COMPETITION POLICY :
THE KEY TO HONG KONG'S FUTURE ECONOMIC SUCCESS

CONSUMER COUNCIL

Corrigendum

"Competition Policy: The Key to Hong Kong's Future Economic Success"

Executive Summary

1. Para. 5 on page 1:

   "Cost pressures felt in Hong Kong ....."

2. Para. 6 on page 2:

   "In a similar way the HongkongBank in its Economic Report....."

3. Para. 14 on page 3:

   ".... The Government's present piecemeal approach has led to differences in the competition provisions of licences issued to broadcasting companies. Provisions in the telecommunications licences are more specific and clearly set out than that contained in the broadcasting licences."

4. Para. 17 on page 4 should be read as:

   "For the consumer, the experience of competition policy in Hong Kong as it has been applied in specific sectors such as telecommunications and banking is that it leads to lower prices, product innovations, more choices, and improved services....."

5. Para. 21 on page 5:

   "b) **Article 2:** to prohibit any abuse by one or more undertakings of a dominant position that prevents, restricts or distorts competition."

6. Para. 26 on page 6:

   "a) .....established to investigate and decide on possible breaches of the Competition Law....."

7. Para 28 on page 6:

   "b) to ensure compliance with the Competition Law..."

8. All references to the Authority in paragraph 27 to 32 are reference to the Competition Authority.

9. Para. 33 on page 7:

   "The Chairman of the Appeal Body should be appointed ....."

10. Para. 34 on page 7:

    ".....withholding only commercial sensitive information."

11. Para. 35 on page 7:

"..... adopt laws and policies that enhance their competitiveness in international trade..... Hong Kong's position in the world economy will be jeopardised if it is unable to play a full role in the international debate on competition and trade policy now taking place."

Chapter 2

12. Para. 2.15 on page 15:

"Many jurisdictions use competition policy to define or redefine regulatory policy....."

Chapter 4

13. Footnotes 14 on page 38 and 16 on page 39:

References are to HongkongBank not Hongkong Bank.

Chapter 5

14. Sub-heading before Para. 5.18 on page 48:

"What is happening in other places?"

Chapter 8

15. Para. 8.12 on page 76:

"b) **Article 2:** to prohibit any abuse by one or more undertakings of a dominant position that prevents, restricts or distorts competition."

16. Para. 8.22 on page 77

"a) .....established to investigate and decide on possible breaches of the Competition Law....."

17. Para 8.24 on page 78:

"b) to ensure compliance with the Competition Law..."

18. All references to the Authority in paragraphs 24 and 25 are references to the Competition Authority.

19. Para. 8.30 on page 79:

".....withholding only commercial sensitive information."

20. Para. 8.38 on page 81:

"..... adopt laws and policies that enhance their competitiveness in international trade..... Hong Kong's position in the world economy....."

Competition Policy sets the rules of the game
to make sure companies play fairly

The Competition Authority is the referee

The business and the consumer are both winners

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EXECUTIVE SUMMARY

HONG KONG'S ECONOMIC CHALLENGES

1. Hong Kong has enjoyed great success in recent decades. It has experienced strong and sustained real GDP growth and has amongst the highest GDP per capita in the world. It's strong economic performance has been due in part to its strategic geographical location on the doorstep of China and easy access to other South East Asian countries. The advent of telecommunication technology and other forms of communication has, however, lessened the importance of Hong Kong's geographical advantage. At the same time Hong Kong's advantages in other areas have been narrowing as Hong Kong's competitors continue to transform their economies and adopt laws and policies which encourage foreign trade and investment. Hong Kong therefore faces an enormous challenge in maintaining its competitive edge.

2. In the past two decades, Hong Kong has undergone an economic structural change from a manufacturing-based economy to a service economy. The services sector has rapidly expanded and replaced the manufacturing sector as the major economic activity in Hong Kong, and the export of services has become an important impetus for economic growth. The Hong Kong Government expects the services sector to be the engine of future economic growth and has said that it will ensure that the markets for services are as open and competitive as possible.

3. Not all markets in service sectors are automatically highly competitive under a laissez-faire regime. Unlike the manufacturing sector, in which most goods are traded in the international market and therefore subject to international competition, the services sector includes some services which can only be provided domestically. Such services, for example, legal and accounting services, medical and dental services, public utilities, local radio and television broadcasting, retail banking services and other services such as restaurants and supermarkets are, therefore, insulated from international competition.

4. In its earlier studies of key sectors of the Hong Kong economy, the Consumer Council found a low level of competition in several sectors, eg, bank deposits, supermarket sales and gas supply.

5. High property and wage costs in Hong Kong, which account for a substantial and increasing percentage of overall operating costs, particular in the service sector are a matter of real concern. The Hong Kong Competitiveness Report, commissioned by Vision 2047 Foundation which is supported by prominent business leaders in Hong Kong has succinctly summarised the challenge for Hong Kong as follows: "Cost pressure felt in Hong Kong have highlighted the need for improved competitiveness and cost effectiveness

throughout the economy. While free and open competition has long been the case in the traded sectors of the Hong Kong economy, this has not been the case in some non-traded sectors. Since they do not face direct competition, it is important to ensure that the monopolies and oligopolies found in Hong Kong operate at maximum efficiency."

6. In a similar vein the Hongkong Bank in its Economic Report for September/October 1996 said, "Maintaining external competitiveness, particularly in the service sector, will be one of the main challenges.....rising service export prices primarily reflect the generally higher cost of operating in Hong Kong. Between 1991 and 1995, nominal wages rose by an average of 9.5%.....occupancy cost in Hong Kong also ranks among the highest in the region".

7. A comprehensive competition policy and a body of law can remove barriers to entry and ensure free competition which is not distorted by price fixing, market sharing or other anti-competitive practices. This will have the overall benefit of keeping operating costs at a competitive level.

8. It is important, therefore, that competition should be encouraged. It should, however, be stressed that the an important aim of competition policy is to keep intervention to a minimum by setting clear ground rules that ensure fair play. Once the ground rules are in place it should not normally be necessary for the body responsible for administering the policy to intervene in the affairs of companies.

THE INTERNATIONAL DIMENSION

9. There is also an international dimension to the need for a new approach. International bodies, such as the World Trade Organisation (WTO), are increasingly making links between competition policy and trade policy. Hong Kong's ability to argue for improvements in trade policy and to argue against measures which may damage its interests will be hampered by the absence of a competition law at home. 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.

10. With its free trade policy, Hong Kong is well placed to argue for international competition policy to replace traditional protectionist trade policy and discriminatory measures such as anti-dumping action. However, Hong Kong's influence will undoubtedly be weakened by its lack of a comprehensive domestic competition policy.

11. The open nature of Hong Kong's economy and the clear advantages it has over other cities in the region ameliorated the effects of this lack in the past. The Government has been able to operate a policy of introducing specific solutions for specific problems. However, in the changing economic climate the old policy will no longer suffice.

THE ADVANTAGES OF INTRODUCING A COMPREHENSIVE COMPETITION POLICY

12. In a series of reports issued over the past two years, the Consumer Council has identified industries where imperfections in the market have raised prices to consumers and businesses. It has received other complaints which it could not investigate because it lacked adequate powers. There is no doubt that there are sectors where a lack of competition is forcing up prices and thus fuelling inflation. If Hong Kong does not adopt a comprehensive competition policy it denies itself an effective weapon in the fight to maintain its international competitiveness. The experience of introducing competition, even though limited, into the telecommunications market shows how effective competition can be in bringing down prices.

13. Most developed economies have competition law. Newly industrialised economies such as South Korea and Taiwan have such laws and the Anti-unfair Competition Law of Mainland China includes provisions against price-fixing and abuse of dominance.

14. For business a comprehensive competition policy has the advantages of fairness, consistency and reduced regulation. It is fair because it acts against anti-competitive practices that can drive efficient and well-run companies out of business. It is consistent because it is applied by a single authority working to a single set of published rules. The Government's present piecemeal approach has led to differences in the competition provisions of licences issued to competing broadcasting companies. Provisions in the telecommunications licences are more specific and clearly set out.

15. A comprehensive policy can lead to a reduction in regulation. It is pro-active, efficient and effective avoiding the need to commit manpower and time to devising new rules when new products or markets emerge.

16. Competition policy recognises that there are some natural monopolies where factors such as economies of scale make it more efficient to have one operator but the competition authority would work closely with the regulators and would review existing or proposed regulations and report to the Government on whether they have significant adverse effects that might outweigh the benefits.

17. For the consumer, the experience of competition policy in Hong Kong as it has been applied in specific sectors such as telecommunications and banking is that it leads to lower prices and improved services. An improvement in the coverage of competition law and a reduction in the time taken to remove barriers to competition must be good news for the consumer.

RECOMMENDATIONS

18. **The Consumer Council strongly recommends** the adoption of a comprehensive competition policy and enactment of a general competition law in Hong Kong. Competition law is an integral part of policy. This is because legal enforcement is the only transparent and effective way to prevent and deal with restrictive conduct.

19. The aim is to create a policy which is pragmatic and cost effective. The proposals on the design of such a policy are not intended to be prescriptive but to provide a starting point for further work if the recommendation to adopt comprehensive competition policy is accepted.

Competition Policy

20. The Consumer Council believes that an effective competition policy requires a wide-ranging and pro-active approach to promoting competition. To achieve this, **the Consumer Council recommends**:

a) action to promote an understanding of the aims of competition policy within Government as a whole, the business community and members of the public;

b) a new system or procedure to ensure Government decisions and the design of all Government policies and decisions give regard to the implications on competition. The procedure might be similar to that of environmental impact assessments required for major government policy decisions (where applicable). New proposals for regulation should be scrutinised to filter out those that are not strictly necessary;

c) scrutiny of existing regulations to ensure that they are still necessary, effective and/or their objectives could not be achieved by other means, eg a review of statutory monopolies, procedures for awarding franchises, and Scheme of Control industries with the aim of increasing competition at the earliest possible opportunity.

Competition Law

21. **The Consumer Council strongly recommends** the enactment of a competition law to cover horizontal and vertical collusive agreements and abuse of dominant position, to be expressed in the Articles 1 and 2 below. This is a pragmatic approach suitable to Hong Kong.

a) **Article 1:** to prohibit explicit agreements between firms that are intended or have the effect of preventing, restricting or distorting competition. These include horizontal agreements such as those involved in price-fixing cartels, bid-rigging, etc and vertical agreements such as retail price maintenance, exclusive dealership, tie-in sales, long-term supply contracts, etc.

b) **Article 2:** to prohibit any abuse by one or more undertakings of a dominant position that prevent, restrict or distort competition. This would address monopoly pricing, and vertical restraints such as tie-in sales enforced through market dominance.

22. Without these articles, the competition legislation would not only be much less effective but not necessarily accepted as adequate in the international arena.

23. The proposed competition law should also include:

a) an article controlling the **abuse of collective dominance;** and

b) an article for the control of **mergers and acquisitions.**

24. There are, however, pragmatic arguments for delaying the introduction of these two articles. The arguments are finely balanced and the Consumer Council recommends that the Government decides how to proceed in the light of the debate that will follow the publication of this report.

Exemptions

25. **The Consumer Council recommends** that exemptions to Articles 1 and 2 should be strictly controlled and, where possible, time-limited, in order to be consistent and fair to all industries. Where possible, the Competition Authority should publish a block exemption which would remove the need for companies to seek individual exemption.

Administrative Framework

26. **The Consumer Council recommends:**

a) a **Competition Authority** should be established to investigate possible breaches of the law; and

b) an **Appeal Body** should be established to hear appeals against decisions by the Competition Authority.

Competition Authority Structure

27. **The Consumer Council recommends** that:

a) the Authority should be an independent body outside the civil service;

b) the Authority should have a full-time chairman and other members appointed by the Chief Executive of the Hong Kong Special Administrative Region.

Duties

28. **The Consumer Council recommends** that the Authority should be given the following duties:

a) to advise the Government on competition policy;

b) to ensure compliance with the ordinance;

c) to consider and suggest reforms to the relevant legislation; and

d) in addition, the Authority should have a widely defined general public interest 'deregulation' duty, to become aware of circumstances leading to lack of market contestability and, in the performance of this or his specific duties, to recommend to Government changes to regulation to facilitate competition in the public interest. Such recommendations should be made public; and

Powers

29. **The Consumer Council recommends** that the Authority should have powers to:

a) initiate investigations, or to act on the recommendations of others; and

b) issue notices requiring the company to cease and desist from a practice deemed to be illegal, if in the course of its investigation, the Authority is satisfied that such a practice is illegal.

30. Consideration should also be given on whether the Authority should have injunctive powers.

Penalties

31. The options for consideration are whether simply to rely on injunctive powers, or to impose fines or award compensation to third parties.

Appeal Body

32. **The Consumer Council recommends** that the Competition Authority's decisions are subject to review by an Appeal Body rather than the courts. Decisions of the Appeal Body would be final. The Appeal Body should be clearly separated from the Authority.

33. The Chairman should be appointed by the Chief Executive of the Hong Kong Special Administrative Region. The Chairman should convene and chair tribunals, to deal with specific cases on an ad hoc basis. The other members should have experience relevant to competition and business.

34. The tribunals should publish detailed reports of their findings, withholding commercially sensitive information.

CONCLUSION

35. Hong Kong has enjoyed great success in the past but its advantages are narrowing as its competitors transform their economies and adopt law and policies that are similar to those that made Hong Kong so successful. To stay ahead, Hong Kong can no longer afford to ignore the problems that stem from a lack of clear rules against anti-competitive practices and an Authority to enforce them. Hong Kong's place in the world economy will be jeopardised if it is unable to play a full role in the international debate on competition and trade policy now taking place.

36. It is, however, essential that the changes Hong Kong adopt reflect its own culture and traditions. The time has come for the debate to move on from the question of whether Hong Kong should have a competition law to ensuring it has a law that will safeguard future prosperity. Devising such a law needs the constructive engagement and active support of the whole community.

Chapter 1

Introduction

Objectives of the study

1.1. The objectives of this study are:

a) to examine whether Hong Kong needs a comprehensive competition policy and competition law; if so, then

b) to consider what framework should be adopted and what should be enacted;

c) what institution(s) should be established.

Approach

1.2. Since 1992, the Consumer Council has been examining the competitive environment and restrictive trade practices in Hong Kong in a series of studies of certain key sectors of the domestic economy. These have included studies of the banking, domestic gas supply, broadcasting, telecommunications and residential property industries. The Consumer Council has also studied competition in the supermarket and driving instruction sectors. The reports of these studies, completed over the last two years[1], have been submitted to the Government for policy consideration, and are available to the public from the Consumer Council. Each of the sectorial reports has its own stand-alone recommendations. Where findings also have a bearing on the case for a comprehensive competition policy, these are referred to in the current study.

1.3. The current study takes a macro-economic view, examining the arguments for and against competition policy in the light of structural changes in Hong Kong's economy, and developments in world trade, as well as looking at

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[1] *Are Hong Kong Depositors Fairly Treated?*, February 1994

Report on the Driving Instruction Industry, July 1994

Report on The Supermarket Industry in Hong Kong, November 1994

Assessing Competition in the Domestic Water Heating and Cooking Fuel Market, July 1995

Ensuring Competition in the Dynamic Television Broadcasting Market, January 1996

Achieving Competition in the Liberalised Telecommunications Market, March 1996

How Competitive Is the Private Residential Property Market?, July 1996

the potential effects of competition policy on consumer welfare and individual businesses.

1.4. The Consumer Council has monitored trade practices, analysed local economic data and reviewed papers issued by the Government and by academic institutions, business sectors and interest groups on the subject of fair trade or competition. The Consumer Council has studied existing Government policy towards competition.

1.5. The Consumer Council has also analysed and compared the forms and operation of competition policy and laws in Australia, Mainland China, the European Union, Japan, South Korea, Taiwan, the UK and the US, to learn from the experience of these economies in implementing competition policy and laws.

1.6. The Consumer Council commissioned David CURRIE, now Lord Currie of Marylebone, Professor of Economics at the London Business School, UK, to look at the case for a competition policy in Hong Kong. Lord Currie's findings have made a significant contribution to the preparation of this report.

1.7. Other contributors who have provided information on specific areas include: Mr Frankie F.L. LEUNG of the Stanford Law School, US, who provided information on competition laws. Professor SHENG Jie-min of the Law Faculty of the University of Beijing, who provided information on Chinese Law. Commissioner WANG Kung and Professor HUANG Mao-zone of the Fair Trade Commission of Taiwan gave a detailed account of the process of formulating Fair Trade Law in Taiwan.

Members of the Competition Policy Committee

1.8. This study has been conducted by the Trade Practices Division of the Consumer Council under the guidance and supervision of a Competition Policy Committee.

1.9. The Committee consists of:

Professor the Hon. Edward CHEN Kwan-yiu (Chairman)

Ms Anna WU Hung-yuk (Vice-chair)

Mr William F.A. CHAO

Dr John HO Dit-sang

Mr Thomas KWOK Wai-yan

Dr Sarah LIAO Sau-tung

Dr TSANG Shu-ki

Mr Peter WONG Tung-shun

1.10. The Consumer Council would like to thank all the individuals and organisations which have provided information and valuable advice on this report.

Chapter 2

Objectives of Competition Policy

Introduction

2.1. This chapter looks at competition policy and its objectives at a general level. It looks at the need for a legal framework to achieve these objectives, and the counter-arguments. Finally, it discusses the types of behaviour covered by competition laws.

What is competition policy?

2.2. The aim of competition policy in most countries of the world is to promote competition by discouraging anti-competitive behaviour. It is based on the view that, in general, competitive markets lead to the most efficient allocation of resources.

The importance of competition

2.3. There is a substantial body of evidence suggesting that a strong competitive environment in an economy is one important factor contributing to sound economic performance. Thus Porter[1], in his review of what underlies the economic performance of nations, cites a strong competitive environment, with discerning and demanding customers, as an important contributing factor. There is also important evidence showing that it is firms and economies that face competitive pressure that are more likely to innovate[2]. This theoretical view is supported by evidence in Geroski[3] where he identifies "a strong and robust negative relationship between market concentration and innovation".

2.4. Competition is equally important in enhancing consumer welfare. The benefits of safeguarding competitive market conditions include lower prices and increased choice for consumers as well as innovative products and better services. For this reason, effective competition has made free markets

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[1] Michael E. Porter (1990), *The Competitive Advantage of Nations*, London: Macmillan.

[2] Mark Armstrong, Simon Cowan and John Vickers (1994), Regulatory Reform: *Economic Analysis and British Experience*, Cambridge, Massachusetts and London: MIT Press.

[3] Paul Geroski (1994), Market Structure, *Corporate Performance and Innovative Activitity*, Oxford and New York: Oxford University Press. (p.147)

acceptable to, and indeed the preferred choice of, political parties in developed countries across the political spectrum. The Consumer Council discusses the potential advantages of greater competition to business and consumers in Hong Kong in Chapter 5.

Perfect competition

2.5. The theoretical underpinning of the beneficial effects of domestic competition may be found in the benchmark theoretical model of perfect competition: when there are many firms with freedom of entry and exit, market forces will result in productive and allocative efficiency. This idea, first presented by Adam Smith[4], finds its most developed representation in modern general equilibrium theory[5].

Workable competition

2.6. However, the conditions for pure competition are rarely realised in practice, so that the theoretical model of perfect competition provides no more than a benchmark, although an important one. In practice, many markets are characterised by 'workable competition', i.e. they have a number of firms that can provide effective competition (particularly if the economy is open to international trade, so that foreign competition is also effective). 'Workable competition' has been defined as 'a market framework in which the presence of other participants is sufficient to ensure that each participant is constrained to act efficiently and, in its planning, to take account of those other participants or likely entrants as unknown quantities.'[6]

2.7. This means that there must be the opportunity or potential for each existing market player or new entrant to achieve an equal footing with the dominant participants in the market. Competition is not therefore dependent on the number of participants in the market but ease of access to the means of entry, sources of supply, outlets for product, information, expertise and finance'.[7]

2.8. Markets with workable competition also promote technical efficiency (the effectiveness with which resources within a firm are utilised) and dynamic efficiency (the speed at which firms respond to changing problems and

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[4] Adam Smith (1776), *An Inquiry into the Nature and Causes of the Wealth of Nations.*

[5] For example, Kenneth Arrow and Frank Hahn (1971), *General Competitive Analysis*, Edinburgh: Oliver and Boyd; or Gerard Debreu (1959), *Theory of Value*, New York: Wiley.

[6] John Heydon (2nd edition, 1989), *Trade Practices Law*, Sydney: Law Book Co.

[7] Ibid.

opportunities - reflecting entrepreneurial flair, motivation etc). This happens because when firms are unable to increase their profits through exercising market power their pursuit of profit is channelled into finding ways to increase their efficiency and into searching for new and better ways to serve their customers.[8]

Market contestability

2.9. Workable competition does not necessarily exist in every market: for example, in markets with very significant economies of scale there will be fewer players. Although such markets may contain only few, or even just one firm, they may nonetheless deviate only a little from the competitive ideal. This is because ease of entry means that the markets are "contestable": the few companies in the sector cannot use their dominant position to their advantage, because to do so would attract effective competition through new entrants to the sector.

2.10. In some other cases, barriers to entry may well mean that the few incumbent firms can exert market power in pricing. This distorts the structure of consumption, thereby resulting in departures from productive and allocative efficiency, and generating excessive profits that are not competed away.

2.11. In this study and in our recommendations in the sectorial studies the Consumer Council seeks to promote workable competition and market contestability in situations where perfect competition is not achievable.

Objectives of competition policy in other jurisdictions

2.12. The objectives of competition policy in Australia, Mainland China, the EU, Japan, South Korea, Taiwan, the UK and the US are summarized in Appendix 1. Most stated objectives are similar. The predominant objective concerns economic efficiency; most have the goals of promoting higher standards of living (EU) and real income (Japan), business activities of enterprises (Japan) and consumer welfare (Mainland China, South Korea, and Taiwan).

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[8] AGPS (1989), *Promoting Competition in Australia*, Canberra: Economic Planning Advisory Council.

Why legislation?

2.13. A set of laws to prohibit practices that restrict market entry or lessen competition among market players is essential to competition policy because:

a) laws provide the most transparent and consistent framework for dealing with anti-competitive practices; and that

b) without legal sanctions, governments have no effective power to stop or prevent anti-competitive practices or even to investigate them.

Why comprehensive?

2.14. While opportunities for anti-competitive behaviour may be limited in many sectors most of the time by fierce competition between firms, market conditions are constantly changing. There is no guarantee that a particular market will remain very competitive and hence less vulnerable to anti-competitive market practices in the long term. By being comprehensive, competition policy provides a ready-made, consistent framework for dealing with anti-competitive behaviour in any sector of the economy - e.g. sugar processing, cement manufacture, retail banking, retail supply of petrol, car distribution, etc - wherever and whenever it may occur.[9] A comprehensive competition policy covers all sectors of the economy with well-defined exemptions.

What else does it include?

2.15. Many countries use competition policy to define or redefine regulatory policy. They may do this by giving the competition authority a formal role in reviewing or approving regulations and by making competition a main consideration for policy makers in the design of sector-specific policies. Both may lead to reform of aspects of sector-specific legislation, deregulation, or other measures to promote competitive market structures in utilities or other regulated sectors of the economy. However the need for and the form of such measures will depend largely on the particular circumstances of national industries/markets. Action will also depend on the enthusiasm of particular administrations. The UK Government, for example, has taken a particularly pro-active approach to promoting competition in utilities and public transport, beginning by breaking up state monopolies through privatisation. South Korea and Taiwan have given their Fair Trade Commissions the role of reviewing regulations and asking the sponsoring ministry for justification.

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[9] See Chapter 3, paragraph 3.26 for examples of sectors where evidence of anti-competitive behaviour has been found in jurisdictions with competition laws.

Debate about competition policy

2.16. While the benefit of competition is universally acknowledged, there is disagreement in academic circles as to how competition can be most effectively safeguarded.

2.17. Some economists, mostly in the United States and associated with the University of Chicago, believe that:

a) barriers to entry are mainly caused by government regulations rather than actions of market players; and

b) "Firms cannot, in general, obtain or enhance monopoly power by unilateral action"[10]. For example, a firm's attempt to sell below cost to drive out competition (predatory pricing) is not likely to be effective. Firstly because, in an efficient financial market, the victim of predatory pricing is likely to have the same access to financing to compete over the short run. Secondly, because even if the competitor is driven out as a result, new competitors will be attracted back to the market by the high profit margin once prices are raised.

2.18. These two tenets have led them to advocate a much narrower application of competition law focusing on:

a) intentional efforts to drive competitors out of the market;

b) horizontal mergers creating very large market shares; and

c) explicit price-fixing.

They also advocate a presumption against action in cases which are not clear-cut.[11]

2.19. Major arguments against this view of competition policy include:

a) The view relies too heavily on the theoretical presumption that the market will automatically generate effective competition - for example, that abnormal profits cannot be sustained because

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[10] See for example, Richard A. Posner (1979), *The Chicago School of Antitrust Analysis*, University of Pennsylvania Law Review, vol. 127, pages 925-928.

[11] R.H. Bork (1978), *The Antitrust Paradox*, New York: Basic Books.

other companies will seek to enter the market. It does not pay enough attention to empirical evidence that companies can often continue to operate anti-competitive practices without serious threat from new entrants;

b) The view understates the importance of economic, in contrast to legal barriers to market entry and effective competition. Even without legal restrictions, economic factors such as high sunk costs, imperfect information, and investment uncertainty may mean that it will be very difficult for any potential competitor to enter a market[12].

c) Even assuming that self-correcting market mechanisms will lead to the emergence of new market entrants offering effective competition, there is no guarantee that this will happen quickly. The adjustment may take so long that international competitiveness and economic growth are impaired in the meantime.[13]

2.20. The free-market views in the United States appealed to the Reagan administration in the 1980s and were a significant influence on the practice of US competition policy in those years. They did not, however, lead to a rejection of competition laws per se, as laws against for example, price-fixing, and certain types of merger were still deemed necessary. Their legacy has been a re-emphasis on the objective of economic efficiency in competition policy and law. The merit of the enhancement of competition as an effective alternative to direct government regulation has also been highlighted.

2.21. After the Reagan years, the application of competition policy and laws seems to have found a new equilibrium. Instead of following the abstract view that dismisses all attempts to monopolise or exert market power as futile, more balanced perspectives advocate a closer look at the conduct of market players, and the empirical evidence of such conduct. The objective is to strike a balance between regulation and competition in promoting efficiency and safeguarding welfare.

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[12] See, for example, Roger Sherman, *The Regulation of Monopoly*, Cambridge University Press, 1989, pp.77-80.

[13] For example, price-fixing behaviour in the UK cement industry occurred over a period of some twenty years. This resulted in higher construction costs and placed companies located in the UK at a competitive disadvantage. Although the cost of the price-fixing behaviour to any one company was probably quite small, the total consequences aggregated across all companies were significant, and would have been even greater had the practice not eventually been stopped by the competition authorities.

Behaviour covered by competition policy

2.22. Leaving aside the different views of the academics concerning the effectiveness of individual aspects of competition laws, most existing competition policies have three main strands, to deal with the following potential restraints on competition:

a) abuse of monopoly power,

b) horizontal restraints, and

c) vertical restraints.

2.23. The first is concerned with policies to limit the adverse effects of monopolies. The other two strands try to prevent anti-competitive practices by firms. Identifying such anti-competitive behaviour is not always straightforward, so that more controversy surrounds these strands of competition policy. We discuss each element in turn.

Anti-monopoly policy

2.24. The first strand of competition policy is concerned with monopolies. A monopoly situation may be loosely described as a market in which one firm establishes a dominant position. The inefficiencies that may result from a monopoly position take the form of higher prices and lower output in the shorter term and, in the longer term, lower investment and innovation. All these effects lower consumer welfare and impair the business of those firms linked to the incumbent monopolist either up or down the supply chain, while generating excessive profits for the monopolist firm.

2.25. Anti-monopoly policy may take three principal forms:

a) the prohibition of mergers and acquisitions that may lead to the creation of a monopoly position to the detriment of economic efficiency;

b) requiring divestiture and break-up of established monopolies against the public interest to create a more competitive market environment; and

c) the regulation of prices, investment and performance in those cases where divestiture is inappropriate, usually in those network industries where natural monopoly elements make break-up inefficient. Prohibition or break-up will only be required after careful consideration of a case to ensure that it is appropriate.

Horizontal restraints

2.26. Certain explicit horizontal agreements among firms in the same market are detrimental to consumers. These include:

a) Price-fixing: when two or more producers sell at predetermined prices, generally for the purpose of exercising market power. This includes: limiting output to stabilise prices, setting maximum prices, uniform discount rates and uniform base prices.

b) Division of markets: when competing suppliers divide the market into territories with a view to emulate the effects of monopoly.

c) Bid-rigging: firms decide, out of own interest, not to compete but to engage in collusive bidding for contracts, so that all involved could survive at a reasonable level of profitability. As a result, inefficient firms are shielded from competition whilst the efficient ones are not given incentives to improve and expand their markets.

d) Predatory pricing: when a firm abuses a dominant position to prevent other firms from entering the market or to drive other firm(s) out of the market through predatory pricing. In that case a firm or group of firms lowers their prices - even to below cost - to drive a competitor out of the market and then raises prices again - perhaps even higher than previously - once competition has been eliminated. However, predation need not take the form of a cut in prices: similar anti-competitive effects may result from a decision to raise costs, forcing competitors to match the increase to compete effectively. [14]

2.27. If firms can form cartels in such ways, they can raise prices to monopolistic levels without any compensating advantages in the form of economies of scale and rationalised production. They are therefore very unlikely to promote economic efficiency. Such behaviour is prohibited in most forms of competition law except in certain rare circumstances. Greater ambiguity surrounds agreements by firms to share Research and Development (R&D) costs, because of the public good aspects of new knowledge resulting from the R&D process. It is therefore not uncommon for cooperation in basic or strategic

[14] Enforcing legislation prohibiting predation is not straightforward because of the need to determine when it is occurring. It is very important that any competition provisions to deal with predation do not discourage aggressive and healthy price competition which is in the interest of consumers. Thus the test for predation is of critical importance. In UK, the test is to examine the incremental profitability of a given action, including spillover effects on to the other products of the possible predator. If incremental profitability is negative, this is a signal of predatory behaviour that is to be discouraged; if positive, it is a signal of aggressive competitive behaviour.

research to be permitted, though similar agreements covering near-market research and development may be prohibited.

2.28. UK competition law, in contrast to EU and US laws, also incorporates explicit measures to guard against damaging effects resulting from a so-called 'complex monopoly'. This is the case where a group of companies, between them representing a dominant segment of the sector, engage in a set of common practices (e.g. in pricing policy) that results in an outcome like a cartel, even when no explicit collusion occurs. This provision guards against the possibility that custom and practice in a sector may result in behaviour that is anti-competitive in effect, even when this is not consciously planned by the firms involved.

Vertical restraints

2.29. Vertical restraints affect firms that are in a supplier/customer relationship. The principal forms of such restraints are:

a) Retail price maintenance: when the manufacturer imposes on the retailer a minimum (or sometimes maximum) price at which the product can be sold.

b) Exclusive dealership: when a retailer undertakes to sell only one manufacturer's product and not that of rival firms.

c) Territorial exclusivity: when sole rights are given to a particular retailer to sell the products of a manufacturer in a particular area.

d) Quantity discounts: when retailers receive progressively larger discounts the more of a manufacturer's product they sell, giving them an incentive to push one manufacturer's product at the expense of that of another.

e) Tie-in sales: restraints that require a retailer to stock a second good in order to receive supplies of a first good, enabling a supplier to extend a dominant position in one market into another and deter entry by requiring prospective entrants to enter with both products simultaneously.

f) Full-line forcing: a particular form of tie-in sales where the retailer is forced to stock the entire range of products of a firm, with no freedom to be selective.

g) Long-term supply contracts: these bind a retailer to a supplier and can often be terminated by the retailer only at great cost.

2.30. It is important to note that these 'arrangements' are sometimes entered into willingly by both parties but are sometimes forced by the dominant company upon the weaker.

2.31. This type of practice can stifle competition to the detriment of economic efficiency and consumer welfare. However, in some circumstances, such arrangements can give benefit. Thus an arrangement for territorial exclusivity can restrict competition and result in higher prices; but it may also allow a manufacturer to ensure that proper information and inspection facilities are available to potential buyers so that they can inform themselves ahead of purchase. Where information is crucial (e.g. car purchases), such an arrangement may well be to the benefit of consumers. It is for this reason that most competition frameworks allow discretion in the treatment of such vertical restraints[15].

Conclusion

2.32. There is general agreement that in order to ensure that markets remain contestable, countries need a competition law that is comprehensive in respect of the industries covered and that this law should cover abuse of monopoly of power, horizontal restraints and vertical restraints. A law is necessary to provide the Administration with transparent and consistent power to deter, prevent and investigate anti-competitive practices.

2.33. Unlike in other countries which provide a system of controls across the board, in Hong Kong, the Government considers the need for controls on anti-competitive behaviour to promote competition on a case-by-case basis.[16] Under this 'sector-specific' approach, the Government has so far introduced legal prohibitions on anti-competitive behaviour in television and the fixed telecommunications industries only. In the following chapters we look at whether the Government's sector-specific approach is adequate to protect competition in present and future markets, and the implications for Hong Kong's economy, businesses and consumers if the status quo is allowed to continue.

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[15] For example, by allowing exemptions under Article 85 of EU legislation and by a case-by-case investigation under UK legislation.

[16] Information paper for the LegCo Panel on Trade and Industry, *Promotion of competition in Hong Kong*, Trade and Industry Branch, Government Secretariat, 13 November 1995.

Chapter 3

Perceptions of and Policies on Competition in Hong Kong

Introduction

3.1. It is a widely held belief in Hong Kong that, unlike other countries, the territory does not need a competition policy because:

a) it is already very competitive; and

b) a competition policy would interfere with Hong Kong's open and free market economy.

3.2. The Government appears to endorse that view: "The Government subscribes to the basic economic philosophy of minimum Government intervention in market forces, which is the best formula for enhancing competition and efficiency on the one hand and keeping costs and prices down on the other."[1] It does not have a declared competition policy like those adopted in other territories. Instead the Government's "policy regarding the promotion of competition in Hong Kong" as it is called, supports, "appropriate and pragmatic measures to rectify any unfair business practices, safeguard competition and protect consumer interests"[2] in specific sectors as necessary.

3.3. In this chapter, we examine the common assumptions in Hong Kong about competition policy, and whether markets are in fact most competitive when left to themselves. We also look at the operation of the Government's sector-specific approach to assess its effectiveness in promoting free and fair markets. We examine the strengths and weaknesses of the sector-specific compared to the comprehensive approach in dealing with the structure, conduct and performance aspects of competition.

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[1] Information paper for the LegCo Panel on Trade and Industry, *Promotion of competition in Hong Kong*, Trade and Industry Branch, Government Secretariat, 13 November 1995.

[2] Ibid. "Appropriate and pragmatic measures" have included provisions against anti-competitive practices in licensing conditions in recently deregulated industries; and controls on service quality and prices in some monopolistic or oligopolistic industries. The second applies, in particular, to those industries which require very high levels of investment (like utilities), prudential supervision, or where there is a need to protect the long-term interest of consumers.

3.4. Our observations are based largely on the Consumer Council's in-depth sectorial studies and wide consultations on the competitive environment in broadcasting, telecommunications, supply of domestic fuel (gas), banking, property and supermarkets in Hong Kong. In this way, we seek to emphasise actual rather than hypothetical market imperfections which would need to be addressed in the development of competition policy. We also refer to complaints received by the Consumer Council and cases quoted in the media of possible of anti-competitive behaviour where indicated.

Common objections to competition policy

"Why would Hong Kong need a competition policy? It is already very competitive"

3.5. Hong Kong has been very competitive internationally. However, domestic competition and international competitiveness are two different concepts:

a) The international competitiveness of an economy measures a country's ability to compete with other countries in attracting global direct investment. A country's performance depends primarily on macro-economic and structural indicators. For example, the compilers of the two annual reports on global competitiveness[3], which ranked Hong Kong second- and third- most competitive in 1995, study macro-economic variables such as gross domestic product (GDP) growth, taxes, and savings rates; micro-economic indicators such as human capital; and qualitative factors such as the openness of domestic markets and the rule of law.

b) However, domestic competition is typically measured by the size and the number of firms in domestic markets, substitutability of like products, contestability, ease of entry and exit by firms in each industry and consumer welfare. Hence a country can score highly in international competitiveness league tables while lacking competition in sectors of the domestic economy.

3.6. A lack of domestic competition over a long period can have a negative impact on a country's international competitiveness (this is discussed in Chapter 4). Hence, even if Hong Kong is already competitive, it does not mean that there is no need for a domestic competition policy. Rather, a well-designed competition policy will enhance its international competitiveness.

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[3] World Economic Forum (WEF), and International Institute for Management Development (IIMD) 1995 global competitiveness reports.

"Competition policy equals regulation. It will interfere with Hong Kong's free market economy."

3.7. This is a misunderstanding of competition policy and regulation in general. First, competition policy is not synonymous with regulation. Promoting the aims of competition policy can imply deregulatory as well as regulatory action. Second, even though some regulation is deemed necessary, it is not anti-market regulation. Instead it aims to enhance market mechanisms.

3.8. Regulation through competition law is necessary under imperfect market conditions. This is because in imperfect markets it becomes possible, and in companies' commercial interests, to make agreements to keep competitors out or to inflate prices to consumers by restricting supply.[4] This is particularly true in the domestic economies of places like Hong Kong where markets are relatively small with high market concentration and constraints on key resources such as land.

