併購行為。
33. 消委會注意到政府承諾在競爭條例實施數年後，會否設立跨行業的合併管制制度作出全面檢討。消委會促請政府在未來的檢討中考慮設立跨行業的合併管制制度，以致競爭事務委員會可以去監督市場上可能損害公眾利益的合併和收購。消委會認為，如果現有的大型連鎖超級市場透過合併或收購其他現有超市投資者的資產而阻礙新競爭者進入市場，政府應迅速採取行動。類似的規管行動在其他有競爭法的國家和地區也存在。目前為止，競爭事務委員會只能對合併和收購情況表示關注，並不能夠改變或阻止市場的投資者透過合併和收購增加自己在市場權勢的事實。

### *正進行的市場研究*

34. 最後，從消委會的觀察所得，現時一些規模較小的連鎖超市或提供專門的產品或服務的連鎖商戶，提供有別於「一站式購物」的「特定」購物環境。然而，它們對大型連鎖商戶在產品定價以及供應商的決定有多大影響，則仍是未知之數。因此，消委會會繼續監察市場。在一個市場上，假如只有大企業不斷增加佔有率或小企業不停作出有關濫用市場權勢的申訴，都會令整個雜貨行業無法提升商業信心，亦難以激發行業的活力。因此，我們需要採取積極主動的措施，不斷透過獨立的市場調查和研究，維護市場競爭。

## Executive Summary

1. The Consumer Council (the Council) studies the foodstuffs and household necessities retailing sector; with special reference to the Council's report on supermarkets<sup>1</sup> published in 1994 and that concerning the state of competition between wet markets and supermarkets in 2003<sup>2</sup>. The Council was also subsequently commissioned by the Government to investigate two complaint cases, related to the alleged anti-competitive practices in the grocery sector.<sup>3</sup>
2. In 2012, the Council noted several press reports on allegations made by businesses against restrictive practices on the part of supermarket chains in relation to the sale of groceries. The allegations concerned exclusionary practices, refusal to supply to competitors and inducement of resale price maintenance. The Council considered that it would be prudent to undertake a sector wide study to assess the current state of competition and to ascertain if there was prima facie evidence of restricting competition, for example: whether alleged abuse of market power was being carried out by undertakings with substantial market power<sup>4</sup>.
3. This study, commenced in 2012 therefore seeks to follow up the preceding studies, update relevant market information on the sector, and examine allegations of anticompetitive conduct, gleaned from industry interviews and market surveys. In summary, it is intended to:
  - (i) examine the state of competition in the Hong Kong foodstuffs and household necessities retailing sector taking into account geographic factors, product dimensions and service attributes;
  - (ii) examine the possible existence of market power of relevant players in the various relevant markets in Hong Kong; and
  - (iii) determine whether there is any prima facie evidence of anticompetitive practice as alleged through anonymous interviews with concerned parties in the sector.

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<sup>1</sup> Consumer Council Report, *Report on the Supermarket Industry in Hong Kong*, November 1994.

<sup>2</sup> Consumer Council Report, *Wet Markets versus Supermarkets: Competition in the Retailing Sector*, August 2003.

<sup>3</sup> Cases were mentioned in Competition Policy Advisory Group Report of 2006-2007 and 2011-2012.

<sup>4</sup> According to the Second Conduct Rule of the Competition Bill, Clause 21(1) at the time, "An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong."



## **FINDINGS OF THE STUDY**

### **State of Competition in the Grocery Sector**

4. Any assessment of competition in the sector will only be valid where the market information on which it is based remains a reliable representation of the competitive choices available, and consumer behaviour and preferences. The average pattern of consumer purchasing behaviour evolves along with the changes of business environment, and emerging technologies and demographic factors. Therefore, the issues addressed by the preceding studies have to be revisited.