3.9. The object of competition policy is to restore competitive market forces. It is implemented by enforcing a code of behaviour prohibiting anti-competitive trade practices.

3.10. It should be noted that competition laws would not be the first regulations to protect and strengthen the market mechanism in Hong Kong. The markets already depend on regulatory structures to confer and enforce property, intellectual property and contractual rights and on prudential regulation of the capital markets, payments and banking systems to finance commercial transactions.

3.11. Against this background, we believe that the assumption that unregulated markets are the best guarantee of competition and efficiency oversimplifies the situation and is a dangerously complacent approach to public policy making.

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[4] See chapter 2 above.

A structure, conduct, performance approach

3.12. Industrial organisation economists have developed three concepts - market structure, market conduct and market performance - as a framework for translating economic aims into practical policies.[5]

3.13. **Market structure** describes the environment where transactions occur between buyers and sellers. The structure of a market is characterised according to the size and number of participants, product substitutability and ease of entry.

3.14. While market structure may provide favourable market power to one group of participants, e.g. in a natural monopoly, it is generally acknowledged that the possession of market power does not equate with abuse of market power. Hence, to establish whether there exists violations that hamper competition, one must also look at **market conduct** or behaviour. Market conduct consists of the policies that participants adopt with regard to pricing, the characteristics of their product, advertising, supply and other terms which influence market transactions. Different market structures influence the conduct of participating buyers and sellers because they present them with different types of constraints on their abilities to achieve their goals.

3.15. **Market performance** provides information about the resulting allocation of resources, and the efficiency, technological progress, stability and equity of a particular market. It is generally believed that market structure influences market conduct and hence market performance.

3.16. Traditionally, competition policy has been based on market structure, e.g. measuring concentration ratios, and on market performance, e.g. looking for abnormal profits as evidence of market power. However, the theory of market contestability - that few players or higher than average returns do not necessarily imply the existence of monopolistic or market power - has cast doubt on this approach. The modern trend is therefore to put greater emphasis on conduct, i.e. whether market players engage in non-competitive behaviour, rather than structural and performance analysis. The most appropriate approach for Hong Kong, in considering the general and specific formulation of a competition policy, is discussed in chapter 7.

3.17. Below we use the three concepts of market structure, conduct and performance to analyse present sector-specific policies to promote competition.

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[5] First developed by E.S. Mason at Harvard University. See Mason (1939), *Price and production policies of large-scale enterprise*, American Economic Review, Supp. 29.

Approach to market structure

3.18. The Hong Kong Government generally adopts a non-interventionist approach to the structural aspect of competition. In the case of services, for example, the Government is committed to maintaining competition "by removing rules and regulations in any of our service industries which may restrict market entry or reduce competition".[6]

3.19. This approach has the merit of minimising the possibility of market distortion created by government regulation, and works well in markets where there is free entry and exit. However, occasionally, in markets where there are significant barriers to entry, other Government action may be required in order to allow free competitive forces to operate.

3.20. Under the sector-specific approach, Government action to encourage competitive market structures in such cases has been pursued with varying degrees of consistency. The following examples show the variations in the Government approach:

a) **telecommunications.** Government has taken a pro-active role in reforming the market structure to promote competition in the domestic market. Upon the expiry of Hong Kong Telephone Company's franchise on local fixed telecommunications network services (FTNS), the Government allowed three new competitors into the market; imposed a statutory requirement for network operators to interconnect with one another; ensured that consumers would be able to change operator without changing telephone numbers; and issued guidelines to facilitate shared use of network facilities. Six Personal Communication System (PCS) licences have been issued to ensure a fair level of competition. However, the Government has granted Hong Kong Telecommunications International (HKTI) a monopoly on international calls until 2006. This monopoly also affects domestic competition, as tariff rebalancing (i.e. removing the subsidy from international to local tariff) is not considered possible under a partially liberalised market. As a result, new entrants are said to have been deterred from competing for the provision of local services to residential customers.

b) **gas supply.** The Government has so far maintained a hands-off policy as, despite its dominant and continual growth position, the piped gas supplier has not been subject to price regulation nor is it operated under franchise, unlike other major utilities. The incumbent firm has not been subject to great competitive pressure either, since potential entrants are deterred by the cost of building a new

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[6] Addendum to the 1996-97 Budget, *The Services Sector Support and Promotion*, the Hong Kong Government.

transmission network and because LPG and electricity, for a variety of regulatory, technical and cultural reasons, are not close substitutes. Due to the economies of scale involved, the transmission/distribution network is a natural monopoly. In July 1995, the Consumer Council urged the Government to introduce competition into the market by requiring the incumbent to open up its existing network (at a commercial rate) to other gas suppliers. This would allow a new competitive market in gas supply to develop without the need for a new network. Government has agreed to examine the feasibility of introducing a common carrier framework to the piped gas supply market.

c) **subscription television.** The Government has effectively extended Wharf Cable's exclusivity period (which expired in May 1996) by deciding not to issue any new licences until after the Government's proposed review of broadcasting in 1998. This is despite the fact that other operators are keen to enter this market.

d) **rice imports.** Hong Kong has maintained a quota and reserve system for the import and sale of rice for more than four decades. The regime restricts which and how many businesses can participate in the market. It was introduced to protect essential food supplies at a time when Hong Kong was an underdeveloped economy with concerns about social and political stability. Today, Hong Kong has developed into an international trading centre and we have access to a wide range of staple food from other countries. The Government recently conducted a review of the system but drew back from proposals which would have significantly increased competition.[7]

e) **driving schools.** One company operates all the existing designated driving schools in Hong Kong, creating a monopoly in the provision of off-road driving instruction. Competition between driving schools and private instructors is also hampered because of product differentiation resulting from the granting of a shorter waiting period for driving examination appointments to students of driving schools. Moreover, the government policy of not issuing any new private instructor licences since 1974 has formed a barrier to entry. Although it may have helped to alleviate traffic congestion, the policy has prevented the development of a competitive market. Because of the increase in the cost of land, no new driving schools are likely to be set up in the foreseeable future.

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[7] Whilst disappointed with Government's conservative stance, the Consumer Council has urged the Government to review the licensing scheme from a competition perspective and to insert "Competition Clauses" into the licences in order to safeguard against possible anti-competitive behaviour among importers and wholesalers.

f) **residential property.** The Consumer Council's report revealed that new entrants were deterred by the high cost (HK$2-5 billion) of lots of residential land in Government land auctions and unfamiliarity with the development control process. Incumbent players were able to reduce their land costs over all because of land banks built up in earlier periods. Government could remove impediments to small developers by providing more lots of "manageable size" in a way which would satisfy town planning requirements and streamline the development control process, making it more transparent.

3.21. From these observations we are concerned that the Government's current sector-specific approach leads to:

a) an inconsistency in the emphasis on promoting competition in different regulated industries;

b) a proliferation of government bodies concerned with the regulation of competition;

c) an unwillingness to take action to promote competition in the unregulated sector, however great the market failure might be;

d) a regulatory policy which is reactive and susceptible to lobbying by those with an interest in perpetuating the status quo, for example the rice import system;

e) a tendency to favour regulatory over competition objectives where the two conflict;

f) anti-competitive structures maintained by Government in some cases, e.g. Hong Kong Association of Banks' Interest Rate Rules for time deposits of up to 7 days; and

g) a reliance on Government deregulatory action to maintain competition in the service sector. While we believe that deregulation is important in enhancing competition, we do not think that responsibility for the initiative should lie within Government. This issue is considered further in chapter 7.

Approach to market behaviour

3.22. Certain market behaviour or trade practices (described in detail in the following chapter) have the effect of creating artificial barriers to entry and restricting competition. Both business and consumers suffer. Some companies lose the opportunity to enter a growing market, and others suffer higher overheads and other input costs. Consumers are deprived of reasonable prices and innovative products.

3.23. The difference between the approach adopted in many overseas countries and Hong Kong is that instead of having comprehensive legislation

applied to all industries and sectors, the Hong Kong Government only applies competition provisions to specific industries. Competition provisions in licences have been introduced in the dynamic and newly liberalised local telecommunications industry and in the rapidly growing broadcasting industry in Hong Kong. Competition rules are therefore not new to Hong Kong.

3.24. Competition clauses are particularly important in the newly deregulated markets like telecommunications because the behaviour of an incumbent firm which possesses a large market share can put new entrants at a significant disadvantage and hinder the development of competition. The licence provisions prohibit any firm in a dominant market position abusing their market power (e.g., through predatory pricing and discriminatory practices). They also prevent any mergers and acquisitions which have an anti-competitive effect and prohibit collusion and price-fixing among market players. In the case of broadcasting, cross-media ownership restrictions are imposed to ensure diversity of views and programme variety.

3.25. However, the general competition clauses embodied in licence conditions differ between industries. For example, the Consumer Council's studies on broadcasting and telecommunications found that there were differences in substance in the general competition provisions contained in licences issued to Wharf Cable, terrestrial broadcasters, and fixed telecommunications network service (FTNS) operators. The degree of penalty for contravention of competition clauses also differed between industries. For market participants, such inconsistencies can lead to a sense of unfairness as well as uncertainty.

3.26. Although competition provisions are currently confined to a very few industries, this does not means that anti-competitive behaviour would not occur in other markets. For example, in Taiwan, cartel-like behaviour has been found among egg producers (fixing wholesale prices, restrictive agreements with retailers) and local record companies (retail price maintenance)[8]. In Japan, nine companies were fined earlier this year for colluding to inflate the price of sewerage contracts.[9] In the UK, uncompetitive behaviour has been found in ready-mixed concrete (price-fixing cartel), grounds maintenance contracts (bid-rigging and market-sharing), the supply of artificial limbs, private bus services, supply of sugar to the retail market, pop music charts (exclusive dealing). The types of industries found guilty of restrictive practices under EU law have been similarly varied - supply of paint for retouching cars (exclusive distribution arrangement), Dutch crane hire (agreements allowing members to fix prices and keep out new entrants), Spanish association of patent agents (setting minimum charges), Dutch building contractor associations (restrictive tendering procedures

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[8] Further details in *Understanding the Fair Trade Act*, (1985), Fair Trade Commission of Taiwan, pages 64 and 102.

[9] Reported in The Economist, 7 September 1996.

and pricing policies), German ice-cream makers (exclusive distribution arrangements), etc[10]. Some of the cases arose from complaints by third parties such as businesses which had had to pay higher prices as a result. It is notable that most cases involved domestic non-tradable sectors. What is also obvious is the practical impossibility of preventing or dealing with anti-competitive behaviour in these examples through sector-specific legislation.

3.27. The allegations and complaints received by the Consumer Council listed in Appendix 2 show that there are concerns about anti-competitive practices in a number of industries in Hong Kong not subject to competition provisions. To cite some examples, the Consumer Council has received complaints from suppliers about various alleged restrictive trade practices by the major supermarkets. A supplier complained that supermarket operators had forbidden the company to sell their products in a trade fair organised during the Chinese New Year festival by threatening to terminate contracts with them. An educational booksellers' association which controls wholesale supplies of textbooks recommended that retailers give a maximum 5% discount. Also, when a new entrant to the newspaper market triggered a newspaper price war, there was no independent and authoritative body to say whether any anti-competitive practice existed in the market, and whether the price war was predatory pricing or just healthy competition. This led to uncertainty for readers, employees and investors.

3.28. While we cannot draw firm conclusions from the allegations of anti-competitive behaviour, that may well be because there is no competition authority with powers to investigate possible instances of anti-competitive behaviour (the scope for the Trade Practices Division of the Consumer Council to study the allegations is very limited). A competition policy framework would provide a mechanism whereby such issues could be examined and resolved. Until we have such a mechanism, the public will remain ignorant of the actual incidence of anti-competitive practices in Hong Kong and the resulting cost in terms of impaired efficiency.

3.29. The business community need not be unduly concerned over the introduction of a competition policy and competition law, because if no problems exist in the first place, then the provisions would not impact on business. If anti-competitive practices were identified then the competition framework would allow their resolution in a consistent and efficient manner.

3.30. There is also some evidence of the need for a body which industry may turn to for a "second opinion" and guidance. The Consumer Council's telecommunications study mentions Hong Kong Telecommunications' dispute with the telecommunications regulator, Office of Telecommunications Authority (OFTA), over whether a proposed new pricing strategy was anti-competitive. This situation might be diffused by an independent body for competition issues.

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[10] Further details in the 1995 *Annual Report of the Director General of Fair Trading*, (1996), London: HMSO.

3.31. Even for those industries where anti-competitive practices are not illegal, there is nonetheless a public stigma attached to them which may harm the public image of the company concerned. An independent competition authority would provide an opportunity for companies to present their case. In the UK, when a price war broke out in the newspaper industry, the case was investigated by the competition authorities. The Conclusion was that the price cut was not predatory.

Approach to market performance

3.32. Companies which have a monopoly in certain industries, such as public utilities and public transport operators in Hong Kong, are subject to a Scheme of Control or price-cap regulation imposed by the Government (i.e., rate of return). Any price rises have to be approved by the Governor-in-Council. These regulations are necessary in order to safeguard the public interest in the absence of competition against abuse of market power in terms of monopolistic rents, high prices, and poor quality of products or services.

3.33. In recent years, criticisms have been directed at the rate of return regulation. They include the creation of undesirable incentives to over-invest and maintain high operating costs. Recently, Hong Kong Electric sought Government approval to build a new electricity generating plant. In the meantime, China Light and Power has over 50% spare generating capacity (the two companies serve distinct geographical areas).

3.34. Also, as regulation only applies to some industries. It is not concerned with the potential for abnormal profits in other industries where one or a few participants hold dominant market power. For example, there is no regulation on performance in the banking industry. Instead, the interest-rate rules enable licensed banks to generate excess profits at the expense of competition and the depositors.

3.35. Whatever form performance regulation may take - whether rate of return or price cap - it is undeniable that a competitive environment provides greater incentives to companies to improve operating efficiency, provide higher quality products/services and lower prices compared with regulatory controls. The development of the telecommunications market is a good example. After the liberalisation of the FTNS market, we have witnessed:

a) a large reduction in the cost of international calls;

b) the supply of new and innovative services; and

c) the improved efficiency of the incumbent firm by downsizing. Many consumers have already benefited from all these.

Conclusion

3.36. Government's current sector-specific approach has the following drawbacks:

a) It fails to provide comprehensive guidelines for the Government to promote competitive market structures in a consistent manner. As a result, whilst Government takes a pro-active role in promoting competition in some industries, other industries are subject to legal or artificial barriers to entry and competition cannot be introduced without Government action to eliminate the barriers.

b) Although there are competition clauses to prohibit market players from abusing their market power and/or engaging in anti-competitive practices under the sector-specific approach, the provisions are not uniform and therefore may be subject to different interpretation and carry different penalties. Moreover, as the enforcement of these provisions is under the purview of different government departments, it leads to a duplication of administrative bodies, each with responsibilities for different sectors. This is unnecessarily costly and not particularly 'small government'. The duplication of bodies can also lead to inconsistencies in the way that policy is carried out in different sectors, leading to uncertainty and unpredictability. This exposes business to extra risk.

c) The Government's sector-specific approach covers very few industries. In other words, anti-competitive practices could be perpetrated with impunity in other sectors. New legislation would be required to tackle such behaviour, by which time the situation may have caused considerable damage to the public interest. Even in licensed industries, it may not be possible to add competition clauses to the licensing conditions without fresh legislation. For example, the Consumer Council has been informed that, competition clauses cannot be added in the Banking Amendment Bill in respect of the issue of multi-purpose cards like Mondex and Visa Cash. New legislation would require substantial time and resources in policy formulation, consultation and legislative processes.

3.37. By comparison, a well-designed and pragmatic competition framework provides:

a) less bureaucracy and less need for regulation. It is true that the introduction of a competition policy involves a small administrative unit and competition rules. But in several areas, this may displace sector-specific regulation and the administration that it entails (Chapter 6 explains in detail);

b) consistency, predictability and clarity for market participants;

c) adaptability. The general coverage of the law encourages the development of competitive market structures, which is the most effective guarantee of market efficiency and performance, in all industries. It also covers the sale of new and future goods and services, not just existing products.

3.38. Overall, a competition policy should not lead to more resources being absorbed by government, but should set out ground rules for fair competition, and protection of consumers.

Chapter 4

The Challenges Facing Hong Kong

Introduction

4.1. Hong Kong has enjoyed great success in recent decades. It has experienced strong and sustained economic growth, resulting in a per capita GDP which is amongst the highest in the world. Hong Kong is also the 4th leading international financial centre and the 8th leading trading economy[1].

4.2. Hong Kong's strong economic performance has been due in part to its strategic geographical location on the doorstep of Mainland China and easy access to other South-East Asian countries. The advent of telecommunication technology and other forms of communication has, however, lessened the importance of Hong Kong's geographical advantage. At the same time, Hong Kong's advantages in other areas have been narrowing as Hong Kong's competitors have been transforming their economies and adopting laws and policies which encourage foreign trade and investment.

4.3. Hong Kong therefore faces an enormous challenge in maintaining its competitive edge. The future of its economic success will depend on its foresight in mapping out a pragmatic development strategy in face of the new international competitive environment. This chapter discusses the importance of a competition policy in ensuring Hong Kong's future prosperity and economic success amidst the challenge of:

a) Hong Kong's economic transformation from a manufacturing economy to a "service- information-based metropolitan economy"[2]; and

b) Hong Kong's continued access to international markets.

Hong Kong's economic changes and future challenges

4.4. In the past two decades, Hong Kong has undergone an economic structural change from a manufacturing-based economy to a service economy. The services sector has rapidly expanded and replaced the manufacturing sector as the major economic activity in Hong Kong, and the export of services has

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[1] The Hong Kong Advantage: *A study of the Competitiveness of the Hong Kong Economy*, Vision 2047 Foundation.

[2] Ibid.

become an important impetus for economic growth.[3] In the 1996-97 Budget, the Government reported that "by the end of 1995, this (service) sector generated over 80% of the territory's Gross Domestic Product (GDP). (Even without the public sector, services still accounted for about 73% of GDP.)"[4]

4.5. The Hong Kong Government expects the service sector to be the engine of future economic growth in Hong Kong. To that end the Government has taken some steps to position Hong Kong as "a major global and regional services centre"[5] and has said it will ensure that the markets for services are as open and competitive as possible.[6] The latter will be extremely important in supporting the growth of the service sector.

4.6. While at present small and medium enterprises in the service sector appear to be filling the gap left by the manufacturing sector, Hong Kong must have the vision to plan ahead and do all that it can to facilitate robust development of the service sector. This is vital if Hong Kong is to sustain its international competitiveness and maintain the growth rate it has always enjoyed as service-based economies have tended to have lower productivity growth rates than manufacturing economies.

4.7. Not all markets in the service sector are automatically highly competitive under a laissez-faire regime. This is because in some (non-tradable) areas of the services sector there is less need for companies to compete. Unlike the manufacturing sector, in which most goods are traded in the international market and therefore subject to international competition, the service sector includes some services which can only be provided domestically. Such services are therefore insulated from international competition (A definition of tradable and non-tradable service will be found in Appendix 3).

4.8. It is important for the service sector as a whole that competition is nonetheless encouraged in this sector since tradable and non-tradable service industries are interdependent. For businesses, the provision of services facilitates the flow of information, supplies financing, provides infrastructure and

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[3] The growing importance of Hong Kong's tradable services sector is reflected in the growth of export of services, which increased by nearly 20% between 1994 and 1995. Compared with the total of $61,050 million in 1985, total export of services had increased nearly five-fold to $291,030 million in 1995. Information obtained from Estimates of Gross Domestic Product, 1961 to 1995; the Census and Statistics Department

[4] Addendum to The 1996-97 Budget, *The Services Sector Support and Promotion,* the Hong Kong Government, p.1.

[5] Ibid., p.1.

[6] Ibid., p.3.

maintains physical assets. Non-tradable services such as trade finance and marketing and most other information-sensitive services, all have an important input to companies operating in tradable services. Many of these tradable services can be produced in Hong Kong and simultaneously consumed in another country with the use of modern telecommunications and information technology. Hence the competitiveness of the tradable services is highly sensitive to the costs incurred for use of local telecommunications networks and other non-tradable services, such as legal and accounting services provided domestically.

4.9. Consequently, a lack of competition in the non-tradable services sector presents a serious threat to the continued success of Hong Kong's tradable service sector. In its earlier studies of key sectors of the Hong Kong economy, the Consumer Council found a low level of competition in the following sectors:

a) **HK dollar deposits:** There was a high degree of concentration in the market for various types of HK$ bank deposits. For example, in 1992, Herfindahl indices indicated that the markets for demand deposit and savings deposit were effectively shared by just 10 and 6 licensed banks respectively, despite a total of 161 licensed banks that year; the market for time deposit was shared by 4 restricted licensed banks;[7]

b) **supermarket sales:** About 70% of the market share for total supermarket sales was in the hands of two major supermarket chains in 1993;[8]

c) **gas supply:** Hong Kong and China Gas Company has "captured almost two-thirds of, and is dominating, the domestic gas market and that its market share is growing steadily, mostly at the expense of cylinder LPG";[9]

d) **telephone:** The previous monopoly accounted for 99% of local telephone services at the beginning of 1996 despite the recent liberalisation of the local fixed telecommunications network. International voice telecommunications has and will be operated by a

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[7] Consumer Council (February 1994), *An Evaluation of the Banking Policies and Practices in Hong Kong* - Focusing on their Impacts on Consumers. Consultants' Report.

[8] Consumer Council (August 1994), *Report on The Supermarket Industry in Hong Kong*, prepared by Ho Suk-ching and research staff of the Consumer Council.

[9] Government Response to the Consumer Council's Report on *Assessing Competition in the Domestic Water Heating & Cooking Fuel Market,* Economic Services Branch, Hong Kong Government, February., 1996.

monopoly until 2006 or such earlier time as Hong Kong Telecommunications Limited and the Government agree;[10]

e) **local broadcasting:** The two terrestrial broadcasters, TVB and ATV's, Cantonese channels accounted for 94% of viewing time in 1995;[11] and

f) **residential property:** Seven property developers dominated the residential property market supplying about 70% of total new private housing in the period 1991-94.[12]

g) **professional services:** The Government has recently made a decision to prohibit scale fees charged for conveyancing on the ground that it restricts competition.

4.10. Since the services provided are non-tradable, businesses using such services have no choice but to purchase them at the price dictated by the service provider, even if that is a much higher price than for similar services provided to businesses in other countries.

Impact of competition policy on costs and inflation

4.11. Small and medium enterprises (SMEs) form a significant part of the service sector and are likely to play a critical role contributing to Hong Kong's economic success[13]. The Government needs to be sensitive to their needs, in particular the impact of rises in operating costs. (The level of operating costs is also extremely relevant to larger businesses and multinationals). In this respect high property and wage costs in Hong Kong, which account for a substantial and increasing percentage of overall operating costs, particularly in the service sector, are a matter of real concern. High rental costs have been a focus of complaint by businesses. A competitive market structure in commercial property

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[10] Consumer Council (March 1996), *Achieving Effective Competition in the Liberalised Telecommunications Market.*

[11] "T.V. Audience Measurement Report 1995" SRG Research Services Hong Kong Ltd.

[12] Consumer Council (July 1996), *How Competitive Is The Private Residential Property Market?* Paper prepared by the Consumer Council based on consultants' report.

[13] SME is defined as a manufacturing enterprise employing less than 100 people or a service enterprise employing less than 50 people. Under this definition, 98% of all businesses in Hong Kong belonged to this category in 1995. The Financial Secretary, Mr Donald Tsang, in a speech, described the SMEs as "the foundation of Hong Kong's economic success".

would help contain a major component of the cost of business operations. Similarly, for residential property a competitive market structure would help keep property affordable at lower prices and, in turn, alleviate the pressure for wage increases.

4.12. The impact of competition on prices is most clearly illustrated by the recent deregulation of the telecommunications market. Prior to the deregulation of the telecommunications market, businesses requiring phone services had no choice but to obtain the service from one monopoly company. Since the introduction of competition, business operators are given the choice of lower cost alternatives. One bank has realised a 20% saving on its direct dial international telecommunications bill as a result of competition in the telecommunications market[14].

Need to ensure fair competition for all market players

4.13. During the Consumer Council's studies of the competitive environment of Hong Kong, SMEs also revealed a number of concerns regarding the lack of a level playing field. Some SMEs said that they felt very vulnerable to monopoly practices such as cross-subsidisation, tie-in sales, price discrimination, resale price maintenance and price-fixing as well as practices such as exclusive dealing (see also Appendix 2).

4.14. To give the service sector and SMEs maximum support, the Government should address market imperfections across the economy and consider introducing a competition policy. A competition policy encompassing competition law would prohibit companies from creating artificial barriers to competition (e.g. exclusive dealerships, tie-in contracts, predatory pricing) and keep prices lower in monopolistic or oligopolistic markets by preventing dominant players from abusing their position.

4.15. A comprehensive competition policy and a body of law can help to spread the advantage of competition to other sectors. This is most important if Hong Kong is to be successful in becoming a service-oriented economy.

Free competition attracts foreign investment

4.16. Apart from exports, foreign direct investment through the establishment of multinational firms in Hong Kong has made an important contribution to our economic growth. Multinationals benefit the economy by bringing with them new technological know-how, locally unavailable components, and key personnel, as well as creating employment opportunities.

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[14] Tim Cureton, Group Head of Telecommunications, Hongkong Bank; quoted in South China Morning Post, 4 September 1996.

4.17. Hong Kong's attractiveness to international companies in the past has been at least partly due to the fact that other locations in the region did not have open economies, institutions to underpin commercial transactions, or business-friendly tax regimes. However, these advantages will become increasingly marginal as:

a) other economies open up; and

b) trade, investment and competition policies converge in the international fora (considered below).

4.18. A study of the competitiveness of the Hong Kong economy concludes that "Hong Kong and its firms are active packagers and integrators of activities for the local, regional and global economy, matching demand and supply on an international basis." However, Hong Kong's competitors are targeting industries and activities in which Hong Kong has traditionally been strong[15]. Hong Kong's pre-eminent position as a gateway to Mainland China may come to be shared with other ports such as Shanghai. Direct access between Mainland China and Taiwan would also weaken Hong Kong's dominance in this respect. As well as port and transportation facilities, Hong Kong faces competition from Mainland China in the area of financial services.

4.19. Against this background, the choice of Hong Kong as a base will be increasingly sensitive to costs of non-tradable services in Hong Kong[16]. These include office rental, local transportation and communication services, and local professional services - for example, local legal and accounting services. The high residential property prices,[17] high salaries and office rents[18] in Hong Kong could cause companies to consider whether to relocate some of their operations to other parts of the region. Several overseas banks with offices in Hong Kong have already transferred some functions to Singapore. Foreign companies will also be aware that operating costs are and are likely to continue to be much lower in China than Hong Kong.

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[15] The Hong Kong Advantage: *A Study of the Competitiveness of the Hong Kong Economy*, Vision 2047 Foundation.

[16] Hongkong Bank Economic Report September/October 1996

[17] The KPMG (April 1995), *Study on the Promotion of Hong Kong Services, Final Report,* for the Hong Kong Government, includes the high cost of property in a list of negative factors in attracting multinational companies.

[18] Richard Ellis (August 1996), *Global survey of office rents*, reported in South China Morning Post 7 August 1996, found that Hong Kong's office rents at the end of June 1996 were the third highest in the world after Bombay and Tokyo.

4.20. The Hong Kong Competitiveness report, commissioned by Vision 2047 Foundation which is supported by prominent business leaders in Hong Kong has succinctly summarised the challenge for Hong Kong as follows: "Cost pressures felt in Hong Kong have highlighted the need for improved competitiveness and cost effectiveness throughout the economy. While free and open competition has long been the case in the traded sectors of the Hong Kong economy, this has not been the case in some non-traded sectors. Since they do not face direct competition, it is important to ensure that the monopolies and oligopolies found in Hong Kong operate at maximum efficiency. Restrictions on entry into professional service industries should work to keep out the unqualified, not to keep out competition". This provides strong evidence that the business community recognises the importance of competition, and the need to check the monopolies and oligopolies, hence the enactment of a competition law in Hong Kong.

Interface between trade policy and competition policy

Recent developments

4.21. In April of this year the Organisation for Economic Cooperation and Development (OECD) set up a working party on Trade and Competition. In the World Trade Organisation (WTO), there has also been increasing interest in the relationship between **trade, investment and competition policies** and the possibility of convergence between the competition regimes of different states may feature on the agenda of the WTO Ministers' meeting in December. There is strong support for trade policy to go hand-in-hand with competition policy as trade liberalisation without safeguards for fair competition could be in danger of causing increasing concentration in some industries and less competition in the end[19].

4.22. While Hong Kong is considered to operate a very open market regime and have very few restrictions on foreign ownership, this is no longer sufficient. The absence of a comprehensive competition law in Hong Kong is likely to affect Hong Kong's position in international trade. General Agreement on Tariffs and Trade (GATT), the predecessor of the WTO raised questions about the rice import quota system operated in Hong Kong.

4.23. It is increasingly clear that a domestic competition policy is becoming a prerequisite for full and equal participation in global trading fora. For example, at a recent conference in the region, the World Bank representative said, "A well-designed competition law should be accorded a central place in economic

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[19] Leonard Waverman & Rong-I Wu (1996), Trade & Competition Policy in APEC, in Priority Issue in Trade and Investment Liberalisation: Implications for the Asia Pacific Region, editors B. Bora & M. Pangestu, Pacific Economic Cooperation Council, Singapore.

framework policies ... An effective competition law prevents artificial barriers to entry and facilitates market access. It complements and buttresses other policies, particularly trade liberalisation, in promoting competition, and domestic and international market integration. The absence or ineffective application of competition law can itself pose as a barrier to entry."[20]

4.24. In providing positive reasons for multinationals to come to Hong Kong, the Government will have to take into account multinational companies' future expectations of the laws needed to underpin free and open markets in individual countries. These expectations will be influenced by the introduction of trade and investment-oriented legal systems in more and more countries in Asia and across the globe - giving companies greater choice of location - and developments in the global trading environment, such as WTO policies. It is vital that Hong Kong keep up with and, where possible, anticipate developments in global trade policy to ensure that Hong Kong companies continue to have access to foreign markets for their goods as well as to attract foreign direct investment. For an export-oriented economy like Hong Kong's, future access to international markets is vital.

Implications for the Future

4.25. Hong Kong should also consider that members of WTO or other trading organisations are unlikely to tolerate indefinitely the failure of some members to introduce or enforce domestic competition policies. This is because, at the domestic level, the absence of national anti-trust rules or their inadequate enforcement within one country may have competition implications, affecting producers and consumers in another. For instance, restrictions in distribution may hamper import sales, and export cartels may hurt foreign consumers.

4.26. Another continuing interest within the world economic order is how to tackle government interventions which have anti-competitive effects on international trade. Appropriate disciplines are already being created for some anti-competitive interventions, such as voluntary export restraints (VERs), certain forms of state aid and discriminatory government procurement. In other cases, much remains to be done. Anti-dumping rules, many argue, can in certain cases amount to an anti-competitive intervention that should be made more sensitive to competitive concerns.[21]

4.27. Given its growing interest in linking competition policy with trade and investment policies, it is likely that in future the WTO will look closely at

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[20] Shyam Khemani, Private Sector Development Division, World Bank in *Priority Issues in Trade and Investment Liberalisation (1996): Implications for the Asia Pacific Region,* editors B. Bora & M. Pangestu, Pacific Economic Cooperation Council, Singapore.

[21] Ibid.

countries whose laws tolerate price-fixing cartels, exclusive distribution arrangements and other agreements which distort markets, or whose governments maintain monopolies. Hong Kong should be prepared for WTO enquiries. The adoption of a competition policy would show a consistent and co-ordinated commitment to free market competition in Hong Kong. By seizing the initiative, Hong Kong would be in a stronger position to influence international trade liberalisation measures, i.e., to eliminate such discriminatory rules as dumping, export restraint agreements, subsidies and countervailing measures etc which have caused great "injury" to Hong Kong companies.

4.28. Hong Kong's dependence on the external market has made the economy vulnerable to economic downturn and restrictive trade policies in the countries with which it trades. Many of these trade policies, for example the imposition of anti-dumping measures and import quotas, are highly protectionist and exempted from competition laws operating within national boundaries. These policies are usually imposed to protect the interest of domestic producers at the expense of consumer interests and international competition.

4.29. Moves towards a world competition policy are very much in the interests of those economies, like Hong Kong, which are highly trade-oriented. If national governments' trade interventions had to be justified in terms of international competition policy, most anti-dumping measures would be ruled out.

4.30. Hong Kong, therefore, has much to gain from pressing, with others, for a strengthening of those aspects of the WTO that bear on competition policy and the adverse effects on competition of trade measures. Hong Kong is not without influence in these matters. With its key role in APEC and its participation in the negotiations that lead to the resolution of the creation of the WTO and with its membership, as an observer, of the key OECD committee looking at trade and competition, Hong Kong is well placed to argue for international competition policy to replace traditional protectionist trade policy. However, Hong Kong's influence will undoubtedly be weakened by its lack of a comprehensive domestic competition policy. It is possible that Hong Kong's representatives would be forced onto the defensive at international meetings, explaining why Hong Kong had not adopted a comprehensive competition policy. Hong Kong's international interests may well be better served by enacting a comprehensive competition law.

International cooperation

4.31. Establishing a common framework for competition policy is also important in dealing with the problem of oligopolies in the world market for certain products. Multinational enterprises may wield market power across national boundaries and stay outside the reach of any national jurisdiction. At present, some countries follow a controversial 'effects' doctrine. The US in particular tries to act against firms based outside the US on the grounds that they are responsible for anti-competitive practices that have an effect on the US economy. In 1994, the US Department of Justice concluded a consent decree with Pilkington UK, against the wishes of the UK government, which did not accept that US had an interest in the case. The decree argued that Pilkington's

activities affected the ability of US firms to export technology to build turn-key glass plants overseas. There was no suggestion that US consumers had been affected.

4.32. To avoid friction, governments are discussing the idea of comity agreements which will provide that other countries affected will stay proceedings while the problem is looked at under the terms of its own competition law by the country where the companies are based. Without a competition law and a competition authority Hong Kong could not be party to any such agreements and its citizens could, therefore, find foreign courts trying to claim jurisdiction over them.

4.33. There is also risk that the WTO may be forced to handle and make judgments about cases involving anti-competitive practices. This should be a particular concern in the Asia-Pacific region given the concentration of multinationals in the area in recent years. It would be much better for the parties and government(s) involved if a set of codes for international competition and cooperation on competition policy were in place. This would allow such a dispute to be settled by courts with much better knowledge of the market circumstances in which it arose rather than in a top-down fashion.[22]

Conclusion

4.34. With a continually changing external environment, Hong Kong cannot rely on past policies to deliver automatic economic success. As a prominent local banker recently wrote, "The world does not owe us a living. Think of Hong Kong as a product. If this becomes too expensive, if it fails to offer good value for money, people will find alternatives."[23] The Government must therefore be forward-looking and take pragmatic action to ensure a fair competitive environment conducive to continued economic growth. This chapter suggests that a competition policy would enhance development of the service sector, and help Hong Kong's tradable sector to perform well against international competitors. A comprehensive competition policy could also help to ensure that Hong Kong continues to attract and retain highly mobile multinational firms. Moreover, as the international new economic order puts greater emphasis on trade, investment and competition policies, Hong Kong, without a competition law of its own will not be able to enter into comity agreements and foreign competition authorities may seek to exercise jurisdiction over its citizens.

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[22] Leonard Waverman (University of Toronto) and Rong-I Wu (Taiwan Institute of Economic Research) (1996) in *Priority Issues in Trade and Investment Liberalisation: Implications for the Asia Pacific Region,* editors B. Bora & M. Pangestu, Pacific Economic Cooperation Council, Singapore.

[23] David Li, Deputy Chairman and Chief Executive of The Bank of East Asia (19 August 1996), *Dateline Hong Kong,* South China Morning Post,.

4.35. Hong Kong's position as a key trading centre gives it the opportunity to influence the current debate on competition policy and to bring an end to anti-competitive trade measures such as anti-dumping action from which Hong Kong industries have suffered. If, however, it does not adopt a competition policy of its own, its potential influence will be diminished and its international interests harmed.

4.36. On the other hand, by refusing to accept the need for provisions to deal with anti-competitive behaviour more widely, Hong Kong is assuming a limited range of scenarios. If there was, for example, a growth in inflationary pressures in the domestic economy, it would have one less tool with which to fight it. To take an international example, if there was growing pressure towards protectionist regional trade blocs, Hong Kong would be in a weak position to push, with others, for an international competition policy as one means to prevent such a development.

4.37. It is tempting to think that because Hong Kong has been competitive without a comprehensive competition policy in the past there is no need for it to adopt such a policy now. However, as this report has argued international competitiveness is enhanced by domestic competition and in the face of the enormous challenge ahead, it is vital that Hong Kong adopts a comprehensive competition policy.

Chapter 5

Benefits of Competition Policy to Business and the Consumer

Introduction

5.1. This chapter looks at some of the specific advantages to business and the consumer in Hong Kong of a competition policy and examines concerns about the negative effects of competition policy on these groups.

Advantage to business

5.2. There are three significant advantages to business beyond the general benefits to the economy as a whole that were described in Chapter 4.

Fairness

5.3. Competition policy works to the advantage of business since it acts against anti-competitive practices that can drive efficient and well-run companies out of business or prevent new companies from entering a market. Competition policy acts to the overall benefit of business in the same way that the rules of a club, by constraining the behaviour of individual members, work to their overall advantage.