#### *The 'relevant market'*

5. The first step in assessing competition is to identify the relevant competitors in the relevant market. The key to identifying competitors that are in the same market is found in assessing the extent to which customers regard different competitors (in this case: stores selling groceries) as effective substitutes for each other. In other words, the stores that should be included in the same market are those to which customers will switch when the store at which they are currently shopping increases prices, or limits choices or decreases service levels.
6. The Council's information obtained through research and an 'Exit Survey' on competition in the sector indicates that there are two kinds of grocery shopping: (i) "one-stop grocery shopping", and (ii) "secondary shopping". One-stop grocery shopping is a highly developed form of retailing in advanced economies. Typically it refers to a convenient form of shopping for household consumption rather than for spot consumption. One-stop shopping facilitates consumers shopping in a place where a complete range of foodstuffs and household necessities is readily available for purchase without the necessity of visiting other retail outlets.
7. In other words, one-stop shopping is shopping for the bulk of satisfying a household's periodical grocery needs, carried out in a single trip and under one roof. Another form of shopping, characterised as "secondary shopping", such as purchasing at convenience stores is typically distinguished by a lower average basket spend and is usually aimed at instant consumption. This study takes the view that the average purchase of shoppers in convenience stores would be different to that in other types of grocery outlets, such as personal care chain stores, supermarket chain stores, grocery chain stores and individual drug stores.
8. The findings of the Council's Exit Survey and a Planning Department Survey provide useful insights as to whether it is appropriate to adopt "one-stop shopping for all types of grocery shopping" in Hong Kong. In the final analysis a 'two relevant market' approach is found to be most appropriate, in which there is taken to be
  - (i) one market for shopping for fresh produce and packaged food in supermarkets and wet markets; and

- (ii) another market for shopping for household products and necessities in supermarkets and other retail outlets, such as personal care chain stores and independent drug stores.
9. Supermarket chains therefore compete with different types of shops in the market for food (pre-packaged and fresh) and the market for household necessities. The degree of market power of any undertakings in these two separate markets will depend on the availability of rival stores within a geographical area, and the economy in general.

#### *Marketplace conduct*

10. Interviews with suppliers revealed that certain trade practices issues deserved further examination: First of all, it would appear that when it comes to negotiation of supply contracts, suppliers may be at a disadvantaged position vis-à-vis retailers. The former often have no bargaining power to include clauses to protect their interests, and the latter seem to impose uneven, opaque conditions for the renewal of the contracts.
11. It was found that exclusivity is sometimes required by big retailers either in the supply contract or subsequent to the contract, by exerting pressure through emails or other means of communication. Whether exclusivity limits consumer choices in the market depends on the duration of the exclusivity, and the provision of alternative choices for purchase from suppliers and retailers.
12. There is no specific indication of resale price maintenance being enforced in the industry, as suppliers tend to merely recommend prices and allow discounts. However, it appears that some retailers have tried to prevent others from offering discounts by complaining to suppliers and threatening to stop dealing with them if the suppliers do not prevent those competitors from offering the goods at a lower price to consumers. It is possible that some retailers might try to use a supplier to coordinate prices with other retailers.
13. Big retailers, in particular supermarkets, frequently engage in the production of own brand goods that compete with the other branded goods provided by their suppliers. The conduct of those retailers (who are also in this case competitors of the suppliers) in charging suppliers various fees, such as slotting fees, a contribution to the retailers' advertising expenditure, damaged goods allowances, and forcing them to take back or bear the cost of unsold goods, would consequently place the suppliers' products at a disadvantage in relation to those produced by them.

#### **Possible Existence of Market Power**

14. Market power (in some jurisdictions referred to as market dominance) is commonly associated with reference to (i) barriers to entry; (ii) the market shares of the parties involved in the relevant market; and (iii) marketplace conduct exhibited by those alleged to have market power.