5.4. In those sectors of the economy exposed to international competition, i.e. the tradable sectors, there is intense competition in Hong Kong. In so far as there is currently a lack of competition in other, principally domestic, sectors of the Hong Kong economy, a competition policy would help open new areas to competition or to the threat of competition and would maintain competition in sectors from which it might otherwise disappear. Even where a market is very competitive at present, in constantly changing market environments there is potential for competition within a particular sector to be reduced in the future. The residential property market, for example, was very competitive 15-20 years ago but, due to a variety of factors, now has a much higher entry threshold and is dominated by a small number of major developers.

5.5. A competition policy will not reduce barriers to entry such as high initial capital costs. It will, however, reduce those barriers caused by 'unfair' or anti-competitive behaviour and, with a complementary regulatory policy, can reduce other institutional barriers. This is good for companies starting up or wishing to diversify their activities. It will also be good for international companies wishing to enter certain domestic markets, for example, international telecommunications. Such international competition is a challenge which Hong Kong has historically accepted and embraced, recognising the advantages of foreign

investment and the benefits of reciprocal freedoms to enter other countries' markets. The existence of a comprehensive policy can also act as a reminder to the government to be pro-competitive in its own purchasing decisions, making use of competitive tendering and using multiple sources of supply.

Consistency

5.6. A competition policy would also provide greater openness and consistency in the economy, setting formal rules by allowing possible anti-competitive practices to be investigated by an independent authority working on the basis of clearly defined and published guidelines. This is vital both in giving business a clear source of redress and in encouraging business confidence in Hong Kong and in the business environment after July 1997. In a recently compiled international league table of business attitudes, Hong Kong was 18th out of 54 on a scale of countries perceived to be least corrupt to countries believed to be most corrupt. This was above most Asian countries but below Singapore (which ranked 7th).[1] Although anti-competitive practices are not illegal in Hong Kong, well-designed competition laws and an independent competition authority will improve perceptions of Hong Kong in this regard.

5.7. A comprehensive competition policy also aids consistency because it is based on a set of published rules and is applied by a single authority. By contrast, the Government's present piecemeal approach has led to differences in the competition provisions of licenses issued to competing broadcasting companies.

5.8. The absence of a competition policy can mean that the only route open to those suffering from anti-competitive practices is to resort to lobbying politicians and administrators. In contrast, by providing an impartial and objective means of resolving disputes over issues of business competition, an effective competition policy can take politics out of business. The role of politicians is then the crucial one of laying down the general framework for competition policy and disputes are resolved within that framework by independent and informed experts.

Reduced regulation

5.9. A well-designed and pragmatic competition framework can mean less bureaucracy and regulation. It is true that the introduction of a comprehensive competition policy involves a small administrative unit and competition rules. But in several areas, this may replace sector-specific regulation or licensing and the administration that is entailed in that. Overall, a competition policy should not lead to more resources being absorbed by government, and should lead to greater simplicity and clarity for business. Sector-specific regulation of prices and competition by bodies such as The Office of the Telecommunications

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[1] Transparency International, Berlin's table was based on the results of 10 international surveys and published in June 1996.

Authority and the imposition of price capping formulae by government may be necessary as a transitional measure but, in the long run, price-fixing by government distorts the market and is not as effective in promoting efficiency and low prices as the discipline of competition.

5.10. Competition Policy can also help the deregulatory process by giving a Competition Authority the ability to report in wide terms on barriers to competition and so enabling it to report on the anti-competitive effects of government regulations which may have come to outweigh the benefits. Chapter 6 looks at this issue in greater detail.

Other benefits of competition

5.11. In addition to the benefits of fairness, consistency and reduced regulation, business will share in the general benefits for the Hong Kong economy described in Chapter 4. Competition will help to hold down prices, encourage efficient management and maintain Hong Kong's attraction as an international centre for services. The liberalisation of fixed-line telecommunications demonstrates the advantages to business that flow from competition.

5.12. Moreover, with the increasing tendency in international negotiations to link trade and competition, the adoption of a competition policy will strengthen the hand of Hong Kong's negotiators at bodies such as the WTO, where Hong Kong must fight to maintain or improve access for its business to the markets of the world.

Business concerns about competition policy

"Is there really a need for competition policy in Hong Kong?"

5.13. Hong Kong has enjoyed a high degree of economic success in the past without a comprehensive competition policy. However, as Chapter 4 makes clear, Hong Kong cannot afford to be complacent. Changes are taking place in the economic structure of the territory, in other Asian economies and in the global trading environment. In the face of the new challenges, a comprehensive competition policy is urgently needed to keep ahead of our competitors.

"Is competition policy anti-big business?"

5.14. No. In other jurisdictions, the EU, Japan, and Taiwan, the implementation of competition policy does not demonstrate a bias against big business and there is no reason to believe such a bias would be present in Hong Kong. In the US, Competition Law has its roots in the 19th century and in a wariness of big business which has lingered on to the present, but the US is exceptional in this respect.

"Does competition policy mean subsidising inefficient firms?"

5.15. No. The reverse is true. It is the absence of competition policy that enables inefficient firms to survive. Cartels, for example, set prices at the level that suits the most inefficient producer. Monopolies are able to continue using old and outdated practices. Competition Policy provides a framework that enables efficient and successful firms to grow.

"Would competition policy harm existing businesses?"

5.16. Business will benefit from lower operating costs as a result of competition, business as a whole will benefit from opportunities to enter new markets. Efficient firms will grow and there will be a period of change and readjustment as the market allocates resources to those firms best able to use them. In some industries the number of firms may contract, in others it may expand. The end result will be a healthier economy.

"Would competition policy increase bureaucratic interference and inhibit my ability to provide a fast and flexible response to changes in the market place?"

5.17. No. If there are no problems, businesses need have no contact with the Competition Authority. In some of the first countries to introduce competition law, there were requirements to report agreements or seek authorisations that were a burden on business, but those countries have learnt from their mistakes and have changed their procedures. Hong Kong can learn from the mistakes or others and avoid creating unnecessary tasks for business. On balance, the burden of bureaucracy may even be reduced.

"What is happening in other countries?"

5.18. In Asia, competition policy is increasingly important. Japan has had a competition law since 1947, but has recently signalled an intention to strengthen the administration of the Law by the choice of a respected senior prosecutor as Chairman of the Fair Trade Commission. South Korea, too, is strengthening the enforcement of its competition law. The original law of 1980 has been revised to increase its scope and the status of the Chairman upgraded so that he now attends meetings of the cabinet. Taiwan introduced a competition law in 1991. The laws are described in Appendix 4.

5.19. Throughout the world, governments are introducing or improving competition law[2]. Some of the changes expand the role of competition law by

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[2] "*The Instruments of Competition Policy and their Relevance for Economic Development*" by R. Shyam Khemani and Mark Dutz, published November 1994, lists 26 developing or emerging market economies where competition law had recently been introduced or revised or where the government was preparing legislation.

removing exclusions previously enjoyed by particular sectors. Other changes seek to reduce the burden on business by defining types of agreement that are usually pro-competition and removing the need for these to be examined by the competition authorities.

5.20. There is a major debate taking place between states and with the representatives of international business on the competition policy of the future. Hong Kong should be playing a part in this debate in order to remove anti-competitive rules such as anti-dumping measures.

Competition policy and consumer interests

5.21. Competition benefits the consumer in terms of choice, quality of service, price and product innovation. By enhancing the effectiveness of competition and by prohibiting anti-competitive practices, competition policy will help to maintain low prices and high service standards for the consumer.

5.22. Of these advantages, the greatest is the pressure for lower prices. For example, as a result of competition, albeit limited, Hong Kong consumers have seen a 75% reduction in the cost of international direct dialled calls (IDDs) to the United States since 1993.[3] The end of Hong Kong Telecommunications International's (HKTI) monopoly on carrying international calls should bring even greater competition and price reductions without the need for call back operators (HKTI's current franchise will not expire until 2006).

5.23. In the absence of price competition, producers often compete on free gifts and supplementary benefits rather than on the price of the goods themselves. For example, petrol stations offer free gifts of water and paper tissues but maintain uniform prices; banks offer holders of their credit cards discounts at certain shops and introductory gifts, but the rates of interest on credit cards are 40-100% higher in Hong Kong than rates in the US and Japan; milk producers attach free packets of cereal, extra milk, hand towels and table mats, but prices of dairy products remain high.

5.24. Whilst such extras may please some consumers, other consumers may not need or want the gift. This sort of 'soft' competition is of limited value to consumers as a whole. In markets where competition is fierce, for example the sale of the above products and services in other countries, or the Hong Kong mobile phone market, gifts are a secondary marketing tool. Companies have to compete in the first instance on price and on the quality of the goods or services on offer, because these are what most affect consumer decisions. This situation is much better for consumers. It means better choice of service or, in the case of lower prices, more money left in the consumer's pocket for him or her to use in complete freedom, according to his or her individual requirements.

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[3] Rate to the US in 1993 = $8.0 per minute (bonus time rate). October 1996 = $1.99 per minute (week-end rate).

Consumer concerns about competition policy

"Would competition threaten existing cross-subsidies?"

5.25. It is true that in order to increase competition and the operation of free market forces it is often necessary for the costs of a particular service or product to be exposed. For example, a monopoly utility company can subsidise one set of customers by charging more to another set because the second set of customers has no alternative supplier. There are four points to make in response:

a) the increased efficiency resulting from competition can more than compensate consumers for the loss of subsidies. This was the case in the UK where, by gradually reducing the subsidy for residential telephone calls at the same time as introducing competition to the market, average bills for residential consumers in fact came down, because competition in the telephone industry reduced prices;

b) consumers as a whole (domestic and business) will pay less for the same amount of services because of the greater efficiency in a competitive market;

c) if a community wishes to assist a particular section of society, it can generally provide such assistance more efficiently through specific rebates or welfare policies than through an untargeted subsidy. In the UK telephone example, British Telecom now provides rebates for customers who make little use of the telephone (generally elderly or poorer people) rather than providing a large subsidy to residential users as a whole;

d) there can be very important economic benefits from reducing cross-subsidies. This is because it encourages more efficient use of resources with the actual cost more closely reflecting the economic cost. For example, if taxis were subsidised to a level which made them cheaper than buses, everyone would use taxis instead of buses even though buses are a more efficient form of public transport.

5.26. For these reasons, arguments about cross-subsidies have been more frequently advanced by companies seeking to protect the status quo rather than by consumer groups.

"If, for the sake of competition policy, regulation is reduced, would consumers lose out?"

5.27. Minimising regulatory control is an important part of competition policy. However, a high degree of regulation is not always to consumers' advantage. The first and most important reason is that it may increase the price of products. This is because complying with a regulation increases production costs, and because some regulations restrict competition in the market (if only a limited number of producers are able to comply with a particular requirement) and hence reduce the need for companies to offer the most competitive prices. Second, as a corollary of this, over-regulation may create or increase black market trade in cheaper versions which meet few, if any, regulations. Low income families, who are generally most vulnerable to the health and safety risks which regulations are designed to prevent, will be most likely to buy such items because of their sensitivity to price.

5.28. In other cases, for example industries with designated regulatory bodies, a company or group of companies may over time be able to use or manipulate the rules to their own advantage. This is known as "regulatory capture" and usually means that, without reform, the regulatory system will not necessarily help, and may work against, consumer interests.

5.29. The majority of health and safety, trade description, and similar regulations are obviously important in protecting consumer interests. A balance therefore needs to be struck between promoting free competition and maintaining regulations which protect consumer interests. This might be achieved by, for example, adopting only those regulations which are effective and cannot be achieved by other means (for example, public education); and by prescribing standards appropriate to the level of development or wealth in a particular jurisdiction.

Conclusion

5.30. In addition to sharing in the advantages to the economy as a whole, competition policy will offer business the benefits of:

a) fairness,

b) consistency, and

c) reduced regulation.

5.31. Competition policy is needed to help Hong Kong keep up with the pace of change in its own economy and in the world economy. A competition law written in Hong Kong would not be anti-business, would not be bureaucratic and would result in a healthier economy. Successful economies throughout the region are adopting or strengthening competition laws and Hong Kong cannot

afford to be left behind if it is to play a role in international debates on trade policy.

5.32. For consumers the benefits of keener competition will be lower prices and, although some cross subsidies may end, the overall improvement in efficiency that follows from the introduction of a competition policy should mean that everyone will be better off.

Chapter 6

Competition and Regulatory Policy

Introduction

6.1. As discussed in Chapter 5, a comprehensive competition policy can play a part in reducing regulation. It does this in two ways. First, it may remove the need for sector-specific regulations such as the imposition of price caps that are designed to substitute for competition. Second, in the course of its work a competition authority may identify some regulations which have the side effect of limiting competition and which are no longer needed for the original purpose for and which they were introduced.

Removing the need for regulation

6.2. Both competition policy and regulatory policy aim at protecting businesses, consumers and the economy from the effects of imperfections in the market or 'market failure'[1].

6.3. In some cases, market failure may be due to the technology involved. The technology may be such as to exhibit substantial economies of scale which require a large plant, if they are to be fully reaped. However, the size of the market may not be large enough to support the existence of more than a single large plant. Hence the conditions for competitive behaviour are breached and we have a 'natural monopoly'.[2]

6.4. Natural monopoly is a commonly observed feature of utilities, e.g. of a telephone network or electricity grid. In these cases, governments commonly introduce regulation to control the amount the monopolist can charge for its supplies. However, unlike competition policy, such regulations are aimed not so much at improving the workings of the market but rather as acting as a substitute for the free play of market forces. They may produce unintended side effects leading to greater market distortions. For example, with the good intention of capping the returns on investment of an utility to a predetermined percentage, the Government may impose a scheme of control. However, since

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[1] 'Market failure' includes any situation where the conditions underlying the equation of a competitive market equilibrium with optimal resource allocation breaks down. Competitive market equilbrium requires that there should be enough players so that there is competitive behaviour and that an equilibrium exists.

[2] A. Koutsoyiannis (2nd edition, 1979), *Modern Microeconomics*, London: Macmillan.

the utility's profits are now proportionally linked to its assets under such a scheme, the company may increase its returns when its capital assets are enlarged. So, there is an incentive for the company to widen its capital base more than what demand requires. From the point of view of market efficiency, regulations based on returns on assets are very much a second-best solution to market imperfections.

6.5. An additional burden of sectorial regulation is the amount of resources it requires from both the Government and the regulated companies. The Government must fund the regulatory body and find staff with sufficient expertise about the sector to monitor the regulated business. The regulated companies may be required to devote scarce management time to making detailed reports to the regulator and to producing accounts solely for the purpose of regulation.

The effects of technological change

6.6. In the context of regulated utilities, the American economists, Viscusi, Vernon and Harrington write, 'Perhaps the most important responsibility that society subsumes when it regulates an industry is that it must know when such regulation is no longer necessary. In our technologically progressive world, there should be no presumption that an industry that is a natural monopoly today will be a natural monopoly tomorrow. Just as much as regulating a natural monopoly can be welfare-improving, regulating an industry that is no longer a natural monopoly can be welfare-reducing.'[3]

6.7. 'While it is ultimately the responsibility of legislators to decide when regulation is no longer appropriate, the first line of change in regulatory policy rests with the regulatory agency. It can choose to allow entry and to loosen controls on price.... Unfortunately, there are obstacles inherent in the bureaucratic structure of a regulatory agency that can impede deregulation even when it is required.... deregulation means a curtailment of the duties of a regulatory agency and perhaps even its ultimate demise.'[4]

6.8. In Hong Kong, regulation of some industries (broadcasting, electricity, rice importation, aviation) is carried out within Government while the Office of the Telecommunications Authority (OFTA) and the Hong Kong Monetary Authority (HKMA) regulate telecommunications and financial institutions respectively.

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[3] W. Kip Viscusi, John M. Vernon, Joseph E. Harrington Jr (1992), *Economics of Regulation and Antitrust*, Lexington, Massachussetts, and Toronto: D.C. Heath & Co.

[4] Ibid.

6.9. In some sectors, competition policy may displace the need for regulation. However, insofar as there continue to be natural monopolies and/or regulatory agencies having social welfare or strategic objectives which competition may not necessarily deliver, there is likely to be a continuing need for sector-specific regulation. Some examples are monetary stability in the case of financial institutions, and provision of an universal service in the case of telecommunications. In other cases, regulation should only be a temporary expedient pending the development of full competition. For instance, OFTA retains the power to approve any tariff reduction plan proposed by the incumbent market player, Hong Kong Telecommunications, prior to the development of a more competitive market. The Consumer Council also advocates regulation of the domestic gas supply industry to protect public interest until such time as the market becomes competitive, e.g. with the introduction of a common carrier system.[5]

6.10. In the case of natural monopolies such as the utilities, it is argued that economies of scale mean that it is much more efficient for one company to provide the service. Whilst that may be true for some utilities especially in small economies like Hong Kong, governments should also recognise that changes in the market, such as technological advances, growth in the size of markets as wealth and populations increase, new sources of supply, for example natural gas from South China, are making it more possible and efficient (i.e. resulting in lower prices) to allow competition in new sectors including those with large economies of scale. For example, the falling costs of laying a telecommunications network have made it possible to introduce some competition in fixed telephone network services in Hong Kong. Or, separation of power supply from power transmission, has enabled Australia and the UK to introduce competition into industries which have traditionally been considered natural monopolies. This is likely to produce substantial efficiency gains.

Identifying regulations that are no longer justified

6.11. In Hong Kong, regulations and regulatory regimes limit competition in some (mainly domestic) areas of the economy. In some industries, market entry is explicitly limited (rice imports, bus companies, electricity companies, international telecommunications traffic, cable TV). In certain cases, market contestability, and the economic benefits which it brings, may be compromised in a number of important areas of the domestic economy.

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[5] Consumer Council (October 1995), *Assessing Competition in the Domestic Water Heating and Cooking Fuel Market.*

6.12. In other industries, market entry may be unintentionally but effectively limited by regulatory requirements (e.g., the prohibition against LPG pipelines crossing public roads,[6] or requirements for baby clothes to meet British Standards Institution standards[7]). Business interests consulted in this study expressed strong concern about the gradual encroachment of Government regulation on commercial activities and the implications on their competitiveness.[8] Competition policy could enable business, consumer and economic interests to find alternatives to going down the regulatory road.

6.13. For example, in the UK the Director General of Fair Trading has the responsibility of advising the Chancellor of the Exchequer on the rules of regulatory bodies in the finance sector to ensure that the rules do not distort competition. In another UK example, the Monopolies and Mergers Commission, after investigating a monopoly in the supply of contact lens solution, concluded that the problem lay less in the actions of companies than in the regulations relating to the approval and distribution of the solution. The Monopolies and Mergers Commission recommended the relaxation of the controls which had distorted the market and the Government accepted the recommendations[9]. A similar role is played by the Fair Trade Commission in South Korea whose functions include the "review of proposed enactment of laws and regulations which may adversely affect fair competition".[10]

Conclusion

6.14. In the utility sector, regulation has been used as a substitute for competition but it is a second-best solution because of its potential to distort decisions and because the burden of reporting it places on industry. The Consumer Council does not expect competition to replace all forms of regulation.

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[6] Section 17 (4) of the Gas Safety (Gas Supply) Regulations.

[7] 1991 Toy and Children's Products Safety Ordinance, highlighted in the Far Eastern Economic Review, 13 June 1996. This regulation effectively prevents the sale of baby clothes from the US, for example, which are much cheaper than those from Britain. A bill which would allow the adoption of safety standards other than BSI's was introduced to the Legislative Council in April 1996 and is currently under consideration by LegCo.

[8] Hong Kong Coalition of Business Services 31 July 1996 (part of Hong Kong General Chamber of Commerce).

[9] '*Contact Lens Solutions*', 1993 Monopolies and Mergers Commission report, Command Paper 2242.

[10] Paper by Chul Lyu of the Fair Trade Commission, South Korea, presented at the 1996 Internation Seminar on Government Efforts of Promoting Fair Trade, Zhuhai.

A competition agency should not replace but would complement and coexist with the regulators. In the long term, the situation may alter following changes in the market, in social or strategic objectives, or changes in the way of achieving those objectives. In the UK, the telecommunications regulator has been able to relax regulatory controls as competition has increased in the market and foresees a day when the regulator will no longer be needed.

6.15. The Consumer Council's sectorial studies and observations of practices in Hong Kong indicated that government regulation is in some cases itself a barrier to market entry. This is a point emphasised by some economists in the United States during the Reagan administration (see chapter 2). Hence, positive steps should be taken to increase competition in sectors which are currently regulated.

6.16. For business in general, competition policy can provide a powerful critique of regulations which do not enhance economic efficiency and consumer welfare and filter proposals for new regulations. Chapter 8 suggests ways in which a competition authority might assist in this process.

Chapter 7

Formulation of a Competition Policy for Hong Kong

Introduction

7.1. This chapter looks at the principles for formulating a competition policy that would address the weaknesses in the existing sector-specific approach. In the light of these principles and experience in other countries and territories, the Consumer Council examines:

a) the objectives of a competition policy,

b) the scope of competition laws, and

c) the institutional framework and approaches to discouraging anti-competitive behaviour.

7.2. The Consumer Council's recommended model for Hong Kong is described in Chapter 8.

Objectives of a competition policy for Hong Kong

7.3. The objective of a competition policy for Hong Kong should be to promote economic efficiency, which can be defined in the widest sense of promoting the economic welfare and living standards of the society taken as a whole.

7.4. Specifically, competition policy should aim to:

a) ensure a contestable market conducive to competition,

b) establish a level playing field for business,

c) enhance consumer welfare; and

d) reduce unnecessary regulation.

7.5. Effective competition promotes efficiency by ensuring that prices reflect costs, thereby promoting allocative efficiency; by increasing pressure on firms to raise efficiency and cut costs; by allowing more efficient firms to displace less efficient firms; by promoting innovation; and by reducing the perceived need or excuse for imperfect interventions by government.

7.6. The Consumer Council believes that a conduct-oriented approach would be appropriate. It would both be less intrusive than traditional competition policies based on structure (concentration ratios, etc) and performance (abnormal profits). In particular, it would allow companies to hold the high levels of market share which may be necessary in some sectors to capture economies of scale. The Consumer Council is open-minded about measuring performance and structure. They may provide a useful trigger leading to investigation of possible anti-competitive conduct.

7.7. In keeping with the conduct-oriented approach, the competition policy should also:

a) reflect the small and open nature of the economy and the importance of international competition;

b) have legislation which takes into account Hong Kong's legal traditions and be compatible with the Basic Law;

c) be pragmatic in its approach providing clear exemption for those agreements that do not restrict competition or which are in the public interest;

d) ensure that institutions are small and cost-effective.

7.8. The policy must also attract sufficient respect from other countries to support Hong Kong's effort to promote world trade and to enable Hong Kong to resist attempts by competition authorities in other states to exercise extra-territorial jurisdiction.

7.9. With these principles in mind, the Consumer Council hopes to create a policy that would command support from the public and business community, yielding maximum economic benefits to Hong Kong with minimum inconvenience.

Establishing competition law

7.10. Adoption of a competition policy by the Government means that it must, in making decisions, e.g. calling for tenders and formulating new policies, make a critical assessment of the likely impact of its proposal on market competition. This is similar to the environmental impact assessment now being incorporated for all major government policies which may affect the environment.

7.11. 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 act to stifle or distort competition.

7.12. Hong Kong is one of the few developed and newly industralised economies which does not have competition law. In general, the successful adoption of competition policy in other jurisdictions has hinged on domestic support as well as external pressure. Externally, in the international arena, Hong Kong's effort to abolish anti-competitive trade measures will be weakened without a competition law of its own. Therefore, Hong Kong should take immediate action to rectify the situation as soon as possible.

7.13. The absence of domestic pressure is due to a combination of factors, e.g. ignorance of what constitutes competition law and of its benefits to business and consumer. Although Taiwan took 10 years to set up its competition mechanism, its community has now seen the benefits and realise that such legislation is in the interests of business in ensuring a level playing field.

7.14. It is therefore vital that, if this Government and the future Special Administrative Region (SAR) Government accept the Consumer Council's recommendation on competition policy, they should enhance public awareness of the importance of a competition law to the marketplace, canvass public support and ensure thorough consultation so that the policy is framed in a way that takes into account local circumstances and traditions.

7.15. Concerns in Hong Kong about the effect of competition law on business and the small size of the economy are similar to those once expressed in Taiwan. Appendix 4 looks at how Taiwan addressed these concerns and implemented its new law.

Coverage of competition laws

7.16. The competition laws of Mainland China, the European Union, Japan, South Korea, Taiwan, the UK and US (Appendix 5), all contain provisions against restrictive trade practices and abuse of power by dominant companies. Appendix 5 shows that these generally cover horizontal price-fixing, vertical resale price maintenance, and price discrimination. Apart from that, the provisions vary according to the particular cultural, legislative and economic background of the countries/territories concerned. For example, in all systems in the sample except Mainland China, competition laws include business combinations (mergers and acquisitions). Mainland China has provisions against predatory pricing. In addition to this, the EU, Japan, South Korea, Taiwan and the UK have provisions against the abuse of monopoly power. In Mainland China, the unfair trade practices law also prohibits the use of administrative powers to inhibit competition.[1] Appendix 4 describes in more detail the competition laws of Mainland China, Japan, South Korea and Taiwan.

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[1] "Governments and their subordinate departments may not abuse their administrative powers by restricting the entry of products from elsewhere into the local market or

7.17. In Chapter 2, the Consumer Council introduced the threefold classification that is frequently used in discussions on competition policy. The three classes are monopolies, horizontal restraints and vertical restraints. As we move to a discussion of potential legislation, the question of intent becomes more important and we must use a different classification. Below we look at four possible articles of a competition law for Hong Kong, common to competition policies generally. These are:

a) to prohibit collusive behaviour and other horizontal restraints;

b) to deal with abuses of a dominant position;

c) to deal with tacit collusion; and,

d) to deal with mergers and acquisitions.

7.18. All competition laws have provision for the granting of exemptions by the Competition Authority. They may be granted upon individual application or on block for a general class, as appropriate.

Article 1 Against restrictive agreements

7.19. This provision would prohibit, and render automatically void, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, markets, technical development or investment;

c) share markets or sources of supply;

d) apply dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage;

e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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the outflow of local products to other markets" (Article 7, PRC Anti-unfair Competition Law).

7.20. Exemptions: Exemption from Article 1 would be obtained from the appropriate authority in those cases where the practice is judged by the authority to contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not:

a) impose on the undertakings concerning restrictions which are not indispensable to the attainment of those objectives in article;

b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

7.21. Exemptions may be granted either by means of individual applications for exemption by the undertakings concerned to the relevant authority, or by means of block exemptions granted by the authority for general classes of agreements. The relevant authority may also exempt agreements that concern goods and services which account for less than a threshold market share.

7.22. Comment: The proposed Article 1 prohibits horizontal and vertical agreements between firms that are intended or have the effect of restricting or distorting competition. These would include price-fixing cartels and vertical restraints such as retail price maintenance, bid-rigging etc. Exemptions may be granted for those agreements that are notified to the relevant authority and are judged, after appropriate investigation, to meet the conditions laid down, that is: the agreement promotes economic efficiency, defined broadly; is essential for this end; and does not represent too major an interference with competition. Block exemptions may also be granted, and may well be appropriate in the case of agreements concerning standards or research and development. We discuss later the appropriate institutional structure.

International experience

7.23. There are many examples of provisions, like these, being used against horizontal and vertical agreements to enhance economic efficiency in countries/territories with comprehensive competition laws. To take three of the examples referred to in chapter 3 above in detail:

a) In Taiwan, five egg merchants, accounting for 67% of the wholesale egg market in Hualian jointly set up a delivery depot. They fixed the wholesale price of eggs and divided distribution points between them to avoid competition, restricting the supply of eggs to selected trading districts. The firms were prosecuted for price-fixing and restrictive distribution arrangements under Taiwan's Fair Trading Act.

b) In Japan, nine electronics companies involved in the construction industry were recently found guilty and fined a total of 460 million Yen for colluding to push up the price of sewerage contracts.

c) In the UK, the Restrictive Practices Court recently imposed a fine for price-fixing of 8.37 million pounds sterling on a group of companies supplying ready-mixed concrete. The weakness of UK competition law, both in terms of the investigative powers of the Office of Fair Trading (OFT) and the limited scope for fines, meant that this case took many years to reach a conclusion, and the price-fixing behaviour in question occurred over a period of some twenty years. Over that period, collusion to fix the price of ready-mixed concrete meant that the UK construction industry incurred higher costs. This raised prices of new buildings both to consumers and the rest of industry. Since property represents a very important input and asset to business as a whole, this increase in cost placed companies located in the UK at a competitive disadvantage. Although the cost of the price-fixing behaviour to any one company was probably quite small, the total consequences, aggregated across all companies, was significant, and compounded by the length of period for which the price cartel operated. This would have acted as a factor limiting UK competitiveness in the international market place.

Considerations for Hong Kong

7.24. Appendix 2 describes a number of cases brought to the Consumer Council's notice of alleged price-fixing, bid-rigging, resale price maintenance in a wide range of industries. These suggest an urgent and practical need for this Article in Hong Kong.

Article 2 Against abuse of market power

7.25. This article would prohibit any abuse by an undertaking in a dominant position which prevents, restricts or distorts competition. A dominant position is defined as a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition in the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers.

7.26. The restrictive practices covered are similar to those for companies acting collusively and include:

a) unfair purchase or selling prices or unfair trading conditions;

b) limiting production, markets or technical development to the prejudice of consumers;

c) applying discriminatory conditions to equivalent transactions; and

d) tie-in contracts.

7.27. This Article applies only to businesses that have a dominant position which gives market power. It incorporates no presumption that market power is, per se, undesirable, but it recognises that the possession of market power may permit behaviour that stifles effective competition, which is undesirable. In particular, a dominant position may allow a business to impose vertical restraints on trade to the detriment of consumers and other businesses. Dominance is defined in terms of the capacity it gives to the business to exert anti-competitive influences in a market, and it would be for the relevant authority to establish the presence of such dominance. A large market share is necessary but not sufficient for dominance because of the possibility of contestability of markets. The Article would prevent dominant firms from using their market power to the detriment of customers: thus it would tackle the issue of monopoly and predatory pricing, as well as vertical restraints, such as tie-in sales, enforced through dominant power.

International experience

7.28. Most competition laws were developed in response to abuse of market power by monopolies (e.g. Japan, South Korea, US). Many jurisdictions, including the EU, have clear definitions of market domination. For example, in the UK, a company with a 25% or more market share is considered a monopoly under the Fair Trading Act (1973). In Japan, market domination is defined in terms either of market share (50%) or size of gross sales (¥50 billion) [Anti-Monopoly Act S.2(7)][2].

7.29. US law, which was among the first to address the concern of monopoly power, does not have a definition of monopoly in terms of market share. This is due to the fact that Section 2 of the Sherman Act specifically suggests that the law is not concerned with the status of monopoly, but the "attempt to monopolize", i.e. dominance is not a problem unless the dominant company abuses its market power.

7.30. A small example of this strand of competition law being invoked is the German Federal Cartel Office's decision to investigate prices charged by the national airline, Deutsche Lufthansa, after receiving complaints about inflated airfares between Berlin and Frankfurt.[3]

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[2] Additional criteria are typically considered together with the said market share before a company is considered as Monopoly, e.g. ease of entry by new entrants [Anti-Monopoly Act S.2(7)(ii)].

[3] Reported in the South China Morning Post, 4 September 1996.

Considerations for Hong Kong

7.31. The Consumer Council's sectorial studies revealed potential for abuse of monopoly power in the gas industry, or of dominant position in a number of sectors including banking, residential property, and supermarkets (chapter 3 refers).

7.32. However, while a large market share is a necessary condition for market dominance, it may not be a sufficient condition. Due to the small size of Hong Kong markets, companies in some non-tradable sectors may need to achieve a relatively large market share to benefit from economies of scale. If entry and exit costs of these sectors are not unduly high, effective competition can still exist. A mechanical application of market share criteria would therefore be inappropriate. Legislation should allow the competition authorities to determine market dominance with careful reference to these issues.

Article 3 Against the exploitation of a complex monopoly

7.33. This prohibits the exploitation of a complex monopoly which is deemed to exist if a group of companies jointly accounting for a large part of the relevant market for a good or service so conduct their affairs, whether voluntarily or not, and whether by agreement or not, so as in any way to prevent, restrict or distort competition in connection with the production of goods or the supply of services, whether or not they themselves are affected by the competition and whether the competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers.

7.34. Comment: UK law contains a provision against complex monopolies. It is designed to deal with situations where there is no explicit collusive behaviour, but where custom and practice in an industry results in concerted behaviour that has damaging effects similar to overt collusion. As we note later, because the implicit nature of this behaviour means that businesses might well engage in such practices without being aware of behaving inappropriately, it would be inappropriate to have financial penalties for this practice, in contrast to Articles 1 and 2 where fines might be levied in the case of violations. This Article would deal with issues where general industry practice had the same effects as an explicit cartel (e.g. price-fixing), but where the practice resulted from general industry practice, not explicit collusive behaviour.

International experience

7.35. The Federal Trade Commission (FTC) Act which outlaws practices found to be "unfair methods of competition" provides some protection against complex monopolies in the US. Unlike the Sherman and Clayton Acts, the FTC Act does not require proof of the existence of an explicit agreement among competitors in the US for anti-competitive behaviour by a group of companies to be condemned.

Considerations for Hong Kong

7.36. Behaviour by a group of firms which is unconsciously or unintentionally anti-competitive is difficult to prove because of the absence of any agreement. The Consumer Council's residential property report found evidence of a dominant group of property developers adopting complementary or similar sales strategies. Although it was unlikely that there was any explicit collusion, certain practices such as alternating sales of properties of a similar type in neighbouring locations, and release of flats in batches, might have had the effect of restricting supply and inflating prices.

7.37. Tacit collusion, even if it could be established and proved to generate anti-competitive results, would not be covered by Article 1 as it stands. Article 3, if enacted, could deal with such complaints.

7.38. This is, however, a particularly complicated area of competition law and considerable experience is needed if the law is to be administered successfully. Chapter 8, discusses whether Article 3 should be introduced at the same time as Articles 1 and 2.

Article 4 Mergers and acquisitions

7.39. In the case of a merger between two distinct undertakings, or the acquisition of one undertaking by another, which will give rise to a dominant position that may be expected to prevent, restrict or distort competition in the market for a good or service, the relevant authorities will have powers to investigate these possible effects and take action to remedy or prevent adverse consequences.

7.40. This Article would give the authorities powers to investigate the consequences of a merger or acquisition that would give rise to a dominant position, and to take action to avert any undue adverse consequences for effective competition. Such action might entail undertakings on the behaviour of the combined undertaking. In cases where such undertakings were unlikely to give sufficient assurance against anti-competitive behaviour, action under this Article could involve blocking the merger or acquisition in question It should be noted that Article 2 gives powers to influence mergers or acquisitions which strengthen an existing dominant position, and Article 1 may be used to control consortium bids; Article 4 provides additional powers in these matters.

International experience

7.41. In EU, UK and US law if the combined market share were to exceed certain percentages (25% in the UK), then the proposed merger would be referred to the competition authorities. If the effects were likely to be anti-competitive then the authority may recommend the minister to seek undertakings or halt the merger. While this is rare in practice, such a reference can slow business. In the laws of Japan and South Korea, mergers which would lead to a combined market share greater than 50% are not allowed.

Considerations for Hong Kong

7.42. Due to the small and open economy, companies need to be large in some sectors to capture reasonable economies of scale. Thus expansion can be a continuing and healthy process whether through companies setting up new businesses or taking over existing ones. In some cases, agreement to a takeover may save a company from bankruptcy. The Consumer Council did not find merger or acquisition a root cause of market dominance in any its competition studies.

7.43. This does not mean that mergers will never be a problem but it may be that Article 4 need not be introduced immediately. Articles 1 and 2 will provide some protection against a company which achieves market dominance through a merger or acquisition engaging in anti-competitive behaviour. It is also worth noting that telecommunication operators and some branches of the media are already subject to restrictions on mergers[4] (although in the case of the latter, the provisions are as much to safeguard a variety of views as to prevent market dominance). Chapter 8 discusses the question of timing.

Approach to defining restrictive practices

International experience

7.44. Legislation in most countries/territories contains a list of practices that are regarded as restrictive (the prohibition approach). The practices covered are similar to those covered by Article 1 and Article 2 above. The UK has an alternative approach. Instead of having a defined list of practices that are regarded as restrictive, the UK adopts a case-by-case approach with a list of practices considered restrictive developing over time. All agreements in which two or more businesses accept restrictions on their freedom must be placed on a public register unless the restrictions fall within well-defined limits. The theory of the law is that agreements will then be referred to the Restrictive Practices Court which can decide whether the agreement may continue. In practice, it became clear in the late sixties that the court would not allow agreements to continue and only one case where the court has been asked to decide whether the agreement should continue has come to the court in the last ten years. The case involves a collective agreement to enforce resale price maintenance on books and it is still before the court. All other cases before the court have been brought by the Director General of Fair Trading following the discovery of covert cartels. For all other agreements, the Director General has taken the view that the restrictions in the agreement are not of such significance as to warrant being referred to the court.

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[4] For example, the Television Ordinance prevents cross ownership and multiple ownership of local broadcasting licences (but is less restrictive with regard to satellite TV). There are also ownership restrictions on radio broadcasting licences.

Considerations for Hong Kong

7.45. The UK approach is regarded as weak in its ability to discourage such practices. Moreover, the compulsory filing of agreements with no restrictions of significance imposes a layer of bureaucracy that is alien to Hong Kong's traditions. A prohibition approach would be more pragmatic and transparent and the UK government has announced its intention to move to such a system.