### *Barriers to entry*

15. According to statistics from Census & Statistics Department in 1999 and 2011<sup>5</sup>, the number of small supermarket operators, with less than two outlets, substantially declined by 16% over twelve years. Moreover, statistics in 2011 revealed that small supermarket operators only contributed very little floor space, with less than 1%, to the total sector compared to the large operators.
16. Today many retail properties in Hong Kong are managed by The Link Real Estate Investment Trust ("The Link REIT"). Its portfolio consists of properties with an internal floor area of approximately 11 million square feet of retail space in purpose built shopping malls. Substantial price advantages, in bundling rental arrangements between the largest supermarket chain operators and the Link REIT, might not be possible between single shop operators and the Link REIT. Opportunity for new entrants to obtain suitable retail space, at similar costs experienced by the largest operators, when attempting to introduce a new supermarket is therefore assumed to be limited.
17. The strategic location decision of a retail chain is a contributing factor to the state of competition. It is understood that land use policy of the Government would to a certain extent influence the number of shopping malls in a geographical area, and therefore the possible number and location distribution of outlets in the area. Retail developments are mainly market-driven and where shopping malls and outlets are located is also susceptible to other economic factors.
18. Pedestrian flow planning could provide space for small and independent retailers at the street front level, thereby serving a function of assisting individual grocery retailers to compete with grocery chains, including supermarket chains, and fostering a different state of competition other than the one centered around shopping malls which tends to favour larger competitors.

### *Market shares*

19. Having regard to the position taken in this study that competition in the sector can be distinguished between two relevant markets based on 'one stop shopping' and 'secondary shopping' (related to foodstuffs and household necessities), market share concerns are somewhat diminished. Concentration ratios in terms of number of outlets, which includes large supermarket chains plus mid-sized grocery stores, limited assortment discounters and wet markets, personal care chain stores, independent drug stores, are low by typical standards that have been adopted by competition authorities overseas. An assumption can therefore be made that the relevant market for retailing of foodstuffs is moderately concentrated. Given that the two supermarket chains have a market share

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<sup>5</sup> Census and Statistics Department, Report on Annual Survey of Wholesale, Retail and Import and Export Trades, Restaurants and Hotels, 2000 – 2012.

below 40% but above 25% respectively, arguably it cannot reject that either one does not possess a substantial degree of market power, that warrants further scrutiny. With regard to the market for retailing of household necessities, there is no strong evidence suggesting a substantial degree of market power by either of the two big supermarkets unless supermarket chains and personal care chains within the same corporate group, under the relevant market of retailing of household necessities are treated as one entity<sup>6</sup>.

#### *Exercising market power*

20. There are indications that the large supermarket chains are able to dictate terms to some suppliers (as noted above) and have some influence over terms that suppliers offer to smaller competitors of the supermarkets.
21. Nevertheless, after taking into account demand factors, through observations on price and non-price competition at the local level, with respect to certain geographic competitive environments, as well as price surveys, no strong evidence is observed in a sample of 120 supermarket outlets in 10 districts that demonstrates supermarket chains have used market power to affect prices, quality, or the product range of goods and services at the local market level.

#### **Does prima facie evidence of anti-competitive conduct exist?**

22. The Council exchanged correspondence and held meetings with businesses who alleged anti-competitive conduct in the sector, in an attempt to establish the veracity of the allegations. The allegations included attempts by certain chains to induce suppliers into exclusive dealing, resale price maintenance, and refusals to supply.
23. Not being an investigative body with powers to obtain information, the Council can only conclude at best that there is strong anecdotal evidence indicating that pressure has been exerted by retailer on suppliers to discipline competitors who threaten retailer's market position with rigorous price competition in the market. However, price surveys undertaken by the Council, albeit with limited access to information, do not indicate that large retailers have been taking advantage of any perceived market power to manipulate prices.
24. In future under the Competition Ordinance framework, with transparent rules and procedures, and investigative powers conferred on the Competition Commission, the various protagonists will be in a position to clarify their concerns, and defences, and the Commission will have to state

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<sup>6</sup> In Hong Kong, two large corporations operate and wholly own both supermarket outlets and personal care chain store outlets in the household necessities market.

its view on competition issues such as those relating to the relevant market, and whether market power actually exists.

25. If certain retailers are found to possess a substantial degree of market power, further investigation could be required to see whether the Second Conduct Rule of the Competition Ordinance is applicable to the practices alleged to have taken place in the course of undertaking this study.

## **RECOMMENDATIONS OF THE STUDY**

### *Allegations of anticompetitive conduct*

26. With the implementation of the Competition Ordinance, the Council believes that the Competition Commission, with its investigative powers can go far beyond what the Council has achieved in this study. Moreover, the published information in this study should become a good source of reference for the Commission's investigations into any similar allegations of anticompetitive conduct, from which more significant conclusions might be drawn.

### *Industry self regulation*

27. While this study has not found any strong evidence clearly supporting specific allegations of anticompetitive practices against supermarket chains, the Council urges the Competition Commission to look into the sector when the Competition Ordinance is fully implemented. Moreover, even if the Commission does not find any violation of the First or the Second Conduct Rule in the future, the Council is of the view that some industry self regulation measures should still be introduced to the sector simultaneously. There is strong evidence from overseas jurisdictions that self regulatory schemes are helpful to provide a satisfactory form of redress that enables market participants who are aggrieved with what they consider unfair practices in the sector to voice their concerns and to have a fair hearing, with the possibility of achieving some redress; even if a breach of competition law is not identified. For example, allegations of high-pressure tactics by retailers applied to suppliers that work against their interests but are not breaches of competition law may still be considered unfair and problematic for the efficient operation of the sector that need to be addressed through some transparent process that provides mediation.
28. At the time of its 2003 study, the Council looked into the possibility of having a self-regulatory framework with a code of conduct to facilitate better relations between suppliers and retailers in the grocery sector. This was in response to not only indications of serious concerns by some in the sector, but also a reflection of the Government's preference in having self-regulatory mechanisms to resolve business disputes, with the ultimate benefit of improving the business environment and improving consumer welfare. From what the Council can ascertain, no effective specific self-regulatory scheme has been put into place along the lines suggested by the Council at the time.

29. The Council believes that some form of industry self-regulatory scheme should be pursued now as a matter of priority. The development of a functional trade complaint forum within the Hong Kong Retail Management Retail Association (HKRMA), that could be acceptable to all sides in the grocery sector, could be a constructive initiative to pursue.
30. The Council also sees self-regulation as a way for industry to collectively assist in ensuring compliance with competition law. For example, the self-regulatory regimes, as practiced in the supermarket sector in Australia and in the United Kingdom, are designed not to displace but rather to supplement competition law. If the market has confidence in a self-regulatory model adopted by the HKRMA for non-competition related complaint handling, this might suffice without any further need for government intervention except where there is a clear indication of contravention against the competition provisions that the Competition Commission considers worthy of legal action.
31. In future, a Code of Practice for the grocery sector based on mandatory undertakings similar to a model adopted in the United Kingdom and administered and audited by the Competition Commission or other public body should be encouraged.

#### *Mergers and Acquisitions*

32. With a cross-sector competition law currently in place in Hong Kong, there are restraints on certain forms of anticompetitive conduct, as provided in the law. However, it is noted with some concern, that a mergers and acquisitions provision does not form part of the law, except for the telecommunications sector. Any attempted acquisitions by supermarket incumbents of assets that deny new entrants an opportunity to either enter the market, or increase their presence, will therefore be excluded from preventative action by the Competition Commission.
33. In this regard, the Council notes that the Government has undertaken to review the Competition Ordinance a few years after the full implementation of the Ordinance. The Council urges the Government to consider in that review introducing a cross-sector merger control regime so that the Commission would have oversight where a merger or acquisition might arise that has a detrimental effect on consumer interest. In particular the Council considers that the Government should be in a position to act quickly if there is a merger between incumbent supermarket chains or an acquisition by any competitors of strategic assets that would impede new entry. Similar regulatory action exists in other competition law jurisdictions. So far, the power available to the Competition Commission would only be to express a concern and it would not be able to reverse or prevent the continuation of accumulation of market power.

*On-going Market Research*

34. Finally, the Council observed that while there are some smaller supermarket chains, and other chain stores providing specialized, as distinct from 'one stop' shopping, it is unclear as to how strong they are in challenging the major chains' pricing and supply decisions. It is therefore important to keep monitoring the market. Increased concentration in relevant markets, and persistent complaints in the sector alleging misuse of market power do not enhance business confidence nor encourage vibrant business development in the grocery sector. The need to apply pro-active measures to safeguard market competition will only become apparent if the sector is being constantly monitored through independent and rigorous market surveys and inquiries.