7.46. The list of prohibited restrictive practices should take into account existing concerns in Hong Kong about practices which may be anti-competitive. It should also follow the approach taken in the competition provisions in the telecommunications licences (these provisions are better developed and more consistent than the provisions in the broadcasting licences).

The institutions

7.47. Based on experiences in developed countries/territories, there are two alternative institutional structures to enforce competition statutes, one takes an **agency approach** and the other takes a **court approach.** Both require two separate institutions, and a Competition Authority is common to both. Under the agency approach, the Appeal Body is the Business Practices Commission. Under the court approach, the Appeal Body is the Business Practices Court.

7.48. In both structures, the **Competition Authority** will have responsibility for investigating possible breaches of the competition statutes that come to its attention, whether by formal complaint or other channels. Thus it will have the duty both to respond to formal complaints made to it by a third party (other firms, consumers or any other parties) and to investigate cases on its own initiative without formal complaints. It will have investigative powers to require the provision of information (broadly such as could be required to be produced in civil court proceedings). In the light of its investigations, it may propose remedies, such as a change to a government regulation affecting the structure of that market or seek undertakings from the businesses concerned. (The Competition Authority may or may not have powers to fine for breach of the Competition Articles.)

7.49. The businesses concerned may reject these proposals and appeal to the Business Practices Commission/Court. In this case, the Authority will present its case to the Commission/Court for consideration. When a business has appealed against the judgment of the Commission, the Commission should have interim injunctive powers that allow it to require a business to abide by its judgment while the appeal is being considered.

7.50. It has been suggested that the Competition Authority could be given the role of ensuring competition in the regulated utilities. Those who advocate this suggestion see three principal advantages. First, it would avoid an increase in bureaucracy and the resources absorbed by government; indeed, over time, it

is possible that economies could be effected. Second, the absence of a dedicated regulatory body with a possible vested interest in maintaining regulation makes it easier for regulation to shrink and be replaced by the general oversight provided by competition policy. Third, decisions made by the Authority in the area of regulation could be appealed to the Business Practices Commission/Court as with competition issues. This provides an appeal mechanism that is currently absent for regulated companies in the present Hong Kong regulatory structure: considerations of natural justice call for such an appeals process. The Consumer Council puts the suggestion forward for wider discussion.

The Agency approach for the Appeal Body

7.51. The Business Practices Commission will consider the appeals brought by businesses against the Authority's decisions. It may consist of a panel of lawyers, economists and business people. It may also have a support staff with similar expertise. Each case could be heard by a panel of three, comprising a lawyer, economist and business person. The Commission will have the right to call and cross-examine witnesses, and will receive both written and oral evidence on the case from the Authority, the defending businesses, and other relevant parties. The Authority and the defending businesses will not have the right of cross-examination. The decisions of the Commission may be appealed to the courts for judicial review of procedure (i.e. the courts may overrule the decision if they find that the Commission has followed inappropriate procedures), but not on the substance of the case.

The Court approach for the Appeal Body

7.52. The Business Practices Court will consider the appeals against Authority judgments made by businesses against the Authority decisions. It may consist of a panel of judges and lay members. The process could comprise the following: the Authority submits its case in writing to the Court; the defendants will then submit a written answer; the Authority may then submit a further response on which the defendants may comment further in writing; and the Court will then commence a formal hearing, adopting the normal procedures of a civil court. The Court's judgments will lead to the development of a set of cases that will establish over time the detailed interpretation and application of the competition statutes, which will therefore become more predictable and understood.

7.53. The two structures embody certain important principles. They establish separate bodies for investigation and appeal, rather than a single organisation for both. This guards against the danger that a body that combined investigative and appeal functions might be reluctant to dismiss a case on appeal because this might be seen as an admission of inadequacy in its investigative powers. It also ensures that justice is not only done but also seen to be done. The agency approach has been followed in Australia and the court approach has been followed in New Zealand. The UK has followed both approaches with an agency

(the Monopolies and Mergers Commission) and a court (the Restrictive Practices Court). It addresses the problem that judges usually lack the knowledge of business and economics required to determine matters of competition policy by having the judge sit with lay experts. The combination of judges and lay experts gives the court the required balance of expertise.

International experience

7.54. The danger with the court model is that it may result in very lengthy and costly proceedings, as in the US model, so that competition policy becomes very cumbersome and expensive. This has been the experience in New Zealand, with the very lengthy resolution of the interconnection dispute between the incumbent business, New Zealand Telecom, and a new entrant. This might be avoided if there are sufficient barriers or deterrents in appealing to the Business Practices Court. These could take the form of an initial sifting of the case for appeal to dismiss actions that are judged frivolous and intended merely to delay a decision. Decisions to appeal could also be influenced by the burden of costs of the hearing and the possibility of fines if the appeal is unsuccessful: businesses will reflect carefully about appealing if they face the possibility of additional costs if they lose. The agency model avoids these problems, but does reduce the scope for cross-examination by both the appealing firm and the Authority.

Considerations for Hong Kong

7.55. In terms of cost, speed of decision-making, and small size of the pool of experts which different interested parties would have to rely on under the court system, it appears the agency approach would be more suitable for Hong Kong. In line with the territory's common law tradition, it may be desirable to ensure that the decisions of the agency can be appealed against in the courts. This should be only on narrow grounds, such as procedural issues, so as not to be slow up the process.

Penalties

7.56. The Authority must have powers to ask firms to desist from breaches of the competition law (just as the Equal Opportunities Commission has 'cease and desist' powers in relation to the Sex Discrimination Act). An important consideration is whether the Competition Authority should also have powers to impose fines if businesses are found to be in breach of the Competition Articles. This is clearly appropriate only if businesses are found to have behaved anti-competitively and thereby imposed costs on other businesses or consumers. It would therefore be inappropriate for Article 4 which might constrain mergers on the grounds of prospective, not past, detriment. It is also inappropriate for Article 3, since although this refers to complex monopoly practices that have resulted in detriment to others, by the definition of a complex monopoly the businesses concerned may not have been aware of this and therefore it would be unreasonable to fine them. Fines may be appropriate for Articles 1 and 2, and this would provide a deterrent against businesses engaging in breaches of these articles. Thus in the European framework of competition law, infringements of

the equivalent articles can attract fines of up to 10% of turnover. By contrast, the UK system makes no provision for fines at present. The UK Government has, however, announced its intention to revise the law on restrictive agreements when time permits and will, at that stage, introduce fines. Many have concluded that the UK system is unduly weak, since it allows businesses to engage in anti-competitive behaviour until found out, when they are merely required to desist. However, UK policy also lacks any interim injunctive powers for the competition authorities to require firms to desist from anti-competitive practices while cases are being reviewed. Allowing for such powers represents an alternative, and possibly better way, of strengthening competition policy without recourse to fines.

7.57. An alternative to fines is to rely on third parties suing for damages in the courts when a firm has been found by the Competition Authority (and Business Practices Commission/Court) to be in breach of the Competition Articles. This has the attraction that third parties who have suffered damages can receive compensation. However, this approach has difficulties. It will certainly lead to more costly and time-consuming legal proceedings (as in the US system, where third parties can sue for triple damages), which imposes an appreciable cost burden on firms. There is also the possibility that the courts may, in effect, reconsider the case, and may reach a different verdict from that of the competition authorities.[5] An alternative to involving the courts would be to allow the competition authorities to impose fines, and to use the fines to provide compensation to those suffering damage. But adjudicating between third parties on levels of compensation, would involve the competition authorities in an additional, and possibly controversial, set of issues.

Conclusion

7.58. In general, domestic conditions dictate the competition policy framework employed in each country/territory. Hong Kong should look at developing a pragmatic regulatory approach reflecting its commitment to small government rather than attempt a wholesale import of any given system Legislation should take into account Hong Kong's legal traditions, the size of the likely pool of experts and be compatible with the Basic Law. Government

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[5] This is possible if the courts take a different view of the appropriate burden of proof from the competition authorities. The usual approach of the competition authorities may well be to look at the balance of evidence, whereas the courts may require those pressing for damages to establish their case beyond reasonable doubt. The onus of proof appropriate in commercial law cases of this kind is a matter of controversy. But irrespective of this point, the defending company may use the opportunity of a court hearing to present their case afresh. It may be possible to change the law in such a way as to prevent the courts reopening the case, but this may not be straightforward.

should, in making decisions, assess the likely impact of its proposal on market competition. There are four possible elements of a competition law, namely :

a) Against restrictive agreements;

b) Against abuse of market power by a single firm;

c) Against collective abuse of market power; and

d) Mergers and acquisitions.

7.59. A fully comprehensive policy would include all four elements but it is not essential that they are all present in the competition law from its inception. Chapter 8 discusses the possibility of deferring the introduction of those elements that deal with collective abuse and the control of mergers and acquisitions.

Chapter 8

Conclusion and Recommendations

Conclusion

8.1. Competition policy is crucial to Hong Kong's economic future. Although Hong Kong prospered in the past decades without a comprehensive competition policy, it now faces an enormous challenge as it completes its transformation into a service economy, as its competitors in the region catch up and as the international competitive environment changes. Hong Kong must map out a pragmatic development strategy in which a comprehensive competition policy should play a vital part.

8.2. The Consumer Council's earlier studies provide clear evidence that key sectors of the domestic economy are presently subject to very limited competition. This situation carries significant risk of the emergence of anti-competitive practices, affecting consumer, business and taxpayers' interests[1]. There are already allegations that such practices exist in a number of areas.

8.3. The Government's current sector-specific approach is arbitrary and inconsistent. It provides safeguards against anti-competitive behaviour amongst telecommunications and broadcasting licensees but is unable to monitor or deal with anti-competitive behaviour in other sectors.

8.4. Our analysis shows that Hong Kong needs a comprehensive policy and related laws to promote fair competition:

At the macro level -

- to improve the efficiency of the non-tradable sector, and
- to lend credibility to Hong Kong's arguments for the removal of protectionist trade rules and the establishment of a global competition system; and

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[1] For example, the exceptionally high cost of residential property in Hong Kong means that Government has to house 50% of the population at public expense. This is one of the largest public housing programmes compared to number of inhabitants in the world. The Consumer Council's report on residential property (July 1996) argues that property prices reflect the lack of contestability (i.e. barriers to entry) in the residential property market.

At the micro level -

- to provide businesses with a fair and open competitive environment,
- to reduce the need for sector-specific regulation, and prevent unnecessary increases in regulation in other areas, and
- to ensure competition whenever and as far as possible, even for regulated industries.

8.5. Of these, the enhancement of competition in the non-tradable sector is perhaps the most important gain: competition policy would make an important contribution to lowering prices for consumers and reducing business overheads, input and labour costs. This would put Hong Kong in an even stronger economic position by putting downward pressure on inflation, enhancing the development of the service sector, and helping Hong Kong maintain its attractiveness to international direct investors.

8.6. Would Hong Kong be adopting a policy whose hour has passed? No, competition policies are being strengthened internationally. This reflects the view that competition law enhances the development of market economies. It does so by restoring the effectiveness of market mechanisms. International evidence supports the view that the introduction of competition laws can help to promote efficiency and innovation in those parts of the economy not subject to international competition, and enhance the capacity of the economy to adapt swiftly and efficiently to changing circumstances.

8.7. For these reasons and from a growing awareness of the benefits of competition policy to consumer welfare, more and more market economies in all regions of the world are adopting competition laws. Most developed economies, whether large (US) or small (New Zealand), a number of economies in transition (Hungary, Poland) and developing countries (Kenya) have competition laws. Switzerland passed a comprehensive competition law, in particular to combat cartels in the domestic economy, on 1 July 1996. Those countries with existing policies, like Australia and the UK, are updating, rationalising, and sharpening their competition laws. This is because they see a clear correlation between policies to promote competition and economic performance.[2]

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[2] "Australia's integration into the world economy has flushed competition policy out of the Government backwaters. There has been a growing perception within political and business circles that the various means for fostering competitive markets can make an important contribution to the improvement of Australia's international performance." Professor Allan Fels (1993), Chairman of Trade Practices Commission, Fair Trading no. 16, Canberra.

8.8. Competition policy, although it originated in "Western" economies, has also been adopted by Japan, South Korea and Taiwan. Malaysia and Thailand are examining the idea. Mainland China has provisions in the Anti-unfair Competition Law prohibiting anti-competitive practices. Hong Kong, as one of the few advanced economies without such a policy, is likely to find itself increasingly isloated. Without the ability to reach comity agreements with other countries, Hong Kong businesses and Hong Kong citizens may find other states trying to exercise extra-territorial jurisdiction. Moreover, in the Canada and the US, much competition law is criminal rather than civil and is enforced accordingly.

Recommendations

8.9. **The Consumer Council strongly recommends** the adoption of a comprehensive competition policy and enactment of a general competition law in Hong Kong. Competition law is an integral part of policy. This is because legal enforcement is the only transparent and effective way to prevent and deal with restrictive conduct.

8.10. The aim is to create a policy which is pragmatic and cost effective. The proposals on the design of such a policy are not intended to be prescriptive but, if the recommendation to adopt comprehensive competition policy is accepted, to provide a starting point for further work.

Competition Policy

8.11. The Consumer Council believes that an effective competition policy requires a wide-ranging and pro-active approach to promoting competition. To achieve this, **the Consumer Council recommends**:

a) action to promote an understanding of the aims of competition policy within Government as a whole and in the business community and members of the public;

b) a new system or procedure to ensure that Government decisions and the design of all Government policies and decisions give regard to the implications on competition. The procedure might be similar to that of environmental impact assessments required for major government policy decisions (where applicable). New proposals for regulation should be scrutinised to filter out those that are not strictly necessary; and

c) scrutiny of existing regulations to ensure that they are still necessary, effective and/or their objectives could not be achieved by other means, e.g. a review of statutory monopolies, procedures for awarding franchises, and Scheme of Control industries with the aim of increasing competition at the earliest possible opportunity.

Competition Law

8.12. **The Consumer Council strongly recommends** the enactment of a competition law to cover horizontal and vertical collusive agreements and abuse of dominant position, as summarised in Articles 1 and 2 below. This is a pragmatic approach suitable to Hong Kong.

a) Article 1: **to prohibit explicit agreements** between firms that are intended or have the effect of preventing, restricting or distorting competition. These include horizontal agreements such as those involved in price-fixing cartels, bid-rigging, etc. and vertical agreements such as retail price maintenance, exclusive dealership, tie-in sales, long-term supply contracts, etc.

b) Article 2: **to prohibit any abuse by one or more undertakings of a dominant** position that prevent, restrict or distort competition. This would address monopoly pricing, and vertical restraints such as tie-in sales enforced through market dominance.

8.13. Without these articles the competition legislation would not be effective. It will probably not be accepted as adequate in the international arena.

8.14. The proposed competition law should include:

a) an article controlling the **abuse of collective dominance;** and

b) an article for the control of **mergers and acquisitions.**

8.15. There are, however, pragmatic arguments for deferring the introduction of these two articles and it is for the Government to decide whether to introduce Articles 3 and 4 alongside Articles 1 and 2, or whether to supplement it at a later stage.

8.16. The issues raised in cases involving complex monopolies are best addressed when experience has been accumulated. Decisions relating to mergers and acquisitions also raise difficult technical issues, which must be resolved within a strict time table if the ordinary conduct of business is not to be impeded. Requiring the Competition Authority to deal with such cases from the start of its existence runs the risk of overburdening the Authority and bringing the new competition policy into disrepute. The existence of merger control would also increase the number of staff that would be required.

8.17. Introduction of Articles 3 and 4 at a second stage would not mean the existence of a void in the legislation. Articles 1 and 2, backed up by a general power to report on matters affecting competition, would, in themselves, be sufficient to offer a reasonable level of protection against anti-competitive acts and introducing these Articles first would give the Competition Authority a chance to develop its expertise and establish its procedures. It could then advise

the Government when it is able to cope with the work that would stem from the introduction of Articles 3 and 4.

8.18. Against the pragmatic arguments it can be said that competition laws almost invariably have provisions to deal with complex monopolies and mergers and their omission from Hong Kong's new law could raise questions about Hong Kong's commitment to competition. It could also be argued that if scarce legislative time is to be devoted to competition the issues should be dealt with in one session.

8.19. The arguments are finely balanced and the Consumer Council recommends that the Government decides how to proceed in the light of the debate that will follow the publication of this report. Appendix 6 lists out the general approach as found in most jurisdictions and the pragmatic approach as discussed in para. 8.17 above.

Exemptions

8.20. **The Consumer Council recommends** that exemptions to Articles 1 and 2 should be strictly controlled and, where possible, time-limited, in order to be consistent and fair to all industries. Where possible, the Competition Authority should publish a block exemption which would remove the need for companies to seek individual exemption.

8.21. A list of criteria should be drawn up spelling out when an agreement would be considered as consistent with the public interest. They might include:

a) professional codes of practice, such as those for doctors, dentists, lawyers, accountants, and others. Initially, professional rules specified in legislation should also be exempted, but should be examined by the Competition Authority;

b) shared funding of basic or strategic research; and

c) agreements to protect consumer welfare.

Administrative Framework

8.22. **The Consumer Council recommends** that:

a) a **Competition Authority** should be established to investigate possible breaches of the law; and

b) an **Appeal Body** should be established to hear appeals against decisions by the Competition Authority.

Competition Authority structure

8.23. **The Consumer Council recommends** that:

a) the Competition Authority should be an independent body outside the civil service; and

b) the Competition Authority should have a full-time chairman and other members appointed by the Chief Executive of the Hong Kong Special Administrative Region.

Duties

8.24. The Authority should be given the following duties:

a) to advise the Government on competition policy;

b) to ensure compliance with the law;

c) to consider and suggest reforms to the relevant legislation; and

d) to have a widely defined general public interest 'deregulation' duty, to become aware of circumstances leading to lack of market contestability and, in the performance of this or his specific duties, to recommend to Government changes to regulation to facilitate competition in the public interest. Such recommendations should be made public.

Powers

8.25. The Authority should have powers to:

a) initiate investigations, or to act on the recommendations of others; and

b) issue notices requiring the company to cease and desist from a practice deemed to be illegal, if in the course of its investigation, the Authority is satisfied that such a practice is illegal.

8.26. Consideration should also be given to whether the Competition Authority should have injunctive powers.

Penalties

8.27. There is a case for including provision in the competition law for companies that breach Article 1 or Article 2 to be penalised. The case is stronger in respect of Article 1 than Article 2. If it is considered that penalties should be imposed, the level should commensurate with the excess profits obtained from the prohibited conduct or the damage suffered by the injured parties. It is also for consideration whether the Competition Authority should be able to award damages to the injured parties.

Appeal Body

8.28. **The Consumer Council recommends that** the Competition Authority's decisions are subject to review by an Appeal Body rather than the courts. Decisions of the Appeal Body would be final. The Appeal Body should be clearly separated from the Authority.

8.29. The Chairman of the Appeal Body should be appointed by the Chief Executive of the Hong Kong Special Administrative Region. The Chairman should convene and chair tribunals, dealing with specific cases on an ad hoc basis. The other members should have experience relevant to competition and business.

8.30. The tribunals should publish detailed reports of their findings, withholding commercially sensitive information.

Administrative arrangements

Access to Competition Authority

8.31. The Consumer Council suggests that complaints to be considered for investigation by the Competition Authority could be initiated from three sources: the Authority itself, the Government, and individual firms or persons.

Size and cost

8.32. In line with the principles of small government and to keep costs to a minimum, The Consumer Council envisages a small organisation more similar in size to the office of the Commissioner for Administrative Complaints. There is a strong argument for forming small ad hoc expert committees assisted by the Authority's staff to carry out the investigations. This would avoid the need for a large permanent staff and harness specialist experience.

Source of finance

8.33. Since the beneficiaries of competition policy will be general and benefits will not accrue to any one sector of the community over time, The Consumer Council recommends that the Authority be publicly funded.

Impact on regulators

8.34. Government will also need to consider:

a) the impact of the competition law on the anti-competitive provisions in existing licences; and

b) the Competition Authority's powers in relation to independent regulatory agencies'.

8.35. On (a), the Consumer Council believes the same standards of behaviour should apply to all Hong Kong businesses and therefore recommend that regulated industries should be subject to the anti-competitive provisions in competition legislation. Any detailed applications and any special exemptions from the provisions for a particular regulated industry which are necessary in the public interest, could be contained in licences, appendices to competition legislation or in sector-specific legislation.

8.36. On (b), the Consumer Council believes that in the interests of consumer protection and the better operation of the market, it is vital for OFTA and other regulatory agencies to maintain the facilitating of competition as a key objective. They may wish to seek the advice of the Competition Authority on the effect on competition of regulatory changes, for example, such as changes to licences.

8.37. With regard to investigation of anti-competitive practices, the Consumer Council recommends a modified version of the UK arrangements to suit circumstances in Hong Kong. In the UK, there is a separate body (the Monopolies and Mergers Commission) responsible for the full investigation and appointment of an investigatory panel. In Hong Kong, investigations would, under the commission approach, be the responsibility of the Competition Authority. In the case of regulated industries, the Consumer Council sees advantage in giving the Competition Authority and regulatory body power to appoint by agreement the panel of experts to carry out the investigation. The appeal channel would be the same as those for investigations initiated by the Competition Authority alone.

Closing remarks

8.38. Hong Kong has enjoyed great success in the past but its advantages are narrowing as its competitors transform their economies and adopt law and policies that are similar to those that made Hong Kong so successful. To stay ahead, Hong Kong can no longer afford to ignore the problems that stem from a lack of clear rules against anti-competitive practices and an Authority to enforce them. Hong Kong's place in the world economy will be jeopardised if it is unable to play a full role in the international debate on competition and trade policy now taking place.

8.39. It is, however, essential that the changes Hong Kong adopt reflect its own culture and traditions. The time has come for the debate to move on from the question of whether Hong Kong should have a competition law to ensuring it has a law that will safeguard future prosperity. Devising such a law needs the constructive engagement and active support of the whole community.

8.40. The Consumer Council has made reference to the set up of the other statutory bodies such as the Commissioner for Administrative Complaints, Equal Opportunities Commission, Office of the Privacy Commission, and Securities and Futures Commission. The Consumer Council believes that Hong Kong needs a Competition Authority to take up the important task described in this report. The Consumer Council believes that it will be an effective and efficient body. The Competition Authority will not be just one more statutory body to be added to the list but an important contributor to ensuring that Hong Kong meets the challenges of future successfully. If Hong Kong's economy is to continue to grow, it is vital that a comprehensive competition policy is introduced now. Without such a policy, Hong Kong may see the gradual decline of its economic fortunes.

International comparison of objective/backgound of competition law

Jurisdiction	Objective/Background
Australia	To improve competition and efficiency in markets, foster adherence to fair trading practices in well-informed markets, promote competition pricing wherever possible and restrain price rises in markets where competition is less than effective. ***Annual Report,*** Australian Competition & Consumer Commission **(1975)**
Mainland China	This Law is formulated in order to ensure the sound development of the socialist market economy, to encourage and safeguard fair trade, to stop acts of unfair competition and to protect the lawful rights and interests of business operators and consumers **Article 1, PRC Anti-unfair Competition Law (1993)**
European Union	To promote throughout the Community a harmonious [and balanced] development of economic activities, [sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the] raising of the standard of living [and quality of life, and economic and social cohesion and solidarity among Member States]. **Article 2, Treaty of Rome (E.C. Treaty 1957)**
Japan	This Act, by prohibiting private monopolisation, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income. **Act 54, Antimonopoly Act (1947)**
South Korea	This Act, by prohibiting abuse of market dominating power by business concerns and excessive concentration of economic power and by controlling undue collaborative activities and unfair trade practices, aims at encouraging fair and free competition, thereby stimulating creative business activities and protecting consumer as well as promoting a balanced development of the national economy. **Article 1, the Monopoly Regulation and Fair Trade Act (1980)**
Taiwan	To protect trade order and consumer right, ensure fair competition, enhance economic stability and growth. **Article 1, Fair Trade Law (1991)**
UK	To promote effective contribution in the markets for goods and services and thereby to further the economic interests of consumers and the efficiency of business. ***Office of Fair Trading Management Plan 1996-7***
US	The promotion of competition in open markets ***Report of Attorney-General's National Committee to Study the Antitrust Laws 1, p.1. (1955)***

Examples of trade practices which might be subject to scrutiny under competition laws

1. The Consumer Council has received complaints about, or become aware of, the following examples of trade practices which may be interpreted as restrictive. The Consumer Council wishes to stress that it has not been able to verify some of the allegations. Also, given the focus of the Consumer Council, we have inevitably attracted more complaints about industry practices which directly affect consumers. Possible restrictive practices affecting businesses may therefore be under-represented in this sample.

2. These real-life examples are presented here for the sole purpose of illustrating the types of anti-competitive practices which might come under the scrutiny of competition laws. The Consumer Council is not passing any definitive judgment on them. With competition laws in place in Hong Kong, the complaints could be investigated and although, in some cases, the complaints might be well-founded, in other cases the behaviour alleged may not have taken place or the practice might be suitable for an exemption.

Abuse of market power?

3. A group of suppliers of consumer products complained against two big retailing chains for requiring them to accept harsh trading terms if they (the suppliers) wanted to market their products in the shops of the chains. Those terms include being charged listing fees for new products, in-store promotion fund and promotion discount etc.

4. An exporter and importer trade association complained against two big terminal operators for imposing a new gate charge in addition to the terminal handling charges. The association considered that the imposition of such a gate charge was unreasonable because it was of the same nature as the handling charge and users had no choice of other suppliers.

5. The gas company offered property developers a combination package for the installation of gas supply piping for both cooking and water heating. This charge was increased by 61.5% if gas was adopted for cooking only. A competitor complained that the gas company had abused its dominant position in the market as most consumers prefer "flame cooking" for Chinese cuisine. Further, due to legal and technical constraints, other energy forms do not serve as effective substitute for piped gas. (Legal constraints: Government prohibits the transmission of LPG under public roadways. Technical constraints: once property developers decide on the installation of gas, LPG or electricity for the kitchen and bathroom, the switching cost for consumers is high).

6. A supplier complained that a big retailer warned that it would cease their business relationship if he participated in another organisation's promotional fair during a festival.

7. A company complained that the revised Government policy for public works had made the company's competitor both the regulator and a service provider in the field of ISO 9000 certification services.

Price-fixing?

8. Through the Hong Kong Association of Banks Ordinance Section 21(a), the Banking Ordinance Sections 12 and 14, Government allowed the Hong Kong Association of Banks (HKAB) to make rules regarding the maximum rates of interest for HK dollar deposits of $500,000 or less having a maturity below 15 months. This is known as the Interest Rate Rule (IRR). This interest rate cartel remained in force for over 30 years. In August 1994, the Government partially accepted the Consumer Council's recommendation to liberalise the IRR by stages. Banks are now free to decide on the interest rate for deposits of 7 days and above, but saving and demand deposits and deposits below 7 days are still subject to price-fixing by HKAB.

9. Many people are not satisfied with the situation that the pump prices of petrol and motor diesel in all petrol station are exactly the same. Furthermore, it has been the practice for all oil companies to adjust the pump prices around the same time.

10. Trade associations formed by private instructors in the driving instruction industry jointly decide on the annual price adjustment and instruction fees for driving lessons.

11. Some travel agents complained against the travel trade body for imposing and enforcing minimum package prices (MPP) for certain tour packages, i.e. travel agents should not sell tours to consumers below the MPP. Travel agents will be penalised for breaches by the Travel Industry Council (membership of TIC is a prerequisite condition for obtaining a licence from the Government Registrar of Travel Agents). At end of October 1996, the TIC ended the MPP for Korea and Thailand tours, but MPPs for other routes remain unchanged.

12. In view of the escalating cost of property, many buyers and sellers were not satisfied with the scale fees for property conveyancing proposed by and enforced by the Law Society. As an illustration, the scale fee for properties with a price between $1,000,000 and $10,000,000, range from 1% to 0.425% of the price. The Legal Services Reform Bill has proposals to abolish the scale fees and allow free competition.

13. Many prospective property buyers complained against the practice of real estate agents imposing a fixed 1% commission rate as recommended by the industry associations concerned.

14. There were a number of business forms printers supplying printing jobs to a complainant. In the tendering exercise, the complainant observed that the price quotations and the annual rate of price increase of these printers were almost identical, hence some kind of price-fixing and bid-rigging was suspected.

15. A trade association of business forms printers was formed in September 1992 to, amongst other business of a trade association, decide on paper prices and establish minimum orders.

Unfair competition through subsidisation and predatory pricing?

16. A private publisher complained against a government funded trade promotion organisation for competing with the private sector in publishing trade information magazines.

17. A private firm complained against a government subsidised organisation for undercutting prices in the provision of pollution control services.

18. When a new entry entered the newspaper market in 1995, there were allegations of a boycott by some distributors against the new entrant. The subsequent price war in late 1995 attracted much public concern over the retail pricing strategy of various newspaper companies as to whether the sharp reductions in prices by some were tantamount to predatory pricing.

Exclusive dealing?

19. A television broadcasting company complained against another broadcasting company for launching an advertising campaign package which offered substantial discounts to advertisers on the condition that they (the advertisers) would not place advertisements with the rival company during the discount period.

20. Two big supermarket chains required suppliers to supply certain products to each of them on an exclusive basis and not to the other chain.

21. An owners corporation of a residential housing estate complained against a broadcasting company for refusing to provide service to the estate unless the owners agreed not to allow the entry of any rival companies in future.

22. A company which installed satellite television reception and distribution systems in buildings restricted the use of the same facility for viewing other services, although the owners corporation of the building paid for and therefore legally owned the facility.

Resale price maintenance?

23. An educational book sellers' trade association which also controlled the wholesale supplies of school textbooks "recommended" book retailers not to give more than a 5% discount to consumers. At one time, there were threats of not giving the "offending" retail bookstore supplies in future.

24. A group of small paging service companies complained against the trade association formed by a group of large paging service companies for reaching an agreement to keep the monthly service fee in the range of $230 to $360.

Tie-in sales?

25. Students complained that some exercise books for certain school textbooks were not available separately. They had to buy the textbook in order to obtain a copy of the exercise book, even though they already had a copy of the textbook.

26. Some financial institutions require customers to insure their mortgaged properties with specified insurers and also use their nominated solicitors and valuers if they (customers) want to obtain mortgages.

27. Many property managers and owners corporations complained that they had no choice but use the maintenance services of the original suppliers after the lifts or elevators were installed.

Tradable and non-tradable services

Tradable services

1. Tradable services are defined as services which are produced and delivered (sold to the customer) in the home country and sold to a foreigner in a different country (e.g. stockbroking by telephone), or whilst visiting Hong Kong (e.g. training services). These services are often produced and delivered at the same time. The definition also includes services which are produced in the home country and delivered in a foreign country, e.g. sales of air tickets on an airline based in Hong Kong to overseas customers.

2. Tradable services broadly cover import/export and wholesale, tourism, transport and storage, communications, wholesale banking, finance (excluding banking), insurance, media services, advertising and market research, building and construction related services, professional services, and other tradable services such as tertiary education.[1] These categories also include non-tradable services, for example, HK dollar deposits in the banking sector and local telephone calls in the communications sector.

Non-tradable services

3. Non-tradable services are, to a large extent, intangible, cannot be stored and are difficult to transport. Often they require personal interaction between provider and user, thus many are produced when and where they are consumed. Non-tradable services are not only information-intensive, but also human capital-intensive. Their production is for the most part dependent on local resources, including skilled labour, infrastructure, and land.

4. Examples of non-tradable services are professional services such as legal and accounting services, medical and dental services, community, government and social services, public utilities, local media services such as local television broadcasting, retail banking services such as HK dollar deposits and mortgage loans, and other retail services such as restaurants and supermarkets. They also include services provided by local companies to foreign-owned companies or multinational firms in Hong Kong.

5. The point is also worth making that whether services are tradable or non-tradable depends in part on the size of the purchaser. Shopping around financial centres for banking services is really only an option for large companies. Small companies, which play a significant role in economic growth, are in practical terms limited to what is available in Hong Kong.

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[1] Hong Kong Government Secretariat, *Study on Promotion of Hong Kong Services*, 13 April 1995.

Competition Policy : Asian experience

Mainland China

1. At the third session of the Standing Committee of the 8th National People's Congress in September 1993, the Anti-unfair Competition Law[1] was enacted. The Law was introduced to "to ensure the sound development of the socialist market economy, to encourage and safeguard fair trade, to stop acts of unfair competition and to protect the lawful rights and interests of business operators and consumers" (Article 1).

2. The law contains prohibitions of practices such as "price-fixing" (Article 15) and "predatory pricing" (Article 11). The Law also embodied provisions which protect trade marks and patents. There are distinct features such as prohibitions against "passing off of the registered trademark of another party"; "unauthorised use of the name, packaging or trade dress unique to well-known products"; "unauthorised use of the enterprise name or personal name of another party"; and "use on products of quality marks such as certification marks, marks of fame and marks of excellence that are counterfeit" (Article 5).

3. There are also provisions restricting the conducts of administration and business, i.e., "Governments and their subordinate departments may not abuse their administrative powers" in Article 7 and "Business operators may not use bribery" in Article 8. These are clearly important issues in ensuring fair competition, although these terms are contained in other legislation in the form of copyright laws and anti-corruption laws in other countries.

4. Enforcement responsibilities fall on "authorities above the county level" (Article 16). County authorities are granted the enforcement rights to make inquires of the business operators, interested parties, and witnesses [Article 17(1)]; to inquire about and duplicate agreements, account books, bills, receipts, etc. [Article 17(2)]; and to examine property connected with acts of unfair competition [Article 17(3)].

5. The authorities had at one time been working on drafts of an anti-trust law to deal with monopolies. This remains a draft and has not yet been made formal law.

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[1] Encyclopaedia of Chinese Law, Vol. II.

Japan

6. Japan was the earliest country to introduce competition law among Asian countries. The law was introduced in 1947.

7. The objective of the law is stated as "by prohibiting private monopolisation, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general."

8. The above statement can be broken into three meaningful sub-sections. First, as with competition policies introduced in the EU, UK and US, the primary concern in the Japanese legislation is over "excessive concentration of economic power" and "eliminating unreasonable restraint." The former was partly accomplished with the breaking up of powerful business combines (known as Zaibatsu), while the latter is achieved with the prohibition of specifically defined restrictive trade practices through the law[2]. Another important area covered in the law relates to the heightening of the level of employment and people's real income.

9. Japanese competition law has its own distinctive characteristics. It is among the first competition laws that specifically takes consumer benefit into account with "to assure the interests of consumers" clearly stated as its objective. This is important as previously competition law was primarily regarded as an issue between businesses. The importance of consumer benefit has largely been taken as a subsidiary objective in the formulation of legislation.

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[2] Under S.2(9), unfair trade practices is defined to include unjustly discriminating against others; dealing at unjust prices; unjustly inducing or coercing customers of a competitor to deal with oneself; dealing with another party on unjustly restrictive terms; unjust use of one's bargaining position; unjust interfering, inducing, investigating or coercing.

Singapore

10. Like Hong Kong, Singapore has no competition law to oversee domestic competition. However, the economic structure of Singapore is different from that of Hong Kong. Hence, its need for a competition law differs from that of Hong Kong. More specifically, while most of Hong Kong's companies are privately owned, most of Singapore's dominant companies are either multinationals or Government Linked Corporations (GLCs) . With such linkage, the Singapore Government actually exerts pressure on the GLCs to compete with each other in light of public interest.

South Korea

11. Prior to the introduction of competition law, the majority of the country's product markets were either monopolistic or oligopolistic in structure and were dominated by Chaebols (the country's conglomerate business groups). In fact, price stabilisation was regarded as a "pressing economic goal"[3].

12. The second oil crisis in the late 70's prompted a reassessment of the past performance of the economy. This led to the general consensus that the economy should be run according to competitive market forces with minimum government and institutional intervention. The result was the introduction of the Monopoly Regulation and Fair Trade Act (Dec. 1980).

13. Due to the common view that the concentration of economic power with Chaebols needed to be addressed, the potential implication of market dominance by these large firms received much attention in the drafting of the Act. One distinct characteristic of the competition act is the existence of the "large enterprise group" designation (Article 8-3). This designation is prescribed to large companies according to the criteria prescribed by the Presidential Decree.

14. Members of this "large enterprise group" are acknowledged as companies possessing dominating economic power and are subjected to limitations that may not be applied to other companies without the designation, e.g., Restrictions on Combination of Enterprises (Article 7); concurrent holding of officer's position in another company [Article 7(2)] and Prohibition of Mutual Combination (Article 7-3)[4].

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[3] K.U. Lee, *Competition Policy in Korea*, presented at the International Conference on Fair Trading, June 1995.

[4] For example, companies with the "large enterprise group" designations are prohibited to "acquire or own stocks of an affiliated company which acquires or owns its stocks" [Article 7-3(1)]. Furthermore, the company is required to "dispose of stocks within six months from the day on which it acquires or holds them" [Article 7-3(2)].

15. For the enforcement of competition law, a Fair Trade Commission (FTC) was set up in the Monopoly Regulation and Fair Trade Act (Ch IX). The Commission is established in the Economic Planning Board "to deliberate and decide important matters provided in this Act ... prior to the decision or disposition concerning such matters to be made by the Minister of the Economic Board" (Article 26). Hence, the role of the FTC is to administer and investigate while the Minister of the Economic Board carries the decision-making responsibility with regard to violations. In fact, cases are typically brought to the Commission's attention by the Minister of the Economic Planning Board or by any person via the Board.

16. Since the introduction and implementation of the Act, the South Korean economy has been transformed from a government-led, heavily regulated economy into a free market economy. The government also claimed that the introduction of competition policy has prepared the country for international, bilateral or multilateral trade talks.

Taiwan

17. Confronted with the fast changing environment both inside and outside, Taiwan recognised, in the late 1980s, that their economic order and structure could no longer support the needs of the rapidly growing economy in the global market. Competition law was introduced in 1991 as a response in the form of the Fair Trade Act. The focus on economic development is clearly reflected in Act 1 of the law which stated that the objective was "To protect fair trade and consumer rights, ensure fair competition, enhance economic stability and growth".

18. The Taiwan law contains clear definitions concerning competition, monopolies and includes prohibitions against such trade practices as price-fixing or conspiracies to boycott competitors[5]. Its law also contains significant coverage over unauthorised use of the name, certification marks that are counterfeit (Article 20, 21 and 22).

19. A Fair Trade Commission was set up to enforce the competition law in Taiwan. Under Article 25, the Fair Trade Commission is granted the authority to formulate policies and rules, hold hearings, investigate, and exercise judgment concerning violations of the law. The Commission also possesses the right to grant exemptions[6]. However, exemptions can be granted for not more than

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[5] Monopoly is defined as when there exists no competition in a market where, or when a company possess a dominant market power to exclude competition.

[6] Exemptions can be granted based on one of seven reasons. These include lower production cost, to raise technical efficiency, to participate in joint research and development, to ensure or promote export, to strengthen the effective of trade, to

three years. Application for extension must be filed with the Commission prior to expiration.

Questions frequently asked at the Legislative Stage

20. At the early stage of Taiwan's legislation, the introduction of competition law with new restrictions on market behaviour led to concerns by the Government as well as society. The worry was whether fair trade law and its implementation would restrain business activities in Taiwan.

21. Regulations covering monopoly, mergers, and vertical restrictions caused particular concern since Taiwan was an even smaller economy than it is today, and most businesses with market advantages were either public companies or companies with specially granted franchises. Furthermore, Taiwan's openness to international imports was frequently cited as an argument why fair trade laws were not an urgent concern in Taiwan.

22. Concerns were also expressed over how the law would affect joint ventures and strategic alliances. Some businesses said they needed a degree of vertical integration such as a territory wide network of suppliers and uniform pricing to operate effectively and establish their market image.

23. In the light of these concerns, the Taiwanese authorities developed a programme to implement the new competition law and resolved to take the following steps:

a) Use academic experts to research and study actual cases based on appropriate theory.

b) Hold quarterly meetings with industry groups and academic experts to discuss policies and obtain input on how past cases are handled as well as set future objectives and strategy.

c) Hold public fora to enhance public understanding of fair trade and competition rules.

d) Hold special intensive training fora for companies' management.

e) Hold special fora for directors of companies.

f) Provide administrative direction for business targeting at traditional practices that may violate fair trade law.

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respond to economic depression and to promote competitive efficiency for small and medium businesses.

g) Enhance administrative cooperation between competition authority and regulatory agencies.

h) Effective use of media to promote understanding of law.

International comparison of monopoly and trade practices laws

Competition Issues	Jurisdiction						
	Mainland China	European Union	Japan	South Korea	Taiwan	UK	US
Monopoly	PRC, Anti-unfair Competition Law, 1993, Art. 6	Treaty of Rome, 1957, Art. 86	Anti-monopoly Act, S.3, S.21, S.22, S.23, S.24; Fair Trade Commission Notification No.15, 1982, S.14	Monopoly Regulation and Fair Trade Act, 1980, Art. 3	Fair Trade Law, 1991, para 10	Monopolies and Restrictive Practices Act, 1948, Monopolies and Mergers Act, 1965; Fair Trading Act, 1973, S.1, S.2	Sherman Act, 1890, S.2
Business Combination		Treaty of Rome, 1957, Art. 85	Anti-monopoly Act, S.15, S.16, S.18	Monopoly Regulation and Fair Trade Act, 1980, Art. 7	Fair Trade Law, 1991, para 11	Monopolies and Mergers Act, 1965; Fair Trading Act, 1973, Part V	Sherman Act, 1890, S.1; Clayton Act, 1914, S.7
Collusion Agreements		Treaty of Rome, 1957, Art. 85	Anti-monopoly Act, S.24-3, S.24-4	Monopoly Regulation and Fair Trade Act, 1980, Art. 11	Fair Trade Law, 1991, para 10, 19	Restrictive Practices Act, 1976, S.6(1)d	Sherman Act, 1890, S.1
Holding Company			Anti-monopoly Act, S.9, S.10, S.11, S.18	Monopoly Regulation and Fair Trade Act, 1980, Art. 7-2			Clayton Act, 1914, S.7; Celler-Kefauver Act, 1950

	Jurisdiction						
Competition Issues	Mainland China	European Union	Japan	South Korea	Taiwan	UK	US
Interlocking Directorates			Anti-monopoly Act, S.13	Monopoly Regulation and Fair Trade Act, 1980, Art. 7(2)			Clayton Act, 1914, S.8 and S.10
Joint Ventures			Anti-monopoly Act, S.24-4	Monopoly Regulation and Fair Trade Act, 1980, Art. 11		Fair Trade Act, 1973, S.65, S.66 Restrictive Practices Act, 1976, S.6	Sherman Act S.1; Clayton Act, 1914, S.7; Federal Trade Commission Act, 1914, S.5
Trade Associations			Anti-monopoly Act, S.8	Monopoly Regulation and Fair Trade Act, 1980, Art. 18		Restrictive Practices Act, 1976, S.8; Resale Price Act, 1976, S.4	N/A
Price-Fixing (Horizontal)	PRC, Anti-unfair Competition Law, 1993, Art.15	Treaty of Rome, 1957, Art. 85 (a), 86 (a)	Anti-monopoly Act, S.18-2	Monopoly Regulation and Fair Trade Act, 1980, Art. 3(1)	Fair Trade Law, 1991, para 18	Restrictive Practices Act, 1976, S.6(1)a, S.11(2)a	Sherman Act, 1890, S.1

	Jurisdiction						
Competition Issues	Mainland China	European Union	Japan	South Korea	Taiwan	UK	US
Resale Price Maintenance (Price-Fixing - Vertical)		Treaty of Rome, 1957, Art. 85(a) , 86(a)	Anti-monopoly Act, S.24-2; Fair Trade Commission Notification No.15, 1982, S.12	Monopoly Regulation and Fair Trade Act, 1980, Art.20	Fair Trade Law, 1991, para 18	Resale Price Act, 1964, 1976	Sherman Act, 1890, S.1
Price Discrimination		Treaty of Rome, 1957, Art. 85(d), 86(c)	Fair Trade Commission Notification No.15, 1982, S.3 S.4	Monopoly Regulation and Fair Trade Act, 1980, Art. 3(1)	Fair Trade Law, 1991, para 19	Restrictive Practices Act, 1976, S.6(1)b	Robinson-Patman Act, 1936
Predatory Pricing	PRC, Anti-unfair Competition Law, 1993, Art.11	Treaty of Rome, 1957, Art. 86(a)	Fair Trade Commission Notification No.15, 1982, S.6	Monopoly Regulation and Fair Trade Act, 1980, Art. 3(1)	Fair Trade Law, 1991, para 19	Restrictive Practices Act, 1976, S.30	
Unjustly High Purchasing Price		Treaty of Rome, 1957, Art. 85(a), 86(a)	Fair Trade Commission Notification No.15, 1982, S.7	Monopoly Regulation and Fair Trade Act, 1980, Art. 3(1)	Fair Trade Law, 1991, para 19		
Division Of Markets		Treaty of Rome, 1957, Art. 85(c)				Restrictive Practices Act, 1976, S.6(1)f, S.11(2)e	Sherman Act, 1890, S.1

	Jurisdiction						
Competition Issues	Mainland China	European Union	Japan	South Korea	Taiwan	UK	US
Exclusive Dealing	PRC, Anti-unfair Competition Law, 1993, Art.6		Fair Trade Commission Notification No.15, 1982, S.11		Fair Trade Law, 1991, para 19	Resale Price Act, 1976, S.5	Clayton Act, 1914, S.3
Boycotts And Refusals To Deal			Fair Trade Commission Notification No.15, 1982, S.1, S.2		Fair Trade Law, 1991, para 19	Resale Price Act, 1976, S.1, S.2	Sherman Act, 1890, S.1
Tie-Ins	PRC, Anti-unfair Competition Law, 1993, Art.12	Treaty of Rome, 1957, Art. 85(e) , 86(d)	Fair Trade Commission Notification No.15, 1982, S.10		Fair Trade Law, 1991, para 19		Sherman Act, 1890, S.1; Clayton Act, 1914, S.3
Deceptive Advertising	PRC, Anti-unfair Competition Law, 1993, Art.9		Fair Trade Commission Notification No.15, 1982, S.8		Fair Trade Law, 1991, para 20 - 21		Federal Trade Commission Act, 1914, S.5, S.12
Bait Advertising	PRC, Anti-unfair Competition Law, 1993, Art.13		Fair Trade Commission Notification No.15, 1982, S.9				Federal Trade Commission Act, 1914, S.5, S.12
Defamatory Advertising	PRC, Anti-unfair Competition Law, 1993, 14				Fair Trade Law, 1991, para 22		

	Jurisdiction						
Competition Issues	Mainland China	European Union	Japan	South Korea	Taiwan	UK	US
Pyramid Selling					Fair Trade Law, 1991, para 23		Federal Trade Commission Act, 1914, S.5, S.12
Interference With A Competitor's Operation	PRC, Anti-unfair Competition Law, 1993, Art.10		Fair Trade Commission Notification No.15, 1982, S.1, S.2		Fair Trade Law, 1991, para 19		
Illegal Obtainment Of Trade Secret					Fair Trade Law, 1991, para 19		
Unauthorised Use Of Trade Mark	PRC, Anti-unfair Competition Law, 1993, Art.5				Fair Trade Law, 1991, para 20		
Abuse Of Power By Government Officials	PRC, Anti-unfair Competition Law, 1993, Art.7						

	Jurisdiction						
Competition Issues	Mainland China	European Union	Japan	South Korea	Taiwan	UK	US
Use Of Bribery	PRC, Anti-unfair Competition Law, 1993, Art.8						
Dedicated Agency	None	None	Anti-monopoly Act, S.27 - S.88-3	Monopoly Regulation and Fair Trade Act, 1980, Ch.IX	Fair Trade Law, 1991, para 25 -29	Monopolies and Restrictive Practices Act, 1948; Fair Trading Act, 1973, S.1, S.2	Federal Trade Commission Act, 1914
Dedicated Court	None	None	None	None	None	Restrictive Trade Practices Act, 1956; Restrictive Practices Court Act, 1976	None

Alternative approaches to trade practices legislation

Competition Issues	Options for Hong Kong	
	Option 1 General Approach	Option 2 Pragmatic Approach
Division of Markets	√	√ (Article 1)
Boycotts and Refusals to Deal	√	√ (Articles 1 & 2)
Unjustly High Purchasing Price	√	√ (Articles 1 & 2)
Collusion Agreements	√	√ (Articles 1 & 2)
Exclusive Dealing	√	√ (Articles 1 & 2)
Predatory Pricing	√	√ (Articles 1 & 2)
Price Discrimination	√	√ (Articles 1 & 2)
Price Fixing (Horizontal)	√	√ (Articles 1 & 2)
Resale Price Maintenance (Price Fixing -Vertical)	√	√ (Articles 1 & 2)
Tie-Ins	√	√ (Articles 1 & 2)
Monopoly	√	
Business Combination (mergers)	√	
Bait Advertising	√	
Deceptive Advertising	√	
Defamatory Advertising	√	
Holding Company	√	
Illegal Obtainment of Trade Secret	√	
Interference with a Competitor's Operation	√	
Interlocking Directorates	√	
Joint Ventures	√	
Pyramid Selling	√	
Trade Associations	√	
Unsolicited Goods	√	
Unauthorised Use of Trade Mark	√	*
Abuse of Power by Government Officials	√	*

Notes: * already incorporated in the current legal framework

公平競爭政策：
香港經濟繁榮之關鍵

1996年11月

消費者委員會

公平競爭政策：香港經濟繁榮的關鍵
報 告 摘 要

香港面對的經濟挑戰

1. 近數十年來，香港經濟成就超卓，本地生產總值實質增長持續強勁，按人口平均計算，本地的生產總值是全球最高的地方之一。這強勁的經濟表現，其中一個原因是由於香港位處中國的大門，亦易於通往其他東南亞國家，因此具策略性的位置。可是，隨着電訊科技及其他交通運輸的發展，香港的地理位置優勢已經減弱。香港在其他方面的領先優勢，亦因爲競爭對手經濟政策的改變，採納了鼓勵外貿及投資的法例和政策，而逐漸降低。因此，香港要維持其競爭優勢，面對莫大的挑戰。

2. 在過去二十年來，香港的經濟結構出現重大轉變，由製造業爲主變爲以服務業爲主，服務業迅速發展，取代了製造業作爲香港主要經濟活動的地位。服務出口將成爲經濟增長的主要動力。香港政府亦期望服務業成爲香港未來經濟增長的「火車頭」，並曾表示，會確保服務市場盡量開放及具競爭力。

3. 在不干預政策(laissez-faire)下，並非所有服務業的市場都能自動產生高度的競爭壓力。服務業跟製造業不同，製造業大部份產品在國際市場出售的，須面對國際競爭；但服務業卻包括一些只提供給本地使用的服務，如法律及會計服務、醫療及牙醫服務、公用事業、本地電台及電視廣播、零售銀行服務、酒樓食肆及超級市場等等。這些服務毋須面對國際競爭。

4. 消費者委員會早前曾研究本港的主要行業，發現一些行業只有很少的競爭，例如：香港銀行的港幣存款、超級市場及氣體燃料供應等。

5. 香港高昂的租金及工資，佔企業經營成本百分比相當高，且還有繼續上升的趨勢，這情況在服務業中尤爲嚴重。「展望 2047 協會」(一個由重要商界人士支持的組織)最近發表了一份《香港競爭能力研究報告》。該報告精簡地把香港面對的挑戰撮要如下：『在香港感受到的成本壓力，反映出整個經濟需要改善其競爭能力及成本效益。雖然香港的「貿易行業」，長久以來已具有自由及開放的競爭，但這現象並沒有在某些「非貿易行業」中出現。由於「非貿易行業」的壟斷者或寡頭壟斷者不用直接面對競爭，因此有需要確保他們能以最高效率經營。』[1]

6. 滙豐銀行的一份經濟報告亦指出：「主要在於如何保持對外競爭力，尤其在服務業方面...服務輸出價格不斷上升，基本上反映香港的經營成本普遍上升。在一九九一至一九九五年間，名義工資的平均升幅爲百分之九點五...香港平均租金成本亦位於亞太區內最高昂之列。」[2]

7. 施行全面的公平競爭政策及法例，可以消除業界入市的障礙，並可確保自由競爭不致被操縱價格（price-fixing）、市場分配（market sharing）或其他違反競爭的措施扭曲。整體來說，企業的營運成本可維持於具有競爭能力的水平。

8. 因此，香港必須鼓勵競爭。公平競爭政策的主要目的是訂定清晰的規例，確保行業的公平競爭機會，盡量使政府毋需插手干預。一旦有基本規例，負責推行公平競爭政策的組織無必要干預一般的商業運作。

國際層面與公平競爭政策

9. 國際層面，也需要採取新政策，以資配合。一些國際組織，如世界貿易組織，日漸重視競爭政策和貿易政策的相連關係，若香港本身沒有公平競爭政策及保障自由競爭的法例，但又在國際層面上提出改善貿易政策及反對損害香港利益的措施，實難自圓其說。國際組織及其他國家已開始察覺到香港一些行業出現的問題，以及香港尚未有全面的公平競爭法例。

10. 香港是自由港及開放經濟，故大有理由要求國際社會訂定全球競爭政策，以取代外地種種的保護貿易政策及歧視措施，如反傾銷行動等。不過，如香港並沒有全面的公平競爭政策支持，本地的議價能力便會被削弱。

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1 展望 2047 協會，《香港競爭能力研究報告》，1996 年 7 月，第 6 頁。

2 滙豐銀行經濟月報，《香港的服務業：增長與競爭力》，1996 年 9 月至 10 月，第 1 頁及第 4 頁。

11. 在過去，香港的開放經濟特質及其在亞洲區佔有優勢，即使沒有公平競爭政策和法例，只因應個別行業的需要，引進一些針對的策略，問題不大。但是在不斷改變的環境下，現行的政策顯見不足。

引進全面公平競爭政策的裨益

12. 消費者委員會在過去兩年發表多份行業的研究報告，發現在自由競爭受到妨礙的「不完全市場」，產品價格會被推高。由於缺乏足夠的權力，消委會未能對個別行業競爭問題的投訴展開全面調查。但有一定證據顯示有些行業由於缺乏競爭，其產品或服務的價格被提高，也相應地推高通脹。假如香港不引進全面公平競爭政策，便缺乏有效的武器去維持國際競爭力。例如，自從電訊業引入競爭以後，雖然仍未進展至全面競爭，但價格已見下降，這是有效競爭可以使消費者受惠的好例子。

13. 大多數的先進經濟體系都已施行公平競爭法。新興工業經濟體系如南韓和台灣亦有同樣的法例。中國大陸也制訂了反不正當競爭法，其中還有條款禁止操縱價格(price-fixing)和濫用市場優勢。

14. 對商界來說，全面的公平競爭政策好處是：促進公平、加強一致性、及減少規管。說是公平，因爲它能杜絕一些違反競爭的經營手法，而違反公平競爭的經營手法，往往使有效率及經營有方的公司無法生存。加強一致性，因爲公平競爭政策由獨立的機構、按照頒報的規例來執行。政府現時所採用的零碎的規管方法，令廣播牌照，訂定的競爭條款，有不一致的情況出現，不同公司略有不同。電訊業的公平競爭條款較廣播牌照寫得更清晰和具體。

15. 全面公平競爭政策有助減少規管，它應該是具有前瞻性、有效和有效率的，毋須因應新產品或服務，再花費人力和時間去厘訂新的規例。

16. 公平競爭政策容許市場出現「自然壟斷」，這現象源於技術因素，例如有些行業採用的技術要有規模經濟，須獨家專營才見效率。公平競爭委員會需與監管機構緊密合作，檢討現行或擬議的法例，當發覺監管有礙公平競爭，弊多於利，即應向政府滙報，作出改善。

17. 對消費者來說，政府就個別行業，如電訊業及銀行業，引進公平競爭措施後，已使價格降低、鼓勵創新、增加選擇和改善服務。如能推擴公平競爭法所包括的範圍和加快消除競爭障礙，對消費者來說當然是喜訊。

建議

18. 消費者委員會建議香港引進全面公平競爭政策，和制訂公平競爭法。公平競爭法是公平競爭政策不可分割的一部份，防止及處理限制公平競爭的經營手法，最具透明度和最有效的方法。

19. 消費者委員會在現階段無意詳細列出政策的細則，但深信報告的建議是實際可行和符合成本效益的。政策的細則，應可作日後訂定法例和政策的參考。

公平競爭政策

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(b) 設立上訴機關，聆訊不滿公平競爭委員會決定的申訴。

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27. 建議：
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28. 該委員會應有下列職能：
(a) 就公平競爭政策，向政府提出意見；
(b) 確保公平競爭法例得以切實施行；
(c) 考慮並建議改善有關法例；

(d) 委員會應有寬闊的保障公益利益職能，減低監管的需要，研究因政府監管導致市場缺乏可競逐性的情況，向政府建議修改或取銷監管，並向公眾公佈該建議。

權力

29. 建議委員會應有下列權力：
(a) 主動展開調查，也可根據其他方面提出的建議展開調查；
(b) 在調查期間，如發現企業有違反法律規定的經營手法，發出通知要求該公司停止涉嫌違法行爲；

30. 此外，還需要考慮應否賦予委員會禁制權力。

處罰

31. 違反競爭法的處罰有幾種方法，可考慮只採取禁制的做法，或罰款、或可要求違法者向受損害一方作出賠償。

上訴機關

32. 公平競爭委員會作出的決定，得由上訴機關覆核，而並非由法庭覆核。上訴機關有權作出最後裁決。上訴機關應與委員會有清晰的界限。

33. 上訴機關的主席應由特區行政首長委任。有案件上訴時，主席可召集特別審裁小組並主持聆訊，其他成員應熟識競爭事務及有關行業。

34. 審裁小組須把審查的詳細報告公開，但有關商業敏感的資料則除外。

結論

35. 香港經濟在過去成就驕人。但近年來，競爭對手紛紛進行經濟改革及採取鼓勵外資的法例和政策，加強他們在國際貿易方面的競爭能力。香港既沒有針對妨礙公平競爭行爲的清晰法規，也沒有執行機構來改善情況，爲維持領先地位，香港必須正視缺乏公平競爭機制對本地的競爭環境、以及對香港在國際貿易層面的影響。假如香港未能全面配合國際貿易對競爭和貿易政策的新要求，亦將有損於其在世界經濟上的地位。

36. 香港推行公平競爭政策的模式，宜因應本地的情況，包括文化及傳統。當前的問題不再是香港應否制訂公平競爭法，而是公平競爭法應如何厘定。以確保香港未來的繁榮及經濟成就。要達到這個目標，有賴香港整個社會對公平競爭的政策的積極參與和支持。

November 1996

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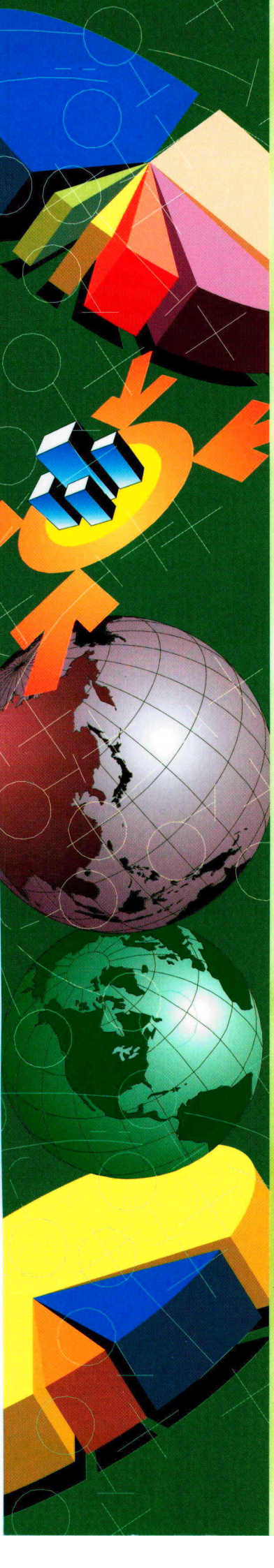

公平競爭政策：
香港經濟繁榮之關鍵

消費者委員會

目錄

報 告 摘 要

香港面對的經濟挑戰

1. 近數十年來，香港經濟成就超卓，本地生產總值實質增長持續強勁，按人口平均計算，本地的生產總值是全球最高的地方之一。這強勁的經濟表現，其中一個原因是由於香港位處中國的大門，亦易於通往其他東南亞國家，因此具策略性的位置。可是，隨着電訊科技及其他交通運輸的發展，香港的地理位置優勢已經減弱。香港在其他方面的領先優勢，亦因爲競爭對手經濟政策的改變，採納了鼓勵外貿及投資的法例和政策，而逐漸降低。因此，香港要維持其競爭優勢，面對莫大的挑戰。

2. 在過去二十年來，香港的經濟結構出現重大轉變，由製造業爲主變爲以服務業爲主，服務業迅速發展，取代了製造業作爲香港主要經濟活動的地位。服務出口將成爲經濟增長的主要動力。香港政府亦期望服務業成爲香港未來經濟增長的「火車頭」，並曾表示，會確保服務市場盡量開放及具競爭力。

3. 在不干預政策下，並非所有服務業的市場都能自動產生高度的競爭壓力。服務業跟製造業不同，製造業大部份產品在國際市場出售的，須面對國際競爭；但服務業卻包括一些只提供給本地使用的服務，如法律及會計服務、醫療及牙醫服務、公用事業、本地電台及電視廣播、零售銀行服務、酒樓食肆及超級市場等等。這些服務毋須面對國際競爭。

4. 消費者委員會早前曾研究本港的主要行業，發現一些行業只有很少的競爭，例如：香港銀行的港幣存款、超級市場及氣體燃料供應等。

5. 香港高昂的租金及工資，佔企業經營成本百分比相當高，且還有繼續上升的趨勢，這情況在服務業中尤爲嚴重。「展望 2047 協會」(一個由重要商界人士支持的組織)最近發表了一份《香港競爭能力研究報告》。該報告精簡地把香港面對的挑戰撮要如下：『在香港感受到的成本壓力，反映出整個經濟需要改善其競爭能力及成本效益。雖然香港的「貿易行業」，長久以來已具有自由及開放的競爭，但這現象並沒有在某些「非貿易行業」中出現。由於「非貿易行業」的壟斷者或寡頭壟斷者不用直接面對競爭，因此有需要確保他們能以最高效率經營。』

6. 滙豐銀行的一份經濟報告亦指出：「主要在於如何保持對外競爭力，尤其在服務業方面...服務輸出價格不斷上升，基本上反映香港的經營成本普遍上升。在一九九一至一九九五年間，名義工資的平均升幅爲百分之九點五...香港平均租金成本亦位於亞太區內最高昂之列。」

7. 施行全面的公平競爭政策及法例，可以消除業界入市的障礙，並可確保自由競爭不致被操縱價格（price-fixing）、市場分配（market sharing）或其他違反競爭的措施扭曲。整體來說，企業的營運成本可維持於具有競爭能力的水平。

8. 因此，香港必須鼓勵競爭。公平競爭政策的主要目的是訂定清晰的規例，確保行業的公平競爭機會，盡量使政府毋需插手干預。一旦有基本規例，負責推行公平競爭政策的組織無必要干預一般的商業運作。

國際層面與公平競爭政策

9. 國際層面，也需要採取新政策，以資配合。一些國際組織，如世界貿易組織，日漸重視競爭政策和貿易政策的相連關係，若香港本身沒有公平競爭政策及保障自由競爭的法例，但又在國際層面上提出改善貿易政策及反對損害香港利益的措施，實難自圓其說。國際組織及其他國家已開始察覺到香港一些行業出現的問題，以及香港尚未有全面的公平競爭法例。

10. 香港是自由港及開放經濟，故大有理由要求國際社會訂定全球競爭政策，以取代外地種種的保護貿易政策及歧視措施，如反傾銷行動等。不過，如香港並沒有全面的公平競爭政策支持，本地的議價能力便會被削弱。

11. 在過去，香港的開放經濟特質及其在亞洲區佔有優勢，即使沒有公平競爭政策和法例，只因應個別行業的需要，引進一些針對的策略，問題不大。但是在不斷改變的環境下，現行的政策顯見不足。

引進全面公平競爭政策的裨益

12. 消費者委員會在過去兩年發表多份行業的研究報告，發現在自由競爭受到妨礙的「不完全市場」，產品價格會被推高。由於缺乏足夠的權力，消委會未能對個別行業競爭問題的投訴展開全面調查。但有一定證據顯示有些行業由於缺乏競爭，其產品或服務的價格被提高，也相應地推高通脹。假如香港不引進全面公平競爭政策，便缺乏有效的武器去維持國際競爭力。例如，自從電訊業引入競爭以後，雖然仍未進展至全面競爭，但價格已見下降，這是有效競爭可以使消費者受惠的好例子。

13. 大多數的先進經濟體系都已施行公平競爭法。新興工業經濟體系如南韓和台灣亦有同樣的法例。中國大陸也制訂了反不正當競爭法，其中還有條款禁止操縱價格(price-fixing)和濫用市場優勢。

14. 對商界來說，全面的公平競爭政策好處是：促進公平、加強一致性、及減少規管。說是公平，因爲它能杜絕一些違反競爭的經營手法，而違反公平競爭的經營手法，往往使有效率及經營有方的公司無法生存。加強一致性，因爲公平競爭政策由獨立的機構、按照頒報的規例來執行。政府現時所採用的零碎的規管方法，令廣播牌照，訂定的競爭條款，有不一致的情況出現，不同公司略有不同。電訊業的公平競爭條款較廣播牌照寫得更清晰和具體。

15. 全面公平競爭政策有助減少規管，它應該是具有前瞻性、有效和有效率的，毋須因應新產品或服務，再花費人力和時間去厘訂新的規例。

16. 公平競爭政策容許市場出現「自然壟斷」，這現象源於技術因素，例如有些行業採用的技術要有規模經濟，須獨家專營才見效率。公平競爭委員會需與監管機構緊密合作，檢討現行或擬議的法例，當發覺監管有礙公平競爭，弊多於利，即應向政府滙報，作出改善。

17. 對消費者來說，政府就個別行業，如電訊業及銀行業，引進公平競爭措施後，已使價格降低、鼓勵創新、增加選擇和改善服務。如能推擴公平競爭法所包括的範圍和加快消除競爭障礙，對消費者來說當然是喜訊。

建議

18. **消費者委員會建議**香港引進全面公平競爭政策，和制訂公平競爭法。公平競爭法是公平競爭政策不可分割的一部份，防止及處理限制公平競爭的經營手法，最具透明度和最有效的方法。

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(b) 公平競爭委員會應設有全職主席一人及其他委員，由特區行政首長委任。

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28. 該委員會應有下列職能：

(a) 就公平競爭政策，向政府提出意見；

(b) 確保公平競爭法例得以切實施行；

(c) 考慮並建議改善有關法例；

(d) 委員會應有寬闊的保障公益利益職能，減低監管的需要，研究因政府監管導致市場缺乏可競逐性的情況，向政府建議修改或取銷監管，並向公眾公佈該建議。

權力

29. 建議委員會應有下列權力：

(a) 主動展開調查，也可根據其他方面提出的建議展開調查；

(b) 在調查期間，如發現企業有違反法律規定的經營手法，發出通知要求該公司停止涉嫌違法行爲；

30. 此外，還需要考慮應否賦予委員會禁制權力。

處罰

31. 違反競爭法的處罰有幾種方法，可考慮只採取禁制的做法，或罰款、或可要求違法者向受損害一方作出賠償。

上訴機關

32. 公平競爭委員會作出的決定，得由上訴機關覆核，而並非由法庭覆核。上訴機關有權作出最後裁決。上訴機關應與委員會有清晰的界限。

33. 上訴機關的主席應由特區行政首長委任。有案件上訴時，主席可召集特別審裁小組並主持聆訊，其他成員應熟識競爭事務及有關行業。

34. 審裁小組須把審查的詳細報告公開，但有關商業敏感的資料則除外。

結論

35. 香港經濟在過去成就驕人。但近年來，競爭對手紛紛進行經濟改革及採取鼓勵外資的法例和政策，加強他們在國際貿易方面的競爭能力。香港既沒有針對妨礙公平競爭行爲的清晰法規，也沒有執行機構來改善情況，爲維持領先地位，香港必須正視缺乏公平競爭機制對本地的競爭環境、以及對香港在國際貿易層面的影響。假如香港未能全面配合國際貿易對競爭和貿易政策的新要求，亦將有損於其在世界經濟上的地位。

36. 香港推行公平競爭政策的模式，宜因應本地的情況，包括文化及傳統。當前的問題不再是香港應否制訂公平競爭法，而是公平競爭法應如何厘定。以確保香港未來的繁榮及經濟成就。要達到這個目標，有賴香港整個社會對公平競爭的政策的積極參與和支持。

第一章
導論

研究目的

1.1. 研究的目的如下：

a) 探討本港是否需要制定全面公平競爭政策和公平競爭法；
b) 如需要立法，應採納的架構及法例的內容；
c) 執行機構的組成。

研究方法

1.2. 消費者委員會自一九九二年開始，研究本港一些主要行業的競爭環境和是否存在違反自由競爭的營商手法，包括：銀行業，家用氣體燃料供應，廣播業，電訊業及住宅樓宇市場等。同時亦完成超級市場及教車業的競爭情況的報告。過去兩年各項研究報告[1]，已陸續完成並呈交政府考慮，市民可從本會取報告查閱。報告就每行業的情況提出個別建議，至於香港應否制定全面公平競爭政策，留待這研究報告探討。

1.3. 這研究報告從宏觀經濟角度，就香港經濟轉型、世界貿易趨勢、及公平競爭政策對消費者和各行業的影響，探討應否制定全面公平競爭政策。

1.4. 報告彙集和分析的資料包括本會監察各行業經營手法的個案、本港的經濟數據、政府和學術機構、商界和其他有關團體發表公平交易或競爭課題的資料，並包括政府現行公平競爭政策。

1.5. 本會亦從日本、中國大陸、台灣、英國、美國、南韓、澳洲及歐洲聯盟等地蒐集資料，分析和比較各國公平競爭政策和法律的形式及實施情況，作爲參考。

1.6. 本會委託英國倫敦商學院經濟系教授 David CURRIE 勳爵，研究香港是否需要制定公平競爭政策，其意見及結論對本會編寫本報告裨益甚大。

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[1] 銀行對存戶是否公平？，九四年二月
教車業研究報告，九四年七月
香港超級市場研究報告，九四年十一月
家用熱水及煮食燃料市場競爭研究報告，九五年七月
廣播業競爭研究報告，九六年一月
電訊業研究報告，九六年三月
香港私人住宅物業市場競爭研究報告，九六年七月

1.7. 此外，還有其他專家和學者提供了寶貴資料和意見。包括：美國史丹福大學法律系的梁福麟教授，提供了有關公平競爭法資料，中國北京大學法律系盛杰民教授提供中國法律的資料，台灣公平交易委員會的王弓委員及黃茂榮教授，對台灣方面《公平交易法》的制定與實施情況也提供了詳盡的資料。

公平競爭政策研究小組成員

1.8. 本研究在公平競爭政策研究小組的指導和監督下，由本會營商研究組負責進行。

1.9. 研究小組的成員包括：

陳坤耀教授(主席)
胡紅玉女士(副主席)
趙培剛先生
何秩生博士
郭偉仁先生
廖秀冬博士
曾澍基博士
王冬勝先生

1.10. 消費者委員會對所有提供資料和寶貴意見的個人和團體，表示深深的謝意。

第二章
公平競爭政策之目的

引言

2.1. 本章概論公平競爭政策及其目的，就是否需要設立法律架構的問題，探討正反兩方面的意見，並討論公平競爭法涵蓋的範圍。

公平競爭政策的定義

2.2. 大多數國家訂立公平競爭政策目的爲打擊壟斷行爲，促進競爭。論據是，存在競爭的市場，資源分配最有效率。

競爭的重要性

2.3. 有充份証據顯示，優越的競爭環境是使到經濟有良好表現的主要因素。Porter[1]在論及各國經濟表現時指出，健強的競爭環境，配合知所選擇及要求高的消費者，是促成因素。此外，亦有証據顯示，需要面對競爭壓力的經濟體系和企業，愈能創新[2]。這個觀點 Geroski[3]有所說明：「市場集中與創新行動的關係成反比。」

2.4. 競爭對促進消費者利益同樣重要。市場有競爭，物價相應較爲合理、消費者有更多選擇、同時會出現更多創新的產品和更優良的服務，爲此，先進發展國家的大部份政治層面均認同自由市場須維持有效競爭的重要性。本會將在第五章討論增強競爭力對本港商界和消費者潛在的益處。

完全競爭

2.5. 經濟內部競爭的優點，可以用完全競爭的基準理論模式加以說明：當有眾多公司可以自由入市或退出市場時，市場力量會帶來生產和配置效率。這個最初由亞當•史密[4]提出的意念，以現代的全面均衡理論解釋[5]，最爲清楚。

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1 Michael E Porter (1990) The Competitive Advantage of Nations, - London : Macmilan.

2 Mark Armstrong, Simon Cowan and John Vickers (1994), Regulatory Reform : Economic Analysis and British Experience, Cambridge, Massachusetts and London : MIT Press.

3 Paul Geroski (1994), market Structure, Corporate Performance and Innovative Activity, Oxford and New York : Oxford University Press. (P.147)

4 Adam Smith (1776), An Inquiry into the Nature and Causes of the Wealth of Nations.

5 例如， Kenneth Arrow and Frank Hahn (1971), General Competitive Analysis, Edingbury : Oliver and Boyd; or Gerard Debreu, Theory Value, (1959), New York : Wiley.

可行競爭

2.6. 完全競爭在實際情況下很少能夠實現，因此完全競爭的理論模式只可作爲基準，但有其重要的參考價值。實際上，很多市場只擁有「可行競爭」的特徵，即是有一定數目的企業能參與有效競爭(尤其市場是對外開放，因而外來競爭也同樣有效)。「可行競爭」是指「市場有足夠數目的參與者，足令每一個市場參與者有效率地運作，而在計劃時，亦須估量市場內現存的或可能進入的競爭者的行動。」[6]

2.7. 換言之，現有經營者、新入市者應與具市場支配地位的參與者，在市場上有平等競爭的機會。競爭並非視乎市場上有多少參與者，而是看入市是否有障礙，「包括入市途徑、貨源供應、銷貨渠道、資訊、專門知識及財務安排等。」[7]

2.8. 存在「可行競爭」的市場，可以促進技術效率(公司利用資源的效率)及動態效率(公司對不斷湧現的困難和機會的反應速度 — 反映公司洞察力和推動力)。「當公司未能透過運用市場力量去增加收益時，便會提高效率和探求新的和更好的途徑去服務顧客。」[8]

市場的可競逐程度

2.9. 並非每一個市場都存在「可行競爭」，例如：規模經濟龐大的市場，市場參與者的數目不會多。雖然這類市場可能只有少數公司經營，或甚至只有一間公司經營，但未必表示遠離競爭目標，因爲入市障礙並不嚴重的話，即表示市場存在「可競逐性」。「可競逐性」是指業內經營者的數目雖然不多，但不能濫用其市場支配地位操縱市場以取得利益，因爲這樣做會吸引新公司加入競爭，反而造成威脅。

2.10. 有些例子顯示，入市障礙可方便業者行使其市場支配力量，隨意訂價，歪曲了消費結構，行業自然缺乏了生產和配置效率，業者獲得的超額利潤，亦不會因爲競爭而減低。

2.11. 這次研究、及本會在個別行業研究報告提出的建議中，一再強調，在未能達到完全競爭的情況下，應該促進可行競爭和提高市場的可競逐程度。

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[6] John Heydon (2nd Edition, 1989), Trade Practices Law, Sidney : Law Book Co.

[7] 同上.

[8] AGPS (1989) Promoting Competition in Australia, Canberra : Economic Planning Advisory Council.

其他地方公平競爭政策之目的

2.12. 日本、中國大陸、台灣、英國、美國、南韓、澳洲及歐洲聯盟等地的公平競爭政策目的，在附件(一)概述。各國的目的大致相同。公平競爭政策主要目的與經濟效率有關；多數爲提高生活水準(歐洲聯盟)和實際收入(日本)，推廣企業活動(日本)，以及促進消費者權益(中國大陸、台灣及南韓)。

爲何需要立法？

2.13. 爲防止違反公平競爭的行爲，如業者合謀限制新經營者入市、或減低市場競爭，必須立法，原因是：

a) 在處理妨礙競爭的經營行爲時，法律確保了公開和一致的體制；

b) 沒有法律制裁，政府便缺乏有效權力去制止或預防違反競爭的經營手法，或甚至無權進行調查。

爲何需要全面公平競爭政策？

2.14. 當公司激烈投入競爭時，違反公平競爭的行爲相應不多。不過，隨着市場情況不斷改變，長遠來說，難保有行業市場未能維持高度競爭，因而出現違反公平競爭的行爲。全面公平競爭政策提供一個現成和一致的架構，處理任何行業可能顯現的違反公平競爭的行爲 — 例如製糖、混凝土製造、零售銀行、汽油零售供應、汽車分銷等[9]。「全面公平競爭政策」除明文確指的豁免情形外，一般來說，涵蓋了各個行業。

公平競爭政策還包括哪幾方面？

2.15. 有很多國家／地區都因應公平競爭政策而厘訂或重新厘訂其監管政策，予公平競爭組織權力去檢討或批核有關監管政策，及要求有關部門爲個別行業制定政策時，務須兼顧公平競爭，這兩種做法可能導致個別行業的法例改革、廢除不必要的規例、或採取其他措施，以促進市場競爭(如公用事業或其他受監管行業)。不過，是否需要這些措施和採用形式，端視國家／地區各行業／市場的不同環境而定。所採取的行動亦視乎執政者的熱衷程度。譬如，英國政府對促進公用事業、公共交通等競爭便採取了特別積極的態度，打破由國家壟斷經營的局面，改爲私有化。台灣及南韓政府任命公平交易委員會負責檢討有關的監管法例及要求執行機構解釋政策存在的必要性。

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[9] 參閱第三章，第3.29段所舉例子，設有公平競爭法的國家，仍有違反公平競爭的行爲。

關於公平競爭政策的不同意見

2.16. 雖然公平競爭政策的好處受到一致公認，但學術界對如何有效保障市場公平競爭，有不同意見。

2.17. 有些經濟學家，其中多數是來自美國芝加哥大學的學者，相信：

a) 入市障礙主要來自政府規例，而非業者的經營手法；

b) 「公司一般不能以單方面行動取得或加強壟斷能力」[10]。例如，一間公司試圖以低於成本推銷貨品(掠奪性訂價)去打擊同業競爭的做法，多不見效果。首先，在一個有效率的財務市場，其對手亦有可能獲得同樣的財務安排去支持短期的競爭；其次，縱使可以打擊到對手，待價格回復正常後，由於行業的邊際利潤可觀，亦會再次吸引新的競爭者打入市場。

2.18. 因此，他們主張採用較狹義的公平競爭法處理競爭事務，特別是以下事情：

a) 刻意把對手排出市場的行爲；

b) 橫向合併，造成極高的市場佔有率；

c) 公然操縱價格。

他們認爲不宜插手干預那些性質不明確的例案。[11]

2.19. 對上述觀點的另一看法是：

a) 它過份着重理論性的假設，以爲市場會自動引發有效競爭。例如超額收益不會持續，因爲其他公司會打入市場。但實際情況是，在不少市場入市者的競爭威脅不易出現，妨礙公平競爭的行爲往往會出現。

b) 這意見低估了造成入市障礙以及限制有效競爭的經濟因素。即使沒有法律規限，各種經濟因素，包括高昂的沉落成本、資料不完全、及投資風險等問題，都令有潛力競爭者難以加入市場競爭。[12]

c) 縱使假定自動調節的市場機制會誘使新經營者入市，帶動有效競爭，但不保証這情形會在短期內發生。在需要一段頗長時間調整的期間，國際層面的競爭力和經濟增長，已可能受到損害。[13]

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[10] 可參考 Richard A Posner (1979), The Chicago School of Antitrust Analysis, University of Pennsylvania Law Review, Vol. 127, pages 925-928.

[11] R H Bork (1978) The Antitrust Paradox, New York ： Basic Book.

[12] 可參考 Roger Sherman, The Regulation of Monopoly, Cambridge University Press 1989, pp 77-80.

[13] 例如，英國混凝土業的縱操價格行爲持續約二十年，導致建築費高企，本土公司缺乏競爭能力。雖然縱操價格行爲影響個別公司的成本不大，但以所有公司累積計算，卻十分可觀，若最終不被公平競爭委員會制止，結果會更加嚴重。

2.20. 美國的自由市場主義得到八零年代列根政府的採納，對美國公平競爭政策的方向有很大影響。不過，它未致推翻公平競爭法的理據。例如，針對業者操縱價格及一些合併行動的法例，仍被視爲不可或缺。自由主義產生的持久影響是：公眾意見都認爲，公平競爭政策和法例應以能符合經濟效率爲目標，而且加強競爭往往比較政府直接監管更有效果。

2.21. 列根政府期後，公平競爭政策和法例似乎找到新的平衡觀點，不再認同凡壟斷或利用市場力量的做法必有問題的抽象見解，而以較客觀的態度去仔細觀察業者的實際市場行爲，務求在監管和促進公平競爭兩方面做到平衡調節，以促進效率和保障各方利益。

公平競爭政策涵蓋的監察範圍

2.22. 除了學術界對公平競爭政策的不同意見外，現時很多公平競爭政策主要從三個方面處理潛在的競爭限制：

a) 濫用市場力量

b) 橫向限制

c) 縱向限制

2.23. 第一項是關於約束壟斷行爲。其餘兩項爲防止公司出現違反公平競爭行爲。界定違反公平競爭行爲有時未必是簡單容易的工作，因此會容易引起爭議。現分別探討。

反壟斷政策

2.24. 公平競爭政策首先是關注壟斷市場的情況。所謂壟斷市場，大致上可解釋爲，一間公司建立其市場支配地位，壟斷市場的結果，短期來說會推高價格、降低產量，長期來說，減少市場的投資和缺少創新。結果削弱了消費者利益，損害了那些與市場壟斷者在上游或下游貨品供應業務有生意來往的商號，市場壟斷者得以攫取超出正常的利潤。

2.25. 反壟斷政策可依三個主要方式：

a) 禁止導致壟斷局面因而有損經濟效率的合併及收購行爲；

b) 分拆或打破已存在的違反公眾利益的壟斷局面，讓市場較具競爭能力；

c) 當壟斷情況不適宜打破(通常關乎網絡業務的自然壟斷因素令分拆後的公司失去效率)，便會提倡監管價格、投資和經營表現等措施。

橫向限制

2.26. 同一行業各公司之間明示橫向協議，有損消費者利益，這包括了：

a) 操縱價格：兩個或兩個以上生產商事前協定貨品的售價，目的爲行使市場力量。這種手法包括：限制生產量以固定價格，制定最高售價，劃一折扣，及劃一底價等。

b) 市場分割：供應商把市場分區，以達到壟斷目的。

c) 串通投標：各公司爲一己利益，在投標時不作競爭，但串通取得合約，俾各參與串通者均能獲得一定程度的利益。結果，經營不善的公司毋須競爭，而經營效率高的公司得不到一些足以令其改善及擴充市場的原動力。

d) 掠奪性定價：是指一間公司濫用其在市場上的支配地位，以掠奪性定價的手法，干預其他公司加入經營、或把其他公司摒諸市場之外。這即是，一間公司或一組公司把貨品減價發售，甚至是低於成本，令同業不能立足後，再把貨價提高，甚至比減價之前的價格還要高。不過，掠奪市場的做法未必要取減價形式，相應提高成本也可達到同樣違反公平競爭的效果，同業爲了參與競爭，也必須相應效法。[14]

2.27. 假如公司能夠利用這些手法去形成卡特爾(壟斷集團)，價格便有可能達到壟斷水平，即使行業存在規模經濟和合理化的生產，也不會利用。這情形實妨礙了經濟效率。因此，除了特別情況例外，在大多數公平競爭法內，上述做法都在被禁止之列。至於公司之間分擔研究及發展經費的做法，由於公眾可從研究及發展過程得到新知識，因此雖然該類協議有不明朗之處，這種基本或策略性研究的合作，多被允准，但一些近似實務性的市場研究及發展協議，可能在禁止之列。

2.28. 英國的公平競爭法與美國及歐洲聯盟不同，它把防止因所謂「聯合壟斷」引致損害的措施包括在內。所針對的情形即如，一組在同一行業佔支配地位的公司，合謀進行同一的經營手法(例如訂定價格的政策)，以致其結果如同一個卡特爾，表面卻非明示串謀。這法例精神在於防止個別行業可能因傳統或慣例、未必是故意謀算、卻可能作出有妨礙公平競爭影響的行爲。

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[14] 執行禁止掠奪市場行爲的法例並非容易的工作，因先要肯定這種行爲何時出現。有關這方面的法例，應以不干預有進取性和健康的價格競爭爲原則。因此，如何定奪一宗行爲是否屬於掠奪市場行爲是很重要。英國的印証方法是以行爲是否有利潤遞增能力，包括公司其他產品的外溢效果，若沒有利潤遞增能力，便是掠奪市場行爲的印証；若具備遞增能力，便屬有進取的競爭行爲。

縱向限制

2.29. 縱向限制影響有供應者／顧客關係的公司。這方面限制的主要形式是：

a) 規定零售價：製造商指定零售商銷貨的最低(有時是最高)價錢。

b) 獨家交易安排、排斥競爭對手：零售商同意銷售一家廠貨後，不得再爲其他同類產品廠家銷貨。

c) 分區專營：零售商在某特定地區的獨家經營權。

d) 大批入貨折扣：零售商推銷一家廠貨愈多，所獲折扣愈大，鼓勵推銷單一廠家產品，妨害了其他製造商銷貨機會。

e) 強迫搭賣：規定零售商必須同時購入另一貨品才供應所選的貨品，使供應商有機會同時在另一產品中打開市場；而由於需要訂購兩種貨品的規限，也令有意加入零售市場者卻步。

f) 全線入貨：一種特別的搭賣方式。零售商必須訂購供應商的全線產品，無選擇餘地。

g) 長期供應合約：零售商受供應商的長期約束，零售商如欲解除合約，往往需要付出很大代價。

2.30. 需要強調的是，這些「協議」有時是雙方自願的，但有時是由於具市場支配地位的一方強令較弱一方接受的。

2.31. 這類行爲一般會妨礙公平競爭，損及經濟效率和消費者利益。不過，在某些情況下，可能有利於消費者。例如，分區專營雖然限制公平競爭和引致售價偏高，但製造商可確保消費者能夠獲得適當資料和驗貨設施，俾能在購買前作出明智選擇。就某些貨品來說，消費者在購買前取得應有資料實十分重要(例如購買汽車)，所以分區專營的安排反而有利於消費者。爲此，大多數公平競爭政策的組織都會酌情處理縱向限制的事宜。[15]

結論

2.32. 各國普遍都認爲，爲確保市場有競爭威脅，有需要制定一套全面的公平競爭法。這套法例的監管範圍應涵蓋所有行業，及處理濫用市場地位、橫向及縱向限制的行爲。此外，法例爲政府提供了具透明度及一致的權力，進行禁止、預防及調查違反公平競爭行爲的工作。

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[15] 例如，歐盟法例第 85 條法規有豁免條文；英國法例亦容許以個別案例處理。

2.33. 有別於其他國家，香港沒有一套全面的監管公平競爭制度。政府只對若干行業採取了個別促進公平競爭的做法[16]。現時爲止，政府只針對電視及固定電訊服務行業，引進一些有關違反公平競爭行爲的法律限制。以下各章，將會探討這種做法對目前及日後的市場競爭方面，是否有足夠保障，並討論若現狀維持不變，會對香港的經濟發展、商界和消費者的利益，產生什麼影響。

[16] 一九九五年十一月十三日工商科向立法局貿易及工業事務委員會提交的資料文件，Promotion of Competition in Hong Kong.

第三章
香港制定公平競爭的觀點和政策

引言

3.1. 不少人相信，香港和其他國家/地區不同，毋須制定公平競爭政策。他們認爲：

(a) 香港的市場已有足夠的競爭；和

(b) 制定公平競爭政策會干預香港自由開放的市場經濟。

3.2. 政府似乎亦認同這觀點：「政府贊成奉行政府盡量避免干預市場力量這個基本經濟原則，因爲這是促進競爭和效率，以及減低成本和價格的最佳法則。[1]」實際上香港政府並沒有類似其他地方既定的公平競爭政策。政府「在促進本港的競爭一方面所採取的政策」祇不過是在有需要時，對特定的行業採取「適當及切合實際的措施，糾正任何不公平的商業經營手法、維護公平競爭，及保障消費者的權益。[2]」

3.3. 在這一章，我們探討香港對施行公平競爭政策的普遍看法，是否讓市場自由發展就可以達到高度競爭。我們並評估現時政府按行業制定的公平競爭政策，能否有效地促進自由及公平的市場，及比較現行方式與全面公平競爭政策在處理市場結構、行爲和表現方面的優點和缺點。

3.4. 消費者委員會曾對香港多個行業的競爭情況作出深入研究及廣泛的諮詢，包括廣播業、電訊業、家用熱水及煮食燃料(煤氣)供應、銀行業、住宅物業市場及超級市場，我們根據這些報告，探討制定公平競爭政策的問題，是以實際情況爲依據，並非「市場不完美」的猜測。我們亦參考了本會所接獲的投訴，及傳媒報導涉嫌違反公平競爭的個案。

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[1] 1995 年 11 月 13 日工商科向立法局貿易及工業事務委員會提交的資料文件，「促進本港的競爭」。

[2] 同上。「適當及切合實際的措施」包括在近期已撤銷監管的行業，把競爭的條款加入發牌條件內；及一些被壟斷或寡頭壟斷的市場內規管服務品質及價格。後者尤其適用於需投入大量資金的行業，如公用事業，或需審慎監管的市場，以確保消費者的長遠利益。

反對制定公平競爭政策最常用的理由

「香港市場已有充份競爭，爲什麼還需要公平競爭政策？」

3.5. 香港在國際市場上極具競爭力。但國際競爭力與經濟內部競爭是兩個不同的觀念：

a) 國際競爭力是以某地區／國家與其他國家互相競逐，吸引全球直接投資的能力爲衡量標準。一個地區／國家在這方面的表現主要視乎其宏觀經濟和結構的指標。舉例來說，有兩個報告比較各地區／國家的世界競爭力，香港名列爲世界上第二及第三最有競爭力的地方[3]，報告考慮的因素包括宏觀經濟指標，如國內生產總值增長率，稅率以及儲蓄率；此外還有微觀的經濟指標如人力資本和質量因素如本地市場的開放性和法治情況。

b) 但衡量經濟內部競爭情況卻要看：公司的規模和數目、同類型商品的替代能力及競爭威脅、個別行業進出市場是否容易，及消費者利益。因此一個地區／國家可以在國際競爭力榜上高據一席位，但本地某些行業仍可能有缺乏競爭的情況。

3.6. 內部經濟長期缺乏競爭對一個地區／國家的國際競爭力有負面的影響(見第四章)。所以設計完善的公平競爭政策，可以大大增強一個地區的國際競爭力。因此，即使香港國際競爭力強，亦不等同香港毋須在經濟內部制定公平競爭政策。反過來說，香港制定了適合經濟內部的公平競爭政策，更可增強其國際競爭。

"公平競爭政策等同監管，干預香港的自由市場經濟。"

3.7. 這是一般對公平競爭政策和監管的誤解。第一，公平競爭政策並非等同監管同義。實施公平競爭政策可能會解除某些監管措施，又或者要對某些行業進行監管。第二，雖然一些監管是必需的，但不能視爲干預市場運作，相反地，它是爲增強市場運作機制。

3.8. 要是市場競爭不完美，就需要有公平競爭法的監管措施。這是因爲在不完美的市場條件下，企業間有可能在商業利益前提下達成互相協議，務求阻止競爭對手加入，或限制供應令貨品價格上升[4]，這種情況特別容易在類似香港般細小的市場發生，因市場高度集中，而且重要資源，例如土地，十分有限。

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[3] 瑞士國際管理發展學會及世界經濟論壇在 1995 年聯合發表的世界競爭力報告。

[4] 請看第二章。

3.9. 公平競爭政策是藉着市場行爲的守則，禁止違反公平競爭的行爲出現，使市場回復競爭力。

3.10. 須留意的是建議的公平競爭法並非香港首套保護及強化市場機制的規例。香港現時已有監管機制確保有關財產、知識產權及合約權益。此外，資本市場、支付系統及銀行體系亦受到審慎的監管。

3.11. 有意見認爲不受監管的市場是競爭和效率的最佳保證，我們認爲這說法，過度簡化。在制定公共政策而言，是缺乏進取的取向。

市場結構、行爲及表現

3.12. 研究工業組織的經濟學家發展了三個概念 — 即市場結構、市場行爲和市場表現 — 把經濟目的轉化爲實際政策的架構。[5]

3.13. **市場結構**描述買家與賣家進行交易的市場環境。市場結構的特徵由市場參與者的規模和數目、貨品的替代性、和進入市場的輕易程度來決定。

3.14. 某些市場結構賦予一些參與者更有利的市場力量，例如自然壟斷的市場，但擁有市場力量並不等同可以濫用市場力量。若要確定市場是否存在違反公平競爭情況，必須研究企業的**市場行為**。市場行爲包括市場參與者所採用的政策，當中涉及訂價、貨品特色、廣告、供應以及其他影響市場交易的條件。不同的市場結構存在的限制，影響買家與賣家的市場行爲和達到目標的能力。

3.15. **市場表現**反映資源調配的結果、市場效率、科技進展，以及市場的穩定性和公平性。一般人相信市場結構會影響市場行爲和市場表現。

3.16. 傳統上，制定公平競爭政策的因素基本上要看市場結構，例如量度市場的集中比率，及企業的市場表現，例如是否有超乎正常的利潤，顯示市場內某些企擁有強大的市場力量。但是，可競逐市場的理論質疑傳統的理論，可競逐市場理論認爲即使市場只有數個競爭者、又或有高於平均回報率，並不一定意味壟斷市場或市場力量的存在。當今較著重行爲因素，即是說，研究市場參與者有沒有違反公平競爭的行爲，並非以市場結構或分析市場表現爲重點。本報告將於第七章探討香港應採用取向那一種方式去制定公平競爭政策。

3.17. 以下，我們根據市場結構、行爲和表現三種概念去分析現行就個別行業推行的公平競爭政策。

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[5] 最初由哈佛大學的 E. S. Mason 所構思。可參考 Mason, Price and production policies of large-scale enterprise, (1939), American Economic Review, Supp. 29.

市場結構

3.18. 就市場結構的競爭方面，香港政府一向採取不干預政策。例如在服務層面，政府致力維持競爭，「消除可能妨礙經營者加入市場或減少競爭的規則和規例」。[6]

3.19. 這方式的優點在於減少因政府監管導致扭曲市場的可能性，在自由出入的市場產生良好效果。但在一些情況下，例如當市場有嚴重的入市障礙的時候，政府需要用採取一些措施去促進公平競爭。

3.20. 在現行按個別行業制定公平競爭政策的情況下，政府似未有一致的措施，來確保市場的競爭結構。從以下的例子可看到政府對不同行業的不同取向：

a) 電訊
為了推動本地市場的競爭，政府積極改革市場結構。當香港電訊的本地固定電訊網絡專營權期滿之後，政府讓三家新競爭者加入市場；立法規定網絡經營者必須互相接駁；讓消費者轉換電話公司而可保留電話號碼；及頒發共同使用網絡設備指引。政府發出六個個人通訊系統牌照，使市場有適度的公平競爭。另一方面，香港國際電訊的國際通話專營權 2006 年才屆滿。這專營權對本地市場的競爭有影響，因爲在局部開放的市場，難以進行重整電話收費(消除本地電話收費受國際電話的補貼)。因此，新加入的固網服務競爭者表示難以在本地住宅電話市場競爭。

b) 氣體供應
即使現存管道煤氣供應商的市場佔有率十分可觀，並將持續增長，政府對這市場一直採用「放任」政策，有異於政府處理其他主要公用事業的政策。供應商不受價格管制，更毋須在專營權的條件下運作。供應商亦毋須面對競爭壓力，因爲建新輸送網絡的龐大費用足以對有意加入競爭者做成障礙。基於法例、技術及傳統煮食習慣等因素，石油氣及電力並不能取代煤氣。加上經濟規模的因素，傳送／分配的網絡變成自然壟斷，本會在 1995 年 7 月時促請政府規定煤氣供應商(以商業收費方式)開放現有的網絡予其他氣體供應商，促使市場有競爭。這可讓新的氣體供應商加入市場而毋需建新的網絡。政府亦已同意考慮不同氣體供應商共用管道的可行性。

c) 收費電視
政府已延長九倉有線電視的獨家經營期限(原於 1996 年 5 月到期)直至政府在 1998 年再檢討香港廣播政策爲止。雖然現時有其他經營者有意加入市場，政府卻不打算在未來兩年再批出任何新牌照。

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[6] 香港政府 1996-97 財政年度政府財政預算案附件，「支援及推廣服務行業」。

d) 食米入口
香港實施食米進口及售賣的配額和儲米機制已逾四十載，規定食米商的資格及數目。這機制在香港經濟未發展、社會和政治均尚未不穩定時實施，以確保香港的主要食糧有足夠供應。時至今日，香港已發展成爲國際貿易中樞，市民的食糧來自世界各地。雖然最近政府對這制度作出檢討，但沒有接納大量增加競爭的建議。[7]

e) 駕駛學校
香港只有一家公司經營駕駛學校，獨佔非路面駕駛訓練的市場。由於駕駛學校的學員可獲優先排期參加駕駛考試，令駕駛學校與私人教車導師所提供的服務有所不同，兩者並不存在完全競爭。再者，自 1974 年以來，政府已再沒有發駕駛私人導師牌照，對有意入行者構成一定的障礙。這政策固然有助舒緩交通擠塞，但無助於推動這個市場的競爭。加上香港地價高昂，在可見將來相信興建新駕駛學校，引入競爭的機會很微。

f) 住宅物業
消費者委員會的研究報告指出，新競爭者難進入地產市場，因爲政府拍賣的住宅用地價格高昂(HK$20-50 億)，他們也不熟悉發展機制。現存市場參與者所要付出的土地成本總體上較低，原因是他們在較早時已建立土地儲備。爲消除小型發展商入市的障礙，政府可提供更多面積適中的土地，一方面可符合規劃要求，另方面則可簡化發展機制進程，增加其透明度。

3.21. 根據這些觀察，我們認爲政府現行按個別行業訂定的公平競爭政策有以下問題：

a) 在鼓勵受監管行業競爭方面缺乏一致性；

b) 須不斷增設政府機關監管競爭事宜；

c) 政府不願意採取行動在不受監管的行業鼓勵競爭，即使該市場的運作嚴重失調；

d) 監管的政策較爲被動，且易受既得利益者的游說，保持原狀，例如食米入口機制；

e) 傾向採納監管方式多於鼓勵競爭，尤其當兩者有衝突時；

f) 政府在一些服務行業內容許違反公平競爭行爲，例如銀行公會維持對七天以下定期存款的利率協議；

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[7] 本會對政府的保守立場感到失望，建議政府在檢討發牌制度時，考慮在牌照內加入競爭條款，以防止入口商及批發商進行違反競爭行爲。

g) 倚賴政府解除監管的行動，把競爭引入服務行業，我們雖然認同解除監管有助於推行競爭，但我們認爲推動競爭的原動力不應完全來自政府。這一點在第七章有深入探討。

市場行爲方式

3.22. 一些市場行爲和營商手法(在下一章節將詳細討論)會產生人爲障礙及限制競爭，令商界和消費者同樣受到損害：一些企業沒有機會進入在增長中市場，其他企業則要面對較高昂的營運開支及其他投入成本。消費者亦缺乏選擇合理價錢及新產品的機會。

3.23. 香港對公平競爭政策的取向有異於其他國家，其他國家有適用於所有行業的全面法例去確保市場公平競爭，但香港政府只對某些行業引入公平競爭的條款。例如剛開放的電訊市場及快速增長的廣播業的經營牌照，已經有公平競爭條款。所以，公平競爭規例對香港來說，一點也不陌生。

3.24. 公平競爭條款對於剛解除監管的市場如電訊業尤其重要，因爲現存的企業，擁有很高的市場佔有率，可能對新入行者構成不利，妨礙市場競爭。因此牌照內須有條款禁止任何公司濫用它們的市場力量(例如，採取略奪性訂價及歧視行爲)。條款更防止有違反公平競爭效果的合併及收購，及禁止市場參與者合謀和操縱價格。廣播業的跨媒體限制，旨在確保市民可以聽到不同的意見，及收看或聽到多元化節目。

3.25. 但是，不同行業牌照內的公平競爭的條款各有不同。例如，本會的廣播及電訊研究發現，九倉有線電視、本地廣播公司及固定電訊網絡牌照內的公平競爭條款各有差異，對違反公平競爭條款的罰則亦不同。可能令市場參與者感覺到不公平或情況不明朗。

3.26. 雖然現時只有幾個行業設有公平競爭條款，但這並不是說違反公平競爭行爲，不會在其他的市場出現。例如在台灣，雞蛋生產商(訂定批發價，和零售商訂定限制協議)和當地唱片公司(規定零售價)有類似卡特爾的行爲(壟斷集團)[8]。在日本，有九家公司因合謀，提高排水系統合約的價格而被罰款[9]。在英國，違反公平競爭的行爲亦出現在現成混凝土的供應(操縱價格聯盟)、地面維修合約(串通投標及瓜分市場)，義肢供應，私營巴士服務，零售市場的食糖供應，流行音樂排行榜(排斥對手的專營權)。而歐洲聯盟裁定的個案，亦涉及不同行業，但性質大同小異 — 汽車噴漆供應(獨家發行協議)、荷蘭起重機租賃(會員協議訂價務求令新加入者難以在市場生存)、西班牙專利權代理協會(議定最低收費)、荷蘭承建商組織(限制招標程序及價格政策)、德國雪糕製造商(獨家銷售協議)等[10]。其中一些案例是

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[8] 可參考認識公平交易法(1985)，行政院公平交易委員會，第 64 及第 102 頁。

[9] 刊載於 1996 年 9 月 7 日的 The Economist 雜誌。

[10] 可參考 1995 Annual Report of the Director General of Fair Trading, (1996), London : HMSO.

源於第三者的投訴，例如要付出更高價錢的公司。必須留意的是，大部份個案所涉及的行業都屬當地非貿易行業。從上述案例來看，實際上很難利用個別行業的法例，去防止或處理違反公平競爭的行爲。

3.27. 消費者委員會也曾接獲一些指控及投訴(列舉在附件二)，顯示有人關注某些行業的違反公平競爭行爲，並未受到公平競爭條款的規管。例如，本會曾接獲供應商投訴，指稱主要超級市場曾進行限制交易行爲，禁止其參加農曆新年期間的貿易展銷會，否則會終止其合約。控制批發教科書的商會建議零售商最多給予顧客九五折優惠。不久以前有新報紙加入市場後，引發了報紙減價戰，當時沒有獨立及具權威的機構評定市場上是否存在違反公平競爭的行爲、減價是否屬掠奪性價格、或屬健康競爭。這些都爲讀者、報館員工和投資者帶來不明朗的環境。

3.28. 我們不能肯定上述個案，是否涉嫌違反公平競爭的行爲。原因是香港並沒有公平競爭組織，去調查違反公平競爭行爲的個案(消費者委員會的營商研究組的調查範圍相當有限)。設立公平競爭政策提供了機制，研究和解決這些問題。一日香港未設立這機制，公眾難以知道香港的違反競爭行爲是否嚴重，和市場損失了效率須付出的代價。

3.29. 爲香港制定公平競爭政策和競爭法，商界毋須過份擔心，若本身並沒有施行違反公平競爭的行爲，公平競爭法不會影響商業運作。若出現違反公平競爭的行爲，公平競爭法可以有效地，及根據一致准則解決問題。

3.30. 設立公平競爭組織，可以讓企業聽取「第二種意見」或指引。消費者委員會的電訊業報告提及香港電訊和電訊管理局的爭議，該公司深信其新訂價策略，沒有違反市場競爭。有獨立的公平競爭組織有助解決這類問題。

3.31. 即使一些違反公平競爭的行爲並非違法，若有人投訴該企業行使違反公平競爭行爲，會影響該企業的公眾形象。透過獨立的公平競爭組織調查，這些企業便有解釋的機會。英國公平競爭委員會曾經調查報業的減價戰，結論是當時的減價並非掠奪性訂價。

市場表現

3.32. 擁有專營權的公司，例如公用事業和公共運輸經營者，均受政府訂立的利潤管制計劃(即是回報率)和價格上限監管，前者加價的申請須經港督會同行政局批準。在缺乏公平競爭的市場下，這些監管規例必須存在，以保障公眾利益，及防止企業濫用市場力量，得到壟斷利潤、收取高昂價格、提供差劣質素的產品或服務。

3.33. 回報率的監管模式近年來受到質疑，認爲這模式是過度投資及維持高運作成本的誘因。最近中華電力公司預計有 50%的發電量盈餘，但香港電燈公司却向政府申請加建發電廠(兩間公司分別對不同地區供電)。

3.34. 此外，香港只有某些行業受到監管，其他行業不受影響，即使該市場由少數參與者支配市場，賺取不正常的利潤，政府也不會理會。舉例來說，政府並不監管銀行業的利潤。但政府却容許利率協議使持牌銀行賺取龐大的收益，影響銀行間的競爭及存款者的利益。

3.35. 不論以何種形式去監管企業的市場表現(回報率或是價格上限)，一個高度競爭的環境會較監管更能令公司改善市場運作效率，提供更佳的產品／服務質素和更低價格。電訊市場的發展便是最好的例子，自固定電訊網絡服務市場開放以後，我們發現

a) 國際電話收費大大下降；

b) 嶄新的服務不斷推出；和

c) 現有企業整頓經營規模，提高效率，令消費者得益。

結論

3.36. 政府現時因應個別行業而訂定公平競爭條款的方式，有以下不足之處：

a) 這方式未能令政府全面地、以一致的政策去促進市場公平競爭。政府只在某些行業推動公平競爭，其他行業仍然存在法律或人爲障礙。政府有必要採取行動，減除入市障礙，引入公平競爭，令新經營者進入市場。

b) 個別行業的公平競爭條款禁止市場參與者濫用他們的市場力量和／或採取違反公平競爭的行爲，但這些條款並不一致，引致不同的解釋，違反這些條款的罰則亦不同。此外，由於條款由不同政府部門執行，導致不必要的政費支出，與「小政府」的目標相違。執行機構的職權重疊，令政策在不同行業推行不一致，導致不明朗和難以預測，增加了營商的風險。

c) 目前只有少數行業受政府監管，難保違反公平競爭的行爲不會在其他行業出現。當政府決定要訂立新法例監管這些行爲的時候，公眾利益可能已受到相當大的傷害。即使目前受政府發牌監管的行業，亦未必能夠在牌照內加入公平競爭條款，除非立新法例。舉例說，政府正在修訂的《銀行業修訂條款草案》，規定 Mondex 和智醒錢納入該條例，經營者須申領牌照。本會建議在法例草案加入公平競爭條款，但政府認爲不可行，除非另行立法，但立新法例需經冗長時間，制定、諮詢及立法程序需投入更多資源。

3.37. 相對來說，設立完善及切合需要的公平競爭系統有以下的優點：

a) 減少官僚架構及對企業的監管。推行公平競爭政策要有行政支援及制定公平競爭則例，這行政架構會儘量保持細小，但它或可代替現行按個別行業訂定的公平競爭條款，及節省執行該條款的行政支出(第六章詳細討論)。

b) 具一致性，使所有的市場參與者清楚了解公平競爭法的內容，及預計情況。

c) 適用於各種市場情況，法例旨在促進市場公平競爭，祇有競爭才可以保證所有行業達致市場效率及有良好表現。法例不獨適用於現時的各行各業，也適用於將來的新產品或服務。

3.38. 總括而言，公平競爭政策不會令政府增加開支，反之，訂立基礎規則以促進公平競爭，保障消費者權益。

第四章
公平競爭政策：未來香港的挑戰

引言

4.1. 數十年來，香港經濟成就超著，本地生產總值實質增長持續強勁，按人口平均計算，本地生產總值是全球最高的地方之一。香港位列全球第四大國際金融中心及八大貿易經濟體系。[1]

4.2. 香港經濟表現強勁，部份原因是它在地理上處於中國的大門，同時亦易於通往其他東南亞國家，因此，極具策略性位置。可是，隨着電訊科技及其他交通運輸的發展，香港在地理上的優勢已經減弱。而香港在其他方面的優勢，亦因爲競爭對手的經濟政策改變、及採取鼓勵外資的法例和政策，而逐漸降低。

4.3. 因此，香港在維持其競爭優勢方面，正面對莫大的挑戰。未來的經濟能否保持成功，端賴它是否有足夠的遠見，訂定務實的發展策略，面對新的國際競爭環境。香港面臨的挑戰來自下列兩因素：

a) 香港的經濟已由製造業經濟轉爲以服務及資訊爲主的大都會經濟[2]，及

b) 香港能否繼續爭取國際市場。

香港的經濟轉變及未來挑戰

4.4. 過去二十年，香港的經濟結構轉變，由以製造業爲主變爲以服務業爲主。服務業迅速發展，取代了製造業作爲香港主要經濟活動的地位，而服務出口亦成爲經濟增長的主要動力[3]。在 1996/97 年度財政報告中，政府指出：「截至 1995 年年底，服務業在本港的生產總值所佔比率超過 80%。(即使扣除公營部門所佔比率，服務業仍佔本地生產總值約 73%。)」[4]

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[1] 展望 2047 協會，《香港競爭能力研究報告》，1996 年 7 月。

[2] 同上。

[3] 服務出口的增長率，反映了服務業在香港的重要性日漸提高。 1994-95 年間，服務出口增加近 20%。 1995 年服務出口總額佔較 1985 年的 610 億 5 千萬元增加近 5 倍。資料來源：本地生產總值估計 1961-1995 年，政府統計處。

[4] 1996-97 年度財政預算案附件「支援及推廣服務行業」，香港政府，第 1 頁。

4.5. 香港政府相信服務業將成爲未來香港經濟發展的原動力。在這方面，政府已採取措施，把香港定位爲「全球及亞太區主要服務中心」[5]，及表示會確保服務行業的市場盡量開放和有競爭[6]。後者對支援服務業的成長至爲重要。

4.6. 現在中、小型服務業企業正填補製造業留下來的空檔，政府應訂定具遠見的計劃，盡力促進服務業的發展。這對香港維持其國際競爭力及經濟增長，十分重要，因爲服務業經濟的生產力增長率，較製造業經濟的爲低。

4.7. 非所有服務業的市場，都能在不干預(laissez-faire)政策下，自動產生高度的競爭，因爲在某些(非貿易)服務行業中，企業間並不需要全力競爭。服務業跟製造業不同，後者大部份產品是拿到國際市場交易的，因此要面對國際競爭；但前者卻包括一些只提供給本地使用的服務，這些服務因此可置身於國際競爭之外(貿易及非貿易服務的定義載於附件三)。

4.8. 政府應促進服務業整體的公平競爭，因爲貿易及非貿易服務業是互相依靠的。對商界來說，服務的提供可促進資訊流通、提供融資及基本建設、以及維持有形資產價值。非貿易的服務，如貿易融資、市場推廣、及大部份其他的「資訊敏感」服務，全都有助可貿易服務公司的運作。很多貿易服務，都可以在香港生產的同時，以現代電訊及資訊科技傳送至外國，供當地消費者使用。因此，可貿易服務的競爭能力，大程度上取決於本地電訊網絡的收費，以及其他不可貿易服務(如本地法律及會計服務)的收費。

4.9. 由此可見，非貿易服務行業缺乏競爭，會對香港可貿易服務行業構成威脅，使其難以繼續成功。本會在其對香港經濟主要行業的研究中，發現下列行業的競爭性相當低：

a) **港幣存款**：不同類型的港幣存款，高度集中在某些銀行中。例如，市場集中指數(Herfindahl Index)顯示，在 1992 年，支票存款及儲蓄存款的市場佔有率，分別只由 10 間及 6 間持牌銀行攤分，雖然市場上共有 161 間持牌銀行；定期存款的市場佔有率主要用 4 間有限制牌照銀行攤分。[7]

(b) **超級市場銷售額**：在 1993 年，兩間大型連鎖超級市場佔去約七成的超級市場銷售總額。[8]

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[5] 同上，第 1 頁。

[6] 同上，第 3 頁。

[7] 消費者委員會，*An Evaluation of the Banking Policies and Practices in Hong Kong - Focusing on their Impacts on Consumers.* 顧問報告， 1994 年 2 月。

[8] 消費者委員會，《香港超級市場研究報告》， 1994 年 8 月，何淑貞及消費者委員會研究員編。

(c) **氣體燃料供應**：香港中華煤氣公司佔去整個氣體燃料供應市場三分二的市場佔有率，並由於罐庄石油氣的不斷減弱而有穩定的增長。[9]

(d) **電話**：雖然本地固定電訊網絡市場已經開放，但在 1996 年初，從前的獨家專營公司，其市場佔有率仍達 99%。而國際電話市場則仍然由一間公司獨家專營，專營權最遲要到 2006 年才結束，除非香港電訊及政府達成提前結束的協議。[10]

(e) **本地電視廣播**：香港電視廣播有限公司及亞洲電視廣播有限公司的廣東話電視廣播，在 1995 年共佔去 94%的總收視時間。[11]

(f) **住宅樓宇**：在 1991 至 94 年間，有約 7 成的新落成私人住宅樓宇由 7 間發展商供應。[12]

(g) **專業服務**：政府最近決定禁止樓宇轉讓的律師定額收費，理由是定額收費限制競爭。

4.10. 由於上述服務均屬非貿易品，即使這些服務供應商訂定的價錢較外地的高出很多，商人除了光顧這些供應商外，別無其他選擇。

公平競爭政策對成本及通脹的影響

4.11. 中、小型企業是服務業重要的一部份，它們在促進香港經濟成功方面，擔當重要的角色[13]。政府須加倍關注它們的需要，尤其是有關經營成本上漲的影響(其實，經營成本對大公司或跨國公司亦同樣重要)。在這方面令人關注的問題是：香港高昂的租金及工資，佔企業經營成本百分比相當高，且還有繼續上升的趨勢，這情況在服務業中尤爲嚴重。商界不斷抱怨高昂的租金。若商業樓宇市場具競爭力，將可把租金控制在一合理水平。租金是經營成本主要的開支。同樣，住宅樓宇市場的結構若存在競爭，住宅樓價將可維持在市民可負擔的水平，因而能紓緩加薪壓力。

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9 消費者委員會，《家用熱水及煮食燃料市場競爭研究報告》，1995 年 6 月 2 日。

10 消費者委員會，《電訊業研究報告》，1996 年 3 月。

11 "TV Audience Measurement Report 1995", SRG 市場研究有限公司

12 消費者委員會，《香港私人住宅物業市場競爭研究報告》，1996 年 7 月，消費者委員會根據顧問報告編寫。

13 中、小型企業的定義是：僱用少於 100 人的製造業企業，或僱用少於 50 人的服務業企業。在這定義下，1995 年香港 98%的商業機構屬中、小型企業。財政司曾蔭權先生在一次演講中，形容中、小型企業是「香港經濟成功的基石」。爲協助中、小型企業成長及質素提升，政府必須提供可能達至的最佳環境，支持中、小型企業發展。

4.12. 近期才開放的電訊市場，最能顯示競爭對價格所造成的影響。在電訊市場開放前，只有一家電話服務爲企業提供服務，自從市場引入競爭後，商人有較便宜的選擇。引入競爭後，有銀行的國際電訊開支節省了 20%。[14]

須確保所有市場參與者可以在公平環境中競爭

4.13. 本會進行研究期間，有中、小型企業曾向本會表示市場缺乏平等競爭機會。它們對相互補貼、搭賣、價格歧視、規定零售價及操縱價格等壟斷行爲，及排斥對手的專營的限制行爲，感到無能爲力。(參看附錄二)

4.14. 政府爲支持服務業及中、小型企業，應採取措施改善本港的不完美市場，及考慮實施公平競爭政策。公平競爭政策和公平競爭法，可制止企業製造妨礙公平競爭的障礙(例如排斥對手的專營行爲、搭賣合約、掠奪性定價)，亦可防止壟斷或寡頭壟斷者利用其市場支配地位，使價格保持在合理水平。

4.15. 實施全面的公平競爭政策及競爭法，使競爭所帶來的益處，廣泛地惠及各行各業。香港若要建立一個以服務業爲主的經濟體系，制定公平競爭政策至爲重要。

自由競爭吸引外資

4.16. 除出口外，跨國公司在香港的投資，對香港的經濟增長亦有重大貢獻。跨國公司有利香港經濟，因爲它促進技術轉移、帶來本地缺乏的運作的元素、人才及增加就業機會。

4.17. 香港以往能吸引國際公司，部份原因是區內的其他地方，缺乏開放的經濟體系、對商業活動有利的制度和稅收政策。可是，香港在這方面的優點，正逐漸減弱，原因是：

a) 不少地方亦已採用經濟開放政策；及

b) 國際貿易組織已把貿易、投資及公平競爭政策三者相連一起討論。(參看下文)

4.18. 一項有關香港經濟競爭能力的研究指出：「香港及香港的企業，活躍地替各種經濟活動進行包裝及整合，以迎合本地、區域及全球經濟，並在國際層面上把供與求配合起來。」可是，香港的競爭對手正以香港一向強勁的工業和經濟活動作競爭目標[15]。香港位處進出中國大陸的主要通道，但這

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[14] Tim Cureton, Group Head of Telecommunications, 香港滙豐銀行；南華早報 1996 年 9 月 4 日報導。

[15] The Hong Kong Advantage : A Study of the Competitiveness of the Hong Kong Economy, Vision 2047 Foundation.

優越地位將來可能會受如上海等的港口所威脅，而一旦台灣直通中國大陸，香港的優越地位亦會進一步減弱。一如港口及運輸設施，本港的金融服務業亦可能面對中國大陸的競爭。

4.19. 在這種環境中，國際企業會否仍選擇香港作爲基地，很大程度上取決於香港非貿易服務的收費[16]，包括寫字樓租金、本地運輸及通訊服務、及本地專業服務(例如貿易融資所需的本地法律及會計服務)。本港高昂的住宅樓價[17]、工資及寫字樓租金[18]，會令企業考慮需否把部份的運作遷往區域內其他地方。某幾間在港設有辦事處的海外銀行，已把部份運作遷往新加坡。外國公司亦將察覺到，在中國的經營成本持續遠低於香港。

4.20. 由傑出商界人士組成的「展望 2047 協會」完成的《香港競爭能力研究報告》，精簡地把香港面對的挑戰撮要如下：「在香港感受到的成本壓力，凸顯了整個經濟要改善其競爭能力及成本效益的需要。雖然香港經濟的貿易行業，長久以來已有自由及開放的競爭，但這現象卻不曾在某些非貿易行業中出現。由於非貿易行業不用直接面對競爭，因此有需要確保香港(指不可貿易行業內)的壟斷者或寡頭壟斷者能以最高效率經營。專業服務行業中的入行限制，應以限制不合資格者入行爲宗旨，而非抑止競爭。」這撮要提供了有力證據，證明商界認識到競爭的重要性及監管壟斷和寡頭壟斷的需要，亦可說是認識到在香港施行公平競爭法的需要。

貿易政策及公平競爭政策的連繫

近期趨向

4.21. 本年四月，經濟合作及發展組織(OECD)成立了貿易及競爭工作小組。而在世界貿易組織(下稱世貿組織)中，會員越來越重視貿易、投資及公平競爭政策三者間的相連關係。此外，十二月的世貿組織部長會議將可能討論把不同國家公平競爭制度合爲一的可能性。由此可見，國際層面支持貿易政策應和公平競爭政策並肩發展，原因是，在缺乏確保公平競爭機制的地區開放貿易，會導致某些行業過度集中，最終減少競爭。[19]

4.22. 香港的市場制度一向非常開放，政府對外國人在企業的股權亦甚少有限制。但時至今天，這些優點已不足以維持香港在國際貿易上的地位，本港缺乏了一套全面的公平競爭法，這可能會削弱香港在國際貿易的優越地

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[16] 香港滙豐銀行經濟月報 1996 年 9 月至 10 月。

[17] The KPMG (1995 年 4 月), *Study on the Promotion of Hong Kong Services, Final Report*，是項研究由香港政府委托進行，研究報告把本地高昂的樓價，列爲本地吸引跨國公司負面因素之一。

[18] Richard Ellis (1996 年 8 月), *Global survey of office rents,* 南華早報 1996 年 8 月 7 日刊出。報導中指出在 1996 年 6 月底香港寫字樓租金是繼孟買及東京後第三高的。

[19] Leonard Waverman & Rong-I Wu (1996), *Trade & Competition Policy in APEC, in Priority Issue in Trade and Investment Liberalisation: Implications for the Asia Pacific Region,* B Bora & M Pangestu Pacific Economic Cooperation Council, Singapore 編。

位。關貿組織，即世貿組織的前身曾對香港實施的入口米配額制度提出質疑。

4.23. 越來越明顯的是，在全球貿易市場獲得全面參與及平等機會，實施本土公平競爭政策將成爲先決條件。最近在一個區域會議上，一位世界銀行代表曾說：「完善的公平競爭法，應在經濟架構政策中佔重要地位..... 有效的公平競爭法可防止人爲的入市障礙，使企業容易進入市場。在促進競爭及整合本地及國際市場方面，公平競爭法起補足及輔助其他政策的作用，尤其是貿易自由化政策。缺乏公平競爭法、或因公平競爭法使用不當以至效果不彰，都會成爲入市障礙。」[20]

4.24. 要吸引跨國企業來港發展，政府必須明白所有跨國企業都期望個別國家能以法律來保証市場自由及開放。現時亞洲及全球越來越多國家已引入貿易及鼓勵投資的法律制度，因此跨國公司有更多選擇。此外，全球性的貿易環境正不斷發展，世界貿易組織所採用的政策正是很好的例子，因此，香港須緊隨甚至預計全球貿易政策的發展，以確保香港貨品可以繼續出口到外國市場，及吸引外國直接投資。將來能否進入國際市場，對香港這個以出口爲主的經濟體系來說，尤爲重要。

未來的挑戰

4.25. 香港應考慮到，世貿組織成員或其他貿易組織，不大可能容忍某些成員無限期地拒絕在內部經濟施行公平競爭政策。原因是沒有公平競爭法，又或公平競爭法實施得不徹底的國家，會影響公平競爭，影響其他國家的生產商及消費者。例如，對發行的限制會打擊入口銷量；出口卡特爾(壟斷)會使外地消費者受害。

4.26. 世界經濟秩序中，另一惹人關注的問題，是怎樣解決由於政府干預導至國際貿易上的違反公平競爭的行爲。其實由於政府干預而造成的違反公平競爭的行爲，如自願出口限制、某些形式的國家資助、及政府歧視性選擇供應商，現已有適當的紀律規則予以約束。但在其他方面違反公平競爭的干預行爲，則仍未有解決方法。例如，很多人認爲反傾銷規例在某些情況下，會變成違反公平競爭的干預，並指出研究公平競爭問題時，應對此多加關注。[21]

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[20] Shyam Khemani, Private Sector Development Division, World Bank in *Priority Issues in Trade and Investment Liberalisation: Implications for the Asia Pacific Region,* B Bora & M Pangestu, Pacific Economic Cooperation Council, Singapore 編， 1996 。

[21] Shyam Khemani, Private Sector Development Division, World Bank in *Priority Issues in Trade and Investment Liberalisation: Implications for the Asia Pacific Region,* B Bora & M Pangestu, Pacific Economic Cooperation Council, Singapore 編， 1996 。

4.27. 由於世貿組織日漸注重公平競爭政策和貿易及投資政策的相連關係，該組織將來很可能會特別注意某些國家和地區，這些國家／地區的法律容許操縱價格的卡特爾、獨家發行協定及其他扭曲市場協議，以及政府容許壟斷經營等違反公平競爭的行爲。香港應隨時準備回應世貿組織的查詢。若香港施行公平競爭政策，則可顯示其維護市場自由競爭的決心是一致而有系統的。率先主動施行公平競爭法，香港可替自己取得有利的位置，加強其對國際貿易自由化措施的影響力。換言之，可更有力地影響世貿組織，令該組織取銷對香港企業不利的歧視性規限，例如有關傾銷、出口限制協議、補貼及抵銷等措施。

4.28. 香港經濟十分依賴外國市場，因而極易受經濟不景及貿易伙伴的貿易限制政策所影響。這些貿易政策，例如反傾銷措施及入口配額，大多都帶濃厚的保護主義色彩，又不受個別國家在內部經濟的公平競爭法所管制，這類政策通常都犧牲了消費者的利益及國際競爭，以達到保護本地生產商的利益。

4.29. 國際趨向推動全球性公平競爭政策，這對像香港這樣高度貿易導向的經濟體系十分有利。有些國家對貿易的干預，如反傾銷措施，從國際競爭政策的角度來看，是站不住腳的。

4.30. 因此，香港如能與其他國家合力爭取世貿組織加強公平競爭政策的施行，及指出貿易限制措施所造成的不良影響，香港可得到的好處甚多。在這方面，香港並非全無影響力。香港在亞太經濟合作論壇(APEC)中擔當着主要角色；在成立世貿組織的談判中，香港亦扮演具影響力的角色；此外，在經濟合作及發展組織研究貿易及競爭的一個主要委員會中，香港是觀察員。香港絕對處於一個有利位置，去爭取實施國際競爭政策，以取代傳統的保護主義貿易政策。然而，倘若香港本身繼續缺乏全面的公平競爭政策，其影響力將必減弱。將來香港代表在國際會議中可能被挑戰，須解釋爲何香港還沒有一套全面的公平競爭政策。爲保障其國際利益，香港理應訂立全面的公平競爭法。

國際合作

4.31. 要防止某些產品的國際市場被寡頭壟斷，就需要建立一個共同的公平競爭政策架構。跨國企業的運作可能不受個別國家法律的管轄，這樣它們可跨越國界，運用其市場力量進行某些違返公平競爭的行爲。現時有些國家採用了極具爭議性的「影響」原則來審視違反競爭的行爲。美國政府曾嘗試起訴某些以外國爲基地的公司，指控這些公司要對一些「影響」美國經濟的違反公平競爭經營手法負責。 1994 年美國司法部裁定英國 Pilkington 公司某些活動，影響了美國玻璃廠(turn-key glass plants)建造技術的能力；但卻沒證據顯示美國消費者受到影響。案件的判決跟英國政府的意見相左，因當時英國政府並不同意案件涉及美國的利益。

4.32. 爲免國家之間發生磨擦，各國政府現正研究訂立互惠協議(comity agreements) 的可行性。協議規定受影響的國家提出訟裁，在訟裁期間，企業所在的國家，會以其本身的公平競爭法，衡量有關糾紛。在沒有公平競爭法及沒有公平競爭事務處理組織的情況下，香港不可能參加該協議，香港公民若牽涉這方面的糾紛，便只能任由外國法庭作出裁判。

4.33. 另一危險是世貿組織將來可能被迫要負起處理及訟裁違反公平競爭案件的責任。這問題在亞太區尤值得關注，因跨國企業在這區近年大大增加。若能訂立一套國際公平競爭法及公平競爭政策合作法則，供當地法庭使用，那麼對糾紛中任何一方及有關政府均有好處。這樣，糾紛便毋須交由世貿組織自上而下地「遠距離」處理，而可交由熟悉當地市場環境的本地法庭解決。[22]

結論

4.34. 外在環境不斷改變，香港不能再憑現有的政策，期望自動可以維持今天的成就。正如一位傑出的本地銀行家認爲：「世界毋須爲我們的生活負責。想像香港是一件商品，如果它賣得太貴，如果它並非物有所值，消費者便會另作選擇。[23]」因此香港政府必須高瞻遠矚，採取務實的行動，確保我們擁有一個有助維持經濟增長的公平競爭環境。本章指出，公平競爭政策可促進服務業的發展，和使貿易行業在國際競爭中有更佳表現。全面公平競爭政策，有助確保香港挽留及繼續吸引流動性高的跨國企業。此外，當前國際新經濟秩序正十分強調貿易、投資及公平競爭政策，若香港沒有公平競爭法，便無法加入互惠協議，外國的公平競爭組織便可在涉及本港市民的違反公平競爭糾紛中，取得絕對的訟裁權。

4.35. 作爲主要貿易中心，香港對國際間有關公平競爭政策的辯論是具有影響力的，亦有機會促使外國取銷其對香港施行的違反公平競爭貿易措施。可是，若香港未能在內部經濟實施公平競爭政策，它的影響力便會減弱，其國際利益亦將受損。

4.36. 此外，若政府繼續漠視在香港實施全面公平競爭法的需要，將來可供香港解決經濟問題的措施便十分有限。例如，當通脹壓力增加，香港便少了一種對付通脹的方法。又例如在國際層面，當地區性貿易壁壘出現保護措施，香港難以連同其他國家，爭取支持實施全球公平競爭政策，以遏這壓力。

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[22] Leonard Waverman (University of Toronto) and Rong-I Wu (Taiwan Institute of Economic Research) in *Priorty Issues in Trade and Investment Liberalisation: Implications for the Asia Pacific Region*, B Bora & M Pangestu, Pacific Economic Cooperation Council, Singapore 編，1996 。

[23] 李國寶先生 (1996 年 8 月 19 日), 東亞銀行行政總裁及副主席, *Dateline Hong Kong*, 南華早報。

4.37. 雖然香港一向以來沒有全面的公平競爭政策，仍然有高度的競爭力。但這並非等同香港毋須制定公平競爭政策。本報告多次強調內部經濟競爭有公平競爭，才可以加強香港在國際層面的競爭。何況香港未來將面對龐大的挑戰。故此，香港必須儘快施行全面的公平競爭政策。

第五章
公平競爭政策對商界及消費者的裨益

引言

5.1. 本章探討公平競爭政策爲本港商界及消費者帶來的裨益，並闡釋商界及消費者對公平競爭政策的疑慮。

對商界的裨益

5.2. 公平競爭政策對商界的裨益，除了第四章提及的有利本港整體經濟發展外，亦包括下列三方面的益處：促進市場公平，加強一致性及減少監管。

促進市場公平

5.3. 公平競爭政策對商界有利，在於它能杜絕有礙工商界整體發展的違反競爭行爲。違反競爭行爲不但會使有效率、經營有方的公司無法生存，亦會阻礙了新公司進入市場。公平競爭政策就如一個會社的會員規章，用來約束個別會員的行爲、保障全體會員的整體利益。

5.4. 香港要面對國際競爭的行業(即可貿易行業)，在本地有激烈競爭。至於其他缺乏競爭的行業(主要是本地行業)，公平競爭政策能引入競爭或加強競爭，亦可防止競爭因環境變遷而減弱。一些現在競爭非常激烈的行業，在不斷變化的市場環境中，亦難保日後不會出現競爭減弱的情況。例如本港住宅物業市場，在 15 至 20 年前，競爭十分激烈，但到了今天，種種因素令入市障礙大增，致使市場集中在數位大發展商上。

5.5. 公平競爭政策不能消除所有的入市障礙如高開辦資金成本等，但卻能減低因「不公平」或違反競爭行爲所造成的入市障礙；配合一些輔助的監管政策，公平競爭政策亦可減少制度上的障礙。這不但有助新公司的成立或把公司業務多元化，亦有助國際公司進入某些本地市場，例如本地的國際電訊市場。其實香港開埠以來，早已習慣了面對國際競爭所帶來的挑戰，香港人亦因此而認識到外資的好處及互惠地可自由進入外國市場的裨益。公平競爭政策的存在可提醒政府在作出購買決定時，考慮以投標及選擇多供應來源方式，增加競爭。

加強一致性

5.6. 若能有獨立機構，按照定義清晰的公開指引，負責調查可能構成違反競爭行爲的經營手法，本港的經濟制度將會變得更開放及一致。設立這樣的獨立機構，可爲商人提供明確的申訴及索償途徑，增強商人對香港及其商業環境的信心，無論是目前或九七以後。最近一項比較各地營商態度的調查顯示，按貪污程度最少至最嚴重的次序排列，香港在五十四個國家／地區中排十八，名次雖高於大部份亞洲國家，但卻低於排第七的新加坡甚遠[1]。雖然違反競爭的行爲現時在香港並非不合法，但若能實施妥善的公平競爭法及設立獨立公平競爭組織，香港的國際商業形象將會獲得提升。

5.7. 全面公平競爭政策有助加強政策的一致性，因爲公平競爭政策是按照公開指引，並由一個獨立機構負責。對照之下，政府現時所採用的零碎的監管方式，較易令公平競爭條款不一致，如廣播牌照，不同公司的公平競爭條款略有不同。

5.8. 在沒有公平競爭政策的情況下，受違反競爭行爲影響的一方，要解困只能向從政者及政府官員進行游說。相反，若實施了公平競爭政策，受影響者便能透過公正及客觀機制，解決有關商業競爭的糾紛，從而使商業運作免受政治因素影響。決定實施公平競爭政策後，從政者的重責，是制定推行公平競爭政策和機制；至於糾紛的處理，則應在既定的機制內，交由獨立及有專門知識的人士負責。

減少監管

5.9. 妥善及務實的公平競爭法執行組織，有助簡化官僚結構及減少政府對一些企業的監管。實施公平競爭政策只需要簡單的行政機構及一套公平競爭法規。公平競爭政策卻可在某些方面替代了一些政府現今按行業特定規管章則，減少對行業不必要的監管。總的來說，實施公平競爭政策後可減省一些政府資源，及令商業環境更簡單清楚。政府現在是透過如電訊管理局等的組織，或實施價格管制，去處理個別行業內的價格及競爭問題，這是一種過渡性措施。長遠來說，由政府操縱價格，會扭曲市場的實況，而且在促進效率及降低價格方面，亦不及利用市場競爭這方法爲有效。

5.10. 若公平競爭政策能賦予公平競爭組織權力去廣泛匯報各種競爭的障礙，反映某些政府管制有礙競爭或弊多於利，那麼公平競爭政策亦能促進市場開放。這問題會在第六章詳細討論。

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[1] Transparency International, Berlin's table。列表根據 10 項國際普查結果編製，在 1996 年 6 月公佈。

競爭帶來的其他裨益

5.11. 除了促進市場公平、政策的一致性及減少政府對一些企業的監管外，公平競爭政策令商人分享到第四章所提到的，香港整體經濟所獲得的利益。競爭有降低價格及促進管理效率的效果，也可維持香港作爲一個國際服務中心的吸引力。最近港府開放了固定電訊網絡市場，充份顯示了競爭可如何惠及各行各業。

5.12. 此外，國際間的貿易談判，正趨向把貿易及競爭一併研究，實施公平競爭政策，能加強香港在國際組織(如世界貿易組織)中的談判能力，爲香港爭取繼續 — 甚至改善 — 進入國際市場的機會。

商人對公平競爭政策的疑問

「香港眞的需要公平競爭政策嗎？」

5.13. 香港一直以來從沒有全面的公平競爭政策，但有可觀的經濟成就。我們在第四章已清楚指出，香港不能固步自封。本港的經濟結構、其他亞洲國家的經濟政策、以及全球貿易環境都在轉變中，香港迫切地需要制定全面的公平競爭政策來面對這些新挑戰。

「公平競爭政策不利於大企業？」

5.14. 不是。在其他地方，例如日本、台灣、歐盟，公平競爭政策並非爲針對大企業而訂定的，因此我們亦沒有理由相信，對大企業不信任的情況會在香港出現。美國的公平競爭法源於 19 世紀，當時社會對大企業瀰漫着不信任的氣氛，這種氣氛延續至今仍然存在，但美國只是異常的例子。

「公平競爭政策補貼效率低的公司？」

5.15. 不是。事實剛好相反，沒有公平競爭政策，才會讓低效率的公司找到生存的空間。例如，卡特爾通常會把價格限定在集團內效率最低的成員也能生存的水平。另一方面，市場壟斷者在不用擔心生意流失下，繼續採用舊式及過時的經營手法。相反，實施公平競爭政策可促進高效率及經營成功的公司茁壯成長。

「公平競爭政策會打擊現存的企業嗎？」

5.16. 競爭往往會降低運作成本，商人因而得益。整體來說，商界會增加進入新市場的機會而得益。有效率的企業會有增長。當市場中的資源逐漸分配到資源效率最高的企業時，行業便會出現一段轉變及重整期。有些行業的企

業數目會因此減少，但有些行業的企業則會增加。結果是整個經濟會變得更健康。

「公平競爭政策會否增加了官僚干預，妨礙我們對市場轉變作出快捷及彈性的反應去應付轉變？」

5.17. 不是。若商人沒有違反公平競爭政策，他毋須擔心公平競爭委員會的干預。某些率先推行公平競爭法的國家，初期確曾規定商人遞交商業協議及申請審批，加重商界負擔。這些國家醒覺這問題後，已修改有關手續及程序。香港可以參考它們的經驗，避免爲商界帶來不必要的程序。有關的官僚架構可以變得更精簡。

「其他地方的情況如何？」

5.18. 在亞洲，公平競爭政策的重要性越來越大。日本自 1947 年已開始實施公平競爭法，最近更有意委任有聲望的高級檢察官，爲公平交易委員會主席，加強公平競爭法的施行。南韓亦正加強執行其公平競爭法， 1980 年修改該法，擴大法例的有效範圍，及提升了公平競爭機構主席的地位，使他能參與內閣會議。台灣在 1991 年訂立了公平競爭法。詳情見附件四。

5.19. 全球很多地方的政府，正引入公平競爭法或改善原有的公平競爭法[2]。包括取銷法例中給予某些行業的豁免權，擴大公平競爭法的執行範圍；有些則界定何種協議有利於促進競爭，毋須交公平競爭機構審核，以減低公平競爭法給商人帶來的負擔。

5.20. 各地及國際企業代表，現正熱烈討論公平競爭政策的未來方向，香港亦應參與這討論，以解除違反競爭的規例，如反傾銷措施。

公平競爭政策對消費者的裨益

5.21. 公平競爭政策在提供消費者選擇、改善服務質素、在價錢及產品創新方面，均對消費者有利。透過加強競爭及杜絕違反競爭行爲，公平競爭政策有助維持貨品或服務的價格在低水平，同時提供高質素服務。

5.22. 公平競爭政策的眾多好處中，最大的是在形成壓力使產品價錢維持在低價水平。例如，自 1993 年香港的電訊市場引入競爭後，雖然只是有限的自由化，通往美國的直通國際電話收費至今已下跌百分之七十五[3]。當香港

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[2] "The Instruments of Competition Policy and their Relevance for Economic Development" by R. Shyam Khemani and Mark Dutz, 1994 年 11 月出版；書中列出 26 個發展中或新興經濟體系的公平競爭法，當中有些是最近引入、修訂或政府在立例中。

[3] 1993 年通往美國的收費：每分鐘$8.0(優惠收費)。 1996 年 10 月收費每分鐘$1.99(週末收費)。

國際電訊公司的國際長途電話專利權終止後，就算沒有了回撥服務，也將會出現更激烈的競爭，收費亦將進一步下降(香港國際電訊公司的專利權至 2006 年)。

5.23. 在缺乏價格競爭下，生產商多以贈品或額外優惠替代減價，作爲競爭的手法。例如汽油站送出水和紙巾作贈品，但卻劃一售價；銀行爲信用咭客戶提供某些商店的購物折扣及入會贈品，但信用咭利息卻較美國及日本高出 40 至 100%；牛奶製造商的產品，附送穀類食品、毛巾、枱墊、又或加大容量，可是價格不減。

5.24. 並非所有消費者都喜歡這些贈品，有些甚至不需要或不想要這些贈品。整體來說，這種「軟性」競爭對消費者的益處不明顯。在某些競爭激烈的市場，例如在外國售賣上述產品和服務的市場，及香港的流動電話市場，贈品只是次要的市場競爭工具。公司首先在價格及質素上競爭，因這兩點最影響消費者的選擇。價格及質素的競爭比贈品，優惠等軟性競爭，對消費者更有利，消費者可因而在產品或服務質素上有更好的選擇，又或能享受更低的價錢，把省回來的錢用在自己認爲需要的地方。

消費者對公平競爭政策的疑問

「競爭會否影響現存的相互補貼？」

5.25. 爲加強競爭及促進自由市場的運作，很多時有需要把服務或產品的成本放開。舉例說，具壟斷性的公共服務公司由於客戶並無其他選擇，可以任意把其服務收費提高，然後把多收的利潤來補貼其他客戶服務種類。有關補貼的問題，我們可作以下回應：

a) 因競爭而提高的效率，能加倍補償消費者因沒有了補貼而遭受到的損失。例如英國爲電話市場引入競爭的同時，逐漸減少對住宅電話的補貼，競爭結果令住宅電話的平均收費不升反降；

b) 競爭令市場效率增加，消費者整體來說(不論是家庭用戶或商業用戶)將可用較低的價錢享用同樣的服務；

c) 倘若政府希望幫助社會上某一群人，可憑票取津貼／退款或福利政策，會較完全一般補貼(沒指定受惠者)更有效率。以英國爲例，英國電話公司現在給予電話使用率低的用戶(一般是老人家或貧民)收費退款，而非給予所有住宅用戶補貼；

d) 減低相互補貼的一個重要經濟效益，是使價格更貼切地反映經濟成本，從而促進資源更有效地運用。舉例說，若的士受補貼而致其收費水平比巴士還便宜，那麼市民都不乘巴士，改搭的士了，雖然巴士是更有效益的公共交通工具。

5.26. 須知爲補貼辯護的論據，往往是來自希望維持現狀不變的公司，而非消費者組織。

「若公平競爭政策導致政府對行業的監管減少，消費者會否受損？」

5.27. 盡量減少監管是公平競爭政策重要的一環。監管多不一定對消費者有利，首要原因是監管增加了生產成本，造成價格上升。有些監管亦限制了市場競爭(當只有少數生產商能符合某項監管要求時)，企業因而毋須把價格降至最具競爭性水平。再者，監管過嚴導致黑市交易的出現或增加，也可能會使市場出現較便宜但不合規格的產品。一般來說，低入息的家庭是最易受平價吸引而購入這些不合規格的產品，雖然監管的出發點原是爲他們提供保障。

5.28. 此外，受政府特定機構監管的行業，在監管推行了一段時間後，有些企業可能會懂得用監管規例，維護其利益。這種情況被稱爲「被虜的監管制度」(regulatory capture)，意即不求改革的監管措施，最終未必能幫助消費者，反而可能會影響消費者的利益。

5.29. 大部份的健康及安全條例、商品說明條例等類似的法例，均爲保障消費者權益的重要法例。在促進自由競爭及維持監管以保障消費者之間，應力求取得平衡。方法可以是，當沒有其他辦法(例如公眾教育)可以替代時才引進一些有效監管措施；在訂定監管標準的時候，須切合本土實況及市民的負擔能力。

結論

5.30. 公平競爭政策除了使商界分享到整體經濟所得到裨益外，亦爲商界帶來下列三方面益處：

a) 促進市場公平

b) 加強一致性

c) 減少監管

5.31. 香港需要公平競爭政策，以緊跟隨本地及世界的經濟轉變步伐。在香港施行的公平競爭法，祇會令我們的經濟更健康。不會對商界不利，亦不會增加官僚架構。亞太區成功的經濟體系，正紛紛引入公平競爭法或加強其已有的公平競爭法；香港若要在貿易政策的國際論壇中佔一席位，實不能在實施公平競爭政策方面裹足不前，落後於其他國家。

5.32. 對消費者來說，加強競爭可帶來價格下降的益處；雖然有些補貼會隨之消失，但引入公平競爭政策後會使整體經濟效率改善，結果是每一個消費者都會受惠。

第六章
公平競爭與監管政策

引言

6.1. 第五章已指出，全面的公平競爭政策，可減低監管的需要。這可從兩方面來看。首先，有了全面的公平競爭政策，政府毋須爲個別行業訂定監管規則，例如價格上限，以彌補因缺乏競爭可能帶來的問題；其次，公平競爭委員會開展工作後，可能發現有些監管規例與原訂的目標不相符，甚至妨礙公平競爭，因此可以把它們廢除。

減除監管的需要

6.2. 公平競爭政策和監管政策同樣確保經營者、消費者和一個地方的經濟體系，免受不完全市場或「市場失靈」(market failure)[1]的影響。

6.3. 在某些情況下，市場失靈可能由於技術因素，例如該行業採用的技術需要可觀的規模經濟，而市場的規模又不容許多於一間公司運作，所以，須獨家專營才見效率。於是市場不存在競爭，可稱之爲「自然壟斷」。[2]

6.4. 自然壟斷的情況多見於公用事業，例如電話或電力輸送網絡。在這些情況下，政府一般會監管經營者的收費。不過，監管的目的並不在改良市場運作而是作爲自由市場力量的替代品，這與公平競爭政策的目的有所分別。監管企業有時卻在無意之間產生一些副作用，造成更大的市場扭曲。例如，政府訂出的利潤管制計劃，祇預先規限公用事業的投資回報上限比率，由於利潤與公司的資產值掛鈎，投資越大，資產基數越大，按比例計算，實得的利潤越多，成爲擴大資本投資的誘因，企業可能因此作超出實際需要投資建設。從市場效率的角度來看，以資產值計算回報率的監管方法，不是解決不完美市場的最佳策略。

6.5. 因個別行業訂定公平競爭規例的另外一個弊端是耗費資源，政府需要人手爲逐個行業厘定規則，及給予監管機構資源，以進行監管的工作。受監管企業的行政負擔亦同時增加了，它們需要額外提交報告，並且爲了符合規例的要求，又需要另設賬目。

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1 「市場失靈」指競爭的市場均衡與最適度資源調配之等式失效；所謂均衡的市場競爭是指在市場上有足夠的經營者，使市場有競爭以達致均衡的情況。(J. O. Ledyard 'Market Failure', in J. Eatwell et al, The New Palgrave, (1986), London : Macmillan)

2 A. Koutsoyiannis, Modern Microeconomics, (2nd edition, 1979), London : Macmillan.

科技發展的影響

6.6. 對公用事業的監管，美國經濟學家 Viscusi, Vernon 和 Harrington 認爲：「最重要是知道什麼時候停止監管某些行業。現代社會科技日新月異，今日被視爲自然壟斷的行業，明日的情況未必一樣。監管自然壟斷行業可以促進各方利益，但監管不再屬於自然壟斷的行業卻可能適得其反。」[3]

6.7. 「雖然，應否繼續監管某公司／行業是由立法者決定，但提出修改監管政策卻是監管機構的責任。從監管機構可鼓勵新經營者加入市場入手、或放寬價格管制.....可惜，監管機構的官僚制度都有內在的因素，阻礙廢除監管，就算極有需要也沒有這樣做.....廢除監管會削減了監管機構的責任，甚至最終毋須存在。」[4]

6.8. 在香港，監管某些行業(廣播業、電力供應、食米進口、航空等)的工作，由政府負責，電訊管理局和金融管理局則分別監管電訊業和財務機構。

6.9. 在某些行業中，公平競爭政策可代替監管。不過，只要自然壟斷繼續存在，或監管機構肩負的公眾福利或策略目標是公平競爭政策未必能夠完成的時候，政府仍須對個別行業實施監管。例如政府爲求維繫金融體制穩定，有需要監管財務機構的運作、爲確保電訊有全民服務，仍需要監管電訊業。另一方面，在市場全面有公平競爭之前，監管成爲短期措施。例如，在電訊市場未有足夠競爭之前，市場「老大哥」香港電話公司的減價計劃，便須由電訊管理局批准。在家用氣體燃料供應市場方面，消費者委員會亦提議，在市場獲得開放競爭之前，例如引進共同輸送系統[5]，應監管煤氣公司，以保障公眾利益。

6.10. 自然壟斷的公用事業，有時由一間公司提供服務，更能符合規模經濟的效率，尤其以香港這麼細小的經濟體系而言。但政府應體會到，市場的轉變，例如先進科技的發展、隨着社會財富和人口增加而擴大的市場、新的供應來源，例如南中國的天然氣體供應等，都可以用來開拓新的競爭領域，使市場可以有競爭及有效率，令價格降低。舉例來說，敷設電話網絡的成本下降，固定電話網絡服務經營者因而有競爭空間。又好像在英國及澳洲，把能源供應服務與能源輸送功能分開，可使一向被視爲自然壟斷的能源供應市場，引進公平競爭，可能帶來更大的效益率增益。

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[3] W. Kip Viscusi, John M. Vernon, Joseph E. Harrington Jr. Economics of Regulation and Antitrust, (1992), Lexington, Massachussets, and Toronto : D. C. Heath & Co.

[4] 同上

[5] 消費者委員會(95 年 7 月)「家用熱水及煮食燃料市場競爭研究報告」。

找出毋須保留的監管規例

6.11. 在香港，有些監管規例及機制限制了，市場(主要屬本地行業)的公平競爭。有些行業，新經營者難以進入市場(食米進口、公共汽車公司、電力公司、國際電訊、有線電視等)。結果，本地有些主要市場的可競逐性遭到犧牲，因此香港未能享受到由競爭的經濟利益。

6.12. 其他行業，又因一些政府監管規定，使新營者不能入市，這雖然並非政府的本意(例如，禁止石油汽管道通過公共道路[6]，或規定嬰兒衣服必須符合英國標準[7])。在資料搜集過程中，本會注意到商界對政府日益加強對商業活動的干預極表關注，並擔心會影響市場的競爭[8]。其實，公平競爭政策可爲商界、消費者和不同經濟利益提供監管以外的另一選擇。

6.13. 舉例來說，英國公平交易局的局長有責任向財政大臣提供意見，建議財經監管機構應如何訂定規則，以確保公平競爭。又英國壟斷及合併事務委員會曾經審查隱形眼鏡清潔劑涉嫌壟斷的個案，結論認爲，問題在於批核及分銷該產品的規例，並非在有關公司的行爲，該委員會認爲，有關規例扭曲了市場運作。於是，壟斷及合併事務委員會建議放寬限制，以免市場繼續被扭曲，政府終接納該建議[9]。南韓的公平交易委員會亦扮演相類似的角色，其功用包括「審視有可能影響公平競爭的法例及規則的制度」[10]。

結論

6.14. 公用事業一向受到監管，以替代自由競爭。這只不過是退而求其次的選擇，因爲監管可能扭曲企業的決策，又會增加企業在交待方面的負擔。本會不期望公平競爭能替代各種形式的監管。公平競爭委員會不會取代所有監管者的職責，但可共存，各自負擔本身的任務。長遠來說，市場的情況會有轉變、例如社會或策略目標的轉移、或有其他方法達到目標，情況可能會改變。英國電訊業開放，引入公平競爭後，監察者便可以放寬規管，並預見終有一天不再需要有監管機構。

6.15. 本會的行業的競爭研究及對香港的市場運作的觀察，顯示政府的監管有時反會成爲入市障礙。這正是美國一些經濟學家在列根政府期間強調的意見

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6 氣體安全(氣體供應)規例第 17(4)條。

7 1996 年 6 月 13 日'遠東經濟論壇'指出 1991 玩具及兒童產品安全條例，阻止美國嬰兒衣物在港的銷售，雖然其價錢遠較英國的同類貨品爲低。據悉， 1996 年 4 月已向立法局呈交條例草案，建議在條例內納入英國標準以外的其他安全標準。該草案現正由立法局省覽。

8 香港服務業聯盟(香港總商會附屬組織)， 1996 年 7 月 31 日。

9 「隱形眼鏡清潔劑」， 1993 年壟斷及合併事務委員會報告， Command Paper 2242 。

10 南韓公平交易委員會的 Chul Lyu 在 1996 年珠海舉辦的"Internation Seminar on Government Efforts of Promoting Fair Trade"的討論文件。

(見第二章)。所以政府有需要採取積極行動去增加受監管企業的競爭壓力。

6.16. 有些監管規例既不能促進經濟效率，亦未能照顧消費者利益。公平競爭政策正可以審視這些監管安排是否有效，更可以過濾增加監管或訂定新規例的建議。第八章討論公平競爭委員會如何承擔這方面的任務。

第七章
制定適用於香港的公平競爭政策

引言

7.1. 本章提出制定公平競爭政策的原則，以改善目前就個別行業制定政策的安排，根據這些原則及參考其他國家的經驗，本章討論：

a) 制定公平競爭政策的目的；

b) 公平競爭法的涵蓋範圍；及

c) 執法機構應按那種制度和模式確立，以有效地防止違反公平競爭的行爲。

7.2. 本會建議香港應採納的模式見第八章。

爲香港制定公平競爭政策的目的

7.3. 香港的公平競爭政策應以推動香港的整體經濟效益爲目的；廣義而言，公平競爭政策有助促進香港的經濟繁榮及提升生活水平。

7.4. 公平競爭政策的具體目的是：

a) 確保市場的可競逐性，促進競爭；

b) 締造公平競爭的市場環境；

c) 促進消費者的權益；及

d) 減少不需要的管制。

7.5. 有效競爭推動經濟效率 — 推動調配效率，以確保貨品或服務的價格反映成本、使企業面對壓力，提高運作效率及減低成本；令較高效率的企業取代效率低的企業，鼓勵創新；及減低政府以有需要爲名或以不完美的市場爲藉口進行干預。

7.6. 本會相信公平競爭政策應以「企業行爲」作爲行動的指引，這模式較適合香港。傳統的公平競爭政策，多以「市場結構」(例如市場集中比率)及「公司表現」(不正常利潤)來衡量對市場競爭的影響。「企業行爲」爲根據，對市場的干預程度，較該兩種傳統模式爲低。「企業行爲」彈性地容許某些行業爲達到規模經濟的目的，在市場上有高度的佔有率。本會抱開放態

度看「市場結構」及「公司表現」，它們是有效的量度工具，均可作爲調查企業是否同時進行反競爭行爲的觸發點。

7.7. 建議以「企業行爲」爲根據的公平競爭政策，應注意下列各點：

a) 反映小型、開放的經濟體系，重視國際競爭。

b) 須考慮香港的法律傳統，合乎《基本法》；

c) 須以務實的方法，清楚界定對不妨礙公平競爭或符合公眾利益協議的豁免；

d) 確保執行機構的規模細小及具成本效益。

7.8. 香港的公平競爭政策須得到其他國家的尊重，換取他們支持香港促進國際貿易的努力，令其他國家沒有藉口在香港行使其本國的公平競爭法。

7.9. 以上述原則爲基礎，本會希望香港制定的公平競爭政策得到公眾及商界支持，賦予香港最大的經濟利益，把任何不便程度減到最低。

制定公平競爭政策

7.10. 公平競爭政策的重要性在於政府決策時(例如招標或制定新政策)，必須考慮對市場競爭的影響。就像目前政府在制定主要政策時，必須作出環境影響評估一樣。

7.11. 有效的公平競爭政策必須有公平競爭法支持。訂立公平競爭法可確保政府處理違反公平競爭行爲的時候，具透明度及一致性，並賦予政府權力進行調查、制止及預防任何妨礙或違反公平競爭的行爲。

7.12. 香港是少數已發展經濟及新興工業地區，沒有制定公平競爭法的地方。一般來說，引入了公平競爭政策的國家，多數是因應公眾需要或外界的壓力而訂定。對外方面，香港在國際市場反對不公平競爭措施的努力，可能因香港本身沒有公平競爭法而減低說服力。因此，香港實急需改正現時的情況。

7.13. 對內方面，香港缺乏來自本土的壓力促使制定公平競爭法，很多人不明白公平競爭法的意義，及其對商界和消費者的好處。台灣雖用了近 10 年的時間，才完成並通過公平競爭法和設立執行機關，但公眾已得享公平競爭法的成果，商界知道公平競爭法不會制肘他們經營，相反，可確保他們在平等的市場環境下競爭。

7.14. 故此，若現時政府及未來特別行政區政府接受本會建議，制定公平競爭政策，須在立法前，令公眾認識公平競爭法對市場的重要性，游說公眾支持，及諮詢公眾意見，以確保公平競爭政策配合香港的情況及傳統背景。

7.15. 商界對公平競爭法的疑慮及細小經濟體系應否制定公平競爭法的質疑，台灣的經驗可以借覽，附件四闡列了台灣在制定法例時所遇到的問題，及實施公平競爭法時的經驗。

公平競爭法的涵蓋範圍

7.16. 日本、中國大陸、台灣、英國、美國、南韓及歐洲聯盟的公平競爭法(見附件五)，有禁止限制貿易行爲及防止公司濫用市場支配力量的條文。附件五列出上述國家的公平競爭法，一般包括：橫向操縱價格，縱向規定零售價格，及價格歧視等。除此之外，各地的條文也會因應各自的文化，法律及經濟背景而有所不同。舉例來說，上述所有國家除中國大陸以外，它們的公平競爭法全都有對企業合併(合併與收購)作出規定。日本、中國大陸、台灣、英國、南韓及歐洲聯盟的公平競爭法有作出禁止掠奪性定價的規定。中國大陸的《反不正當競爭法》禁止以行政手段妨礙市場公平競爭[1]。附件四闡列了日本、中國大陸、台灣及南韓等地的公平競爭法。

7.17. 本會在第二章討論公平競爭政策時，提及三種分類，包括：壟斷、橫向及縱向限制，但在討論制定法例時，我們爲能清楚界定企業行爲的意圖，採用了不同的分類方式。下文歸納了四類常見於各國公平競爭政策內，並較適合香港情況的條款：

a) 禁止合謀行爲及其他橫向限制；

b) 處理企業濫用市場力量的行爲；

c) 處理濫用聯合壟斷力量；及

d) 處理合併及收購。

7.18. 所有公平競爭法均賦予公平競爭委員會權力批出豁免。可以是個別申請豁免，或是對一般類別批出的集體豁免，視情況而定。

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[1] 政府及其所屬部門不得濫用自己的行政權力，限制其他地方輸入產品，或向其他市場輸出內地產品。中國《反不正當競爭法》(第7條)。

第一條　禁止企業之間爲限制公平競爭的互相協議

7.19. 這條款禁止任何以妨礙、限制或扭曲公平競爭爲目的，或產生以上後果的企業契約，和企業聯會訂下的協議或聯合行爲；這條款並勒令上述約定自動無效。特別指下列行爲：

a) 直接或間接訂定貨品或服務之買賣價格，或其他交易條件；

b) 限定或控制生產數量、交易市場、技術發展或投資；

c) 分割市場或供應來源；

d) 予其他交易者不同的交易條件，即使交易性質相同，導致其他交易者處於不利競爭的位置；

e) 要求交易者遵守與合約內容或在商業用途方面無關的附加條件。

7.20. **豁免**：條款一的豁免須經由指定的機構審核批準。如機構認爲有關企業的行爲是爲改良貨品的生產及分配，或促進技術及經濟發展，但亦同時容許消費者分享隨之衍生的益處，但該行爲：

a) 不能令有關企業受到限制，而該等限制並非令消費者得到有關益處的唯一途徑；

b) 不是給予有關企業機會去排除相當部份貨品的競爭，會獲批準豁免。

7.21. 豁免批準可由企業向有關機構申請個別豁免，或經由該機構對一般類別協議批出的集體豁免。同時，一些市場佔有率低於某程度的貨品或服務的協議或可獲豁免。

7.22. **意見**：條款一禁止企業作出任何蓄意、或可能會有限制或違反公平競爭影響的橫向及縱向協議。這包括壟斷性劃一價(price-fixing controls)及縱向限制(例如：零售價格維持、操縱投標等)。協議在通知有關機構，並由該機構審查符合下列的條件後可獲豁免：協議是主要爲推動廣泛的經濟效益，及不會對市場競爭做成很大干擾。集體豁免的申請亦可獲批準，特別是與標準、研究及發展有關的協議。我們在稍後會討論條款的執行機構。

外地經驗

7.23. 外地的全面公平競爭法中，有很多條文是針對橫向及縱向協議，目的爲確保經濟效益。以前文第三章段提及的 3 個例子說明：

a) 台灣有 5 個佔花蓮雞蛋批發市場 67%的雞蛋商人，合作興建貨物交收倉庫。他們被發現合謀劃一雞蛋批發價、瓜分分銷站以避免直接競爭，及限制某些地區的雞蛋供應。這些商人最後被台灣當局根據《公

平交易法》起訴其劃一定價及限制性分銷安排；

b) 日本 9 間與建築行業有關的電子公司，因合謀推高排污系統合約的價格，被裁定有罪及合共罰款四億六千萬日元；

c) 英國審議限制貿易的法庭最近向被裁定操縱價格的一群混凝土供應公司罰款 8.37 百萬英鎊。由於在英國公平競爭法下，公平交易局的調查權力及罰款範圍有限，導致這宗約 20 多年前發生的劃一定價案件，花了很長的時間才得到判決。在該段時期，建築業因混凝土的價格被操縱承受高昂的成本，繼而推高新樓宇的價格，影響消費者以至其他行業。房地產對商界整體來說是十分重要的資產及投入成本，因此，房地產成本的提高令英國公司的競爭處於不利地位。雖然，劃一定價行爲的代價對個別公司可能會很少，但對行業整體而言，加上劃一操縱市場定價有相當長久時間，其後果就十分嚴重。上述情況可能有礙英國的對外競爭。

從本地情況考慮

7.24. 附件二闡列一些本會收到指稱是操縱價格、串通投標、規定零售價的個案，遍及不同行業。這顯示香港有急切需要儘早制定公平競爭政策。

第二條　禁止企業濫用市場力量

7.25. 這條款禁止企業濫用其市場支配地位，作出妨礙、限制或扭曲公平競爭的行爲。具市場支配地位是指企業憑藉其經濟力量，在市場上的行爲妨礙有效競爭，毋須顧及這些行爲對其他競爭者及消費者的影響。

7.26. 限制行爲與企業間的合謀行爲近似，包括：

a) 不公平的貨品或服務買賣價格或交易條件；

b) 限制生產數量、技術和市場的發展，影響消費者利益；

c) 相同交易予歧視性條件；

d) 強迫搭賣合約。

7.27. 這條款祇適用於一些藉市場支配地位，濫用市場力量的企業。這條款並非假定市場力量在本質上是有問題的，關鍵在企業坐擁市場力量後可能作出壓抑有效競爭的行爲。特別是企業在交易時的縱向限制，損害消費者及其他行業。具市場支配地位的界定是當企業具備能力，行使違反競爭的行爲；但這須由有關機構決定審核是否出現濫用市場力量的情況。佔較大市場比率雖然是市場支配地位的必需條件，卻非唯一的條件，還須看市場的可競逐性。這條款防止具市場支配地位的公司利用其力量，損害消費者的

利益：條款針對因市場支配力量所產生的壟斷、掠奪性定價，及縱向限制(例如強迫搭賣銷售)問題。

外地經驗

7.28. 外地絕大多數的公平競爭法(例如：日本、美國及南韓)，都是因應壟斷者濫用市場支配力量而產生。很多地方包括歐洲聯盟，對市場地位有很清晰的界定標準。例如：英國的《公平交易法》(1973 年)，一間公司佔 25%或以上的市場佔有率便會被視爲壟斷；日本的《反壟斷法》第 2 節(7)[2]，以企業的市場佔有率達 50%或銷售總額達 500 億日元，來界定企業是否具備市場支配地位。

7.29. 雖然美國法例最早對市場壟斷力量，表示關注，但它卻沒有以市場佔有率作爲界定壟斷的標準。在《謝爾曼法案》(Sherman Act)第 2 節已清楚指出，法例並非着重壟斷者的位置，而是在於試圖壟斷市場的行爲；換言而之，企業具備市場支配地位不是問題，除非該企業濫用其市場力量。

7.30. 以援用這原則的公平競爭法的案例：德國的聯邦「卡特爾」辦事處(Federal Cartel Office)接到有關公司抬高往來柏林及法蘭克福飛機票價的投訴後[3]，調查國營的德國航空公司。

從本地情況考慮

7.31. 本會的行業研究發現，某些行業出現可能濫用市場力量的潛在危機；如煤氣供應、在銀行、住宅樓宇及超級市場方面，亦發現出現市場支配地位的情況(見第三章)。

7.32. 雖然，佔較大市場比率是具備市場支配地位的先決條件，卻非唯一的條件。由於香港的市場細小，非貿易行業的企業，可能需要有較大的市場佔有率，才可以取得經濟規模的益處。若進入及離開市場的成本並非過高，有效競爭仍然會存在。因此，機械地引用市場佔有率作爲衡量標準是不合適的。公平競爭法應容許執行機構參考以上原則，小心研究企業具市場支配力量的問題。

第三條　禁止濫用聯合壟斷力量(Complex monopoly)

7.33. 這條款禁止聯合壟斷的情況出現。聯合壟斷是指數間合共佔市場大比例的公司，在供應貨品或服務時，不論是自願或非自願，又或是在協議或沒有協議的情況下，作出妨礙、限制或扭曲市場公平競爭的行爲；無論這行爲

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[2] 根據日本的《反壟斷法》第 2 節(7)(ii)，在界定公司是否壟斷時，除考慮上述提及的市場佔有率外，還會附加考慮其他因素，例如新參與者的入市可能。

[3] 南華早報 1996 年 9 月 4 日報導。

是否影響壟斷者本身；或對公司之間或生產者與供應者之間，又或是消費者與供應者之間有影響。

7.34. 意見：英國的公平競爭法包括禁止聯合壟斷的條文。目的是爲處理一些雖然不是公然的合謀行爲，但行業在傳統或慣例下所作的行爲，引致的嚴重後果與公開合謀的情況無異，有負面影響。我們在下文稍後提出，由於這些行爲並非公然約定，很多公司也不自覺地行使了這些行爲；這條款主要處理一般商業行爲，這些行爲並非公然的卡特爾(例如操縱價格)，但與後者有同一影響效果。因此，若以違反第一及第二條條款的罰款方法，來處理行使這些行爲的企業，未必適當。

外地經驗

7.35. 美國聯邦貿易委員會法案，禁止「不公平競爭手法」，爲美國的聯合壟斷提供了明確的處理方法。有別於《謝爾曼法案》及《克賽頓法案》(Sherman and Clayton Acts)，該委員會毋須証明有公然協議存在的情況下，可向行使違反競爭行爲的公司採取行動。

從本地情況考慮

7.36. 由於沒有公然協議存在，很難証明企業是否不自覺地或蓄意作出違反公平競爭的行爲。本會的私人住宅樓宇研究報告發現，具備市場支配地位的發展商採用了互相補足或類似的售樓策略。雖然這些策略不大可能存在公然合謀行爲，但其中有些行爲，例如：相同地區近似類型樓盤的開售時間各不相疊，及樓宇單位分成小批推出，這些行爲都可能會令樓宇的供應量受到限制，推高樓宇價格。

7.37. 第一條款不包括默示合謀行爲，即使能確定有默示合謀行爲存在，及証明有違反公平競爭的後果；反之，條款第三可處理這類投訴。

7.38. 這是公平競爭法中是較爲複雜的條款，若要成功的施行，需要累積相當的經驗。在第八章，我們會討論應否在制定條款第一、二時，同時引入條款第三。

第四條　合併及收購

7.39. 兩間企業的合併，或企業收購另一間企業，可能導致出現市場支配地位的情況。應賦予權力讓公平競爭執行機構調查合併或收購行動，會否對貨品或服務引起妨礙、限制及扭曲公平競爭。以糾正或制止任何不利的後果發生。

7.40. 這條款賦予執行機構權力調查可能導致出現市場支配地位的合併及收

購，採取行動以防止出現妨礙有效競爭的後果。這些行動包括要求合併企業承諾。假若企業不可能提出足夠的承諾保証不會作出反競爭行爲，根據條款四，執行機構可能禁止該合併及收購行動。條款二賦予執行機構權力影響會加強市場支配地位的合併或收購的行動；條款一可應用在管制財團投標方面；條款四則爲這些問題提供其他調查權力。

外地經驗

7.41. 美國、英國及歐洲聯盟的公平競爭法訂定，若合併後的市場佔有率超出某個百分點(英國是 25%)，合併建議須遞交有關的公平競爭機構審理。假設合併後有可能產生違反公平競爭的影響，有關機構會向部長建議尋求公司的承諾或終止合併活動。雖然實際很少發生上述的情況，但審議程序可能減慢商業運作。日本及南韓的公平競爭法不容許公司在合併後的市場佔有率合共超出 50%。

從本地情況考慮

7.42. 由於香港是一個細小及開放的經濟體系，某些行業的公司需要較大的市場佔有率，才可取得合理的規模經濟。因此，公司爲擴張經營而成立新公司或收購現有公司，可能是常有及健康的過程。有時候，收購協議可拯救面臨倒閉的公司。在本會的行業競爭研究中，沒有發現合併及收購是導致出現市場支配地位的主要原因。

7.43. 但這並不表示合併永遠沒有問題，這可能祇是表示條款四毋須即時引入。條款一及二將會提供保護措施，禁止以合併或收購取得市場支配地位的公司作出違反公平競爭的行爲。值得注意的是，電訊公司及部份傳播媒介機構經已受到合併限制[4] (後者的出發點是要確保有多元化意見的渠道，而非爲防止支配市場地位的行爲)。第八章討論制定公平競爭法的時間表。

界定「限制競爭行爲」的方式

外地經驗

7.44. 很多國家／地方的公平競爭法會列明視爲限制公平競爭的行爲，大致與上文條款一及二相同。英國採用不同方法。英國並沒界定何者屬限制公平競爭行爲，而是按個別個案評定，並參考過往經驗裁定爲限制公平競爭行爲的案例去處理。所有由兩間或以上公司簽署、具限制商業活動自由的協議，必須登記，除非這些協議屬於特定的範圍，經評定爲不會妨礙公平競爭行爲。法例的原則是由「限制競爭行爲」法庭裁定協議可否延續。實際上在 60 年代後期，法庭已明確不容許這類協議延續。在過去 10 年，亦祇

[4] 舉例說明，《電視條例》禁止本地電視廣播牌照擁有跨公司及多項擁有權(但對衛星電視的限制則較爲寬鬆)。電台廣播牌照的擁有權也有限制。

有一宗案件向法庭申請容許協議延續。這案件涉及規定零售價的聯合協議，案件現時仍在審議中。其他經該法庭審議的案件牽涉秘密同業協議，由公平交易委員會轉交法庭。至於其他個案，公平交易委會發現協議內的限制對競爭不會產生重大影響，則沒有轉介到法庭審裁。

從本地情況考慮

7.45. 英國的模式對禁止限制競爭行爲方面的成效較爲薄弱。其不論其影響範圍如何而硬性規定申報協議的要求，只會增添官僚架構，與香港一貫的傳統做法不相同。因此，採取禁令方式較爲務實及具透明度，英國政府亦宣佈有意朝這方向改革。

7.46. 假若香港要列明限制競爭的行爲應包括現有可能涉及違反公平競爭行爲的投訴，同時可參考電訊業牌照，該牌照條款清楚說明什麼是違反公平競爭行爲(這條文較廣播牌照的條文更完善及一致)。

執行機構

7.47. 根據已發展國家／地區的經驗，公平競爭政策的執行機關有兩種組成模式：第一種是以**監管機構**模式，第二種是**法庭審裁**模式。兩種模式均有兩層架構，同時均須設立公平競爭委員會。監管機構模式的上訴機關是「商業行爲委員會」；法庭審裁方式的上訴機關是「商業行爲法庭」。

7.48. 在兩種制度下，**公平競爭事務委員會**負責調查可能觸犯公平競爭法的案件，包括主動發現、投訴或其他途徑取得的。因此，委員會有責任回應投訴(指其他公司、消費者或其他市場參予者的投訴)，或主動調查案件。委員會應有權要求公司提供資料(這與民事訴訟法庭的程序大致相同)。根據調查所得，委員會建議補救方法，例如：改變政府有關法例以影響該市場的結構，或取得有關公司的承諾。(公平競爭事務委員會可能有權向違反公平競爭法的公司罰款。)

7.49. 被投訴公司不滿委員會的決定，可向商業行爲委員會／法庭上訴。在這情況下，委員會須向商業行爲委員會／法庭提交報告。當公司對委員會判決作出上訴時，委員會應有臨時禁制權，要求公司在上訴期間遵守委員會所作出的判決。

7.50. 有意見認爲公平競爭委員會應有責任確保受監管公用事業的競爭情況，這安排主要有三個好處：第一，避免增加行政架構及減低政府的監管資源；雖然，長遠來說，所用的資源可能達到經濟規模。第二，公平競爭委員會可以取代某些專門的監管機構，以免該些機構有可能不自覺地延長監管的需要。第三，公平競爭委員會對監管事務方面的決定，可向商業行爲委員會／法庭提出上訴。這上訴程序是現時香港某些監管架構所欠缺的，而上訴機關是符合自然公義的訴求。本會提出以上意見建議以供讀者廣泛討論。

監管機構的上訴渠道

7.51. 商業行爲委員會負責處理企業對公平競爭委員會有關決定的上訴。商業行爲委員會可以考慮由法律、經濟專家，及商界人士組成，並包括具有上述專業知識的員工支持。每宗案件可交由三人組成的專家小組聆訊；小組分別由律師，經濟專家及商界人士出任。商業行爲委員會有權傳召及盤問証人，及向公平競爭事務委員會、被告公司及其他有關方面，取得有關案件的書面及口頭據証。公平競爭委員會及被告公司將沒有「盤問」權力。對商業行爲委員會有關決定的上訴，可向法庭要求司法審核有關審判的程序(若法庭發現委員會沒有根據適當的程序判決，有關決定可被法庭否決)，而非對案件的實質內容。

法庭審判作爲上訴渠道方式

7.52. 商業行爲法庭負責審議企業對公平競爭事務委員會有關決定的上訴。法庭由一組法官及業外人士組成。聆訊過程可考慮包括下列步驟：公平競爭委員會向法庭呈交書面報告；被告人隨後呈交回覆書面；公平競爭委員會及被告人可能進一步呈交評論及再回應對方；接着法庭會按一般民事法庭的正常程序，展開正式聆訊。法庭所作出的判決會成爲案例，這些案例會有助詳細解釋及引申公平競爭法的法規，這樣會讓公平競爭法的更具可測性更易於明白。

7.53. 上述兩種模式包含了幾個重要的原則。設立不同機構專責處理調查及上訴事宜，而並非由一個機構同時兼負上述兩種職能。若由同一機構調查及上訴職能，上訴機關爲免反映其在調查時候有不足，可能駁回上訴。以不同機構處理調查及上訴事宜不單可確保公正，更可讓人清楚知道這機制處事公正。監管機構模式是參考澳洲，而法庭審判則是參照紐西蘭的模式。英國同時採用了兩種方式，監管機構有壟斷及合併事務委員會，法庭審判有限制競爭行爲法庭。建議的模式可補充法官在判決有關公平競爭政策方面在商業運作及經濟方面的知識。法庭由法官及行外專家組成，可平衡判決時所需的專業知識。

外地經驗

7.54. 法庭審裁模式的問題在於審訊時間冗長及費用高昂，一如美國的情況，令施行公平競爭政策十分繁複昂貴。紐西蘭電訊與新入市者花了冗長的時間，才解決兩者之間互相連接線路的爭議。假如商業行爲法庭對上訴案件訂出一些要求，在開始時作出篩選，剔除可能是輕率及是爲達到延遲執行決定的行動，便能避免冗長的聆訊。聆訊費用由那一方支付，及上訴失敗後可能要支付罰款，可能影響企業是否提請上訴。若企業敗訴要額外負擔金錢，會令企業仔細考慮是否進行上訴。監管機構模式可以避免上述問題，但仍然讓上訴公司及公平競爭委員會有互相盤問的機會。

從本地情況考慮

7.55. 以支出費用、判決的速度、及目前香港只有少量具有公平競爭法專長的專家爲各方面提供服務等因素考慮，監管機構模式似乎較適合香港。爲保持香港普通法的傳統，有需要讓企業就監管機構的決定向法庭申請上訴。但爲確保不會拖延案件的決定，應只容許有關的上訴停留在較狹窄的層面上，例如在程序方面。

處罰

7.56. 公平競爭委員會有權要求公司停止違反公平競爭法的行爲(這等同平等機會委員會在性別歧視法案中有關「中止及結束」的權力)。另一個重要的考慮是委員會應否有權力向違反公平競爭法的企業罰款。當企業被發現從事違反公平競爭的作爲，令其他企業／消費者蒙受損失，作出懲罰是恰當的；但不適用於違反條款四的行爲，原因是條款所約束的合併行爲祇會對未來有影響，而非針對過往的行爲。對違反條款三的企業作出懲罰亦是不恰當，雖然條款所指的合謀壟斷對其他市場參與者不利；但由於根據合謀壟斷的定義，有關公司未必察覺這些行爲是有害，因此向他們罰款是不合理的。向違反條款一及二者懲收罰款可能是恰當的做法，這會對涉及違反這兩條款的企業起阻嚇作用。以歐洲的公平競爭法來說，違反類似條款會被懲收達營業額 10%的罰款。相反來說，英國則沒有罰款的規定(英國政府已宣佈修訂有關限制競爭協議的條款，在適當時間及環境下引入罰款規定)，很多人認爲英國有關法例過於軟弱，法例容許企業繼續其違反公平競爭的行爲直至被發現，其後只須中止該行爲。再者，英國的公平競爭委員會亦缺乏臨時強制權力，要求公司在案件審核時，中止有關涉嫌違反公平競爭的行爲。賦予監管機構臨時強制權是另一種方法，或可能是更好的方法，加強競爭的效果而毋須懲收罰款。

7.57. 替代罰款的另一種方法是當企業被公平競爭委員會(及商業行爲委員會／法庭)發現違反公平競爭法，由受損害的一方向企業起訴及索取賠償。這方法的特點是受損害的第三者可以得到應得的賠償。但實施這方法會有困

難，肯定會帶來高昂的支出，及涉及更長時間的法律訴訟(像美國的制度，第三者可以作出三重賠償的起訴)，企業亦可能因而增加了可觀的支出。此外，法庭亦有可能在重新考慮案件時，作出與公平競爭委員會不同的裁決[5]。另一種替代法庭參與的方法是容許公平競爭委員會懲收罰款，及直接把罰款補償給受害者。但這會令公平競爭委員會，牽涉入裁定第三者應得賠償金額的責任，這是額外及較備受爭議的責任。

結論

7.58. 一般來說，各地公平競爭政策的執行架構是按當地情況而設計。香港應按務實的模式，反映「小規模政府」的情況，而非照單全收外來的模式。制定公平競爭法時應考慮香港的法律傳統，專家的數目，及與《基本法》銜接的問題。政府在制定決策時，應考慮其對市場競爭的可能影響，公平競爭法可包括下列四種元素：

a) 禁止合謀行爲及其他橫向限制；

b) 處理企業濫用市場力量的行爲；

c) 處理濫用聯合壟斷力量；及

d) 處理合併及收購。

7.59. 全面的公平競爭法應包括上列四部分，但不一定把四部份在引進公平競爭法同時開始。第八章討論暫延引進禁止濫用集體市場優勢，及管制企業合併與收購條款的問題。

[5] 法庭是有可能對公平競爭委員會確立的舉証責任有不同意見。委員會一般的做法是權衡証據，而法庭則會向索償一方要求將案件至無合理疑點。在商業法中，有關舉証責任的案例時常引起爭議。但無論如何，辯方公司可以利用聆訊的機會，重述案情。或許，可以改變法例，防止法庭重開案件，但這是相當複雜的問題。

第八章
結論及建議

結論

8.1. 全面公平競爭政策對未來香港經濟發展有重大影響。雖然香港在過去十年沒有制定全面公平競爭政策，經濟相當繁榮，但現今香港卻面對重大的挑戰 — 香港的經濟結構轉型，變爲以服務業爲主、鄰近地區競爭對手迎頭趕上、以及對外競爭環境的轉變。因此，香港須爲未來描繪務實的發展藍圖，而全面的公平競爭政策是當中十分重要的部份。

8.2. 消費者委員會早前發表的競爭研究報告，清楚顯示本地某些主要行業的競爭環境受到限制。在這情況下，市場上大有機會出現違反公平競爭的行爲，不獨影響消費者利益，也損及企業本身和納稅人的利益[1]。事實上，已有指稱市場上存在違反公平競爭的情況。

8.3. 目前政府爲個別行業訂定的公平競爭則例，選定行業的安排沒有準則，亦沒有一致的標準。電訊業和廣播業的牌照條款不容許違反公平競爭的行爲，但其他行業並沒有同樣規定。

8.4. 本會分析資料顯示，香港的確需要一套涵蓋面較爲廣濶，足以促進公平競爭的政策和法例：

從宏觀角度來看 —

- 全面公平競爭政策提高非貿易行業的效率；
- 支持本港在國際貿易層面上提出解除貿易保護主義，及建立全球競爭政策的要求。

從微觀角度來看 —

- 爲各行業提供公平和開放的競爭環境；
- 政府毋須按行業擬定規管章則，減少對行業不必要的監管；
- 盡量鼓勵市場公平競爭，即使是受監管的行業。

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[1] 例如，本港住宅樓宇售價十分高，香港政府因而需要資助半數人口解決住屋問題，本港的公共房屋建設計劃是世界上最大型的公共房屋計劃之一。據消費者委員會九六年七月發表的私人住宅物業市場研究報告，物業價格反映出私人物業市場缺乏了「可競逐性」，有入市障礙。

8.5. 縱觀以上各點，公平競爭政策將爲非貿易行業帶來最大得益：消費者可享較合理的價格、減輕企業經營的成本、投入的資金和勞工成本，從而減輕通脹壓力，促進服務行業的發展，使香港維持對外資的吸引力，這都是增強本港經濟地位的重要因素。

8.6. 香港在這時候才提出全面公平競爭政策是否不合時宜？答案是否定的。在國際層面上，公平競爭政策日益受到重視。公平競爭法確保市場機制的效率、促進市場經濟的發展。從各國的實踐經驗反映，公平競爭法會令毋須面對外來競爭的產品和服務行業，增進經營效率，鼓勵創新，並加強經濟體系的應變能力。

8.7. 正因如此，加上有更多人日漸意識到公平競爭政策有利於消費者，全球很多奉行市場經濟的國家／地區引進公平競爭法。已發展的國家(不論是大如美國或細小如紐西蘭)、經濟體系在轉變的國家(匈牙利及波蘭)、以及發展中國家(肯尼亞)，均制定了公平競爭法。瑞士已於九六年七月一日通過全面公平競爭法，針對國內存在的卡特爾。其他已制定公平競爭法的國家，如英國和澳洲，也在修訂、重整和加強有關法例。這些國家深知公平競爭政策與經濟表現息息相關。[2]

8.8. 雖然公平競爭政策在「西方」經濟體系最先發展，日本、台灣和南韓已參照引進，馬來西亞和泰國亦正在考慮中，中國大陸也制定了《反不正當競爭法》，以竭止不公平競爭。在經濟發展蓬勃的國家和地區中，香港是少數尚未制定全面公平競爭政策和法例的地區，形勢日漸孤立。由於沒有公平競爭法，香港將不容易與一些國家／地區達到互惠協定(comity agreement)，若有國家／地區引用治外法權指港商，牽涉違反公平競爭的行爲，香港將無能爲力。美國和加拿大，對某些違反公平競爭法的行爲，按刑事而非民事程序處理，後果嚴重。

建議

8.9. 消費者委員會建議香港引進全面公平競爭政策，和制定公平競爭法。公平競爭法是公平競爭政策不可分割的部分，在防止及處理限制公平競爭的經營手法，是最具透明度和最有效的方法。

8.10. 本會建議的政策是務實和符合成本效益的。我們在現階段無意詳細列出政策的細則。若政府同意制定公平競爭政策，這些建議可作爲日後進一步制定法例和政策的參考。

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[2] 據坎培拉「經營手法委員會」主席 Allan Fels 教授在 93 年「公平交易」第 16 號中指出：「澳洲加入世界經濟之列，政府方面相應制定了公平競爭政策。無論政界和商界均認爲，以各種渠道加強市場競爭，均有助於提高澳洲的國際地位。

公平競爭政策

8.11. 本會認爲，有效的公平競爭政策應該是全面和具前瞻性的，以促進市場的競爭力。爲達到這目標，本會建議：

a) 加強整個政府體系、商界及社會大眾認識公平競爭政策的宗旨；

b) 制定指引，確保政府作出決策時，必須考慮該政策對市場公平競爭的影響，正如目前政府作出一些重大決策，須提交環境評估意見一樣。同時，任何監管的建議，政府應只接納確實有監管必要的提案；

c) 檢討現有的監管方式是否依然有效和有需要，是否沒有其他途徑足以代替。例如，對法例容許的專營企業，發出特許牌照的程序、和在利潤管制計劃下經營的企業，政府宜不時檢討，盡可能及盡快增加市場的競爭環境，以替代監管。

公平競爭法

8.12. 本會建議制定公平競爭法，涵蓋市場上橫向和縱向的合謀協議(horizontal vertical collusive agreements)。見下文第一及第二條。這是適合香港的情況的做法。

a) 條款一：禁止公司之間互相協議，以妨礙或意圖妨礙、限制或扭曲市場競爭。這包括橫向協議，例如操縱價格和串通投標；及縱向協議，例如規定零售價，排斥其他競爭對手的專營行爲，強迫搭賣，及長期供應合約等。

b) 條款二：禁止一間或多間市場佔有率高的公司濫用其市場優勢，妨礙、限制或扭曲競爭。這條款針對價格壟斷及縱向經營限制如強迫搭賣。

8.13. 香港的公平競爭法，如不包括上述兩條款，不獨難以有效地確保市場競爭，亦恐難爲國際社會所接受，因爲它未能充份保障市場有公平競爭。

8.14. 建議的公平競爭法亦應包括：

a) 禁止濫用集體市場優勢的條款；及

b) 管制企業合併和收購條款。

8.15. 從實際施行的角度來看，香港可暫緩引進這兩項條款。政府可決定是否在施行條款一和二的同時引進條款三和四，或在較後階段引進後兩項條款。

8.16. 對於引進禁止濫用集體市場優勢的條款，最佳的做法是待累積足夠經驗後才作決定。有關管制企業合併和收購條款，涉及十分複雜的技術問題，但需要限期盡快解決，以免影響正常商業活動。在設立公平競爭委員會的初期，要求委員會處理上述複雜的事宜，責任重大，稍有不慎，恐怕影響公眾對公平競爭政策的信心。再者，處理合併申請，所需的人手亦會增加。

8.17. 在第二階段才引入條款三和四並不會引致法例「真空」。條款一和二賦予委員會權力滙報對公平競爭有影響的事務，遏止違反公平競爭的行爲。引入首兩項條款讓委員會有機會累積經驗，及建立處理程序。當委員會處理上述工作上軌道後，可向政府建議引入條款三和四。

8.18. 也許有人不同意上述務實的建議：公平競爭法向來包涵了處理濫用集體市場優勢及管制企業合併的問題，立法時沒有即時包括這兩條款，令人懷疑香港對制定公平競爭法的決心。再者，由於立法局能撥出的立法時間十分寶貴，應一次過通過公平競爭法條款一至四。

8.19. 上述提出的意見各有不同考慮。本會建議在報告發表後，政府參考各方面的反應，再作決定。附件六闡列各地所採用的模式及在上文第 8.17.段所提及的務實方式。

豁免

8.20. 本會建議，條款一和二的豁免事項，應有嚴格規定，在可能情況下，豁免應受時間規限，以示對所有行業一致和公正。

8.21. 公平競爭委員會就某行業可發出整體豁免，毋須由個別公司提出申請。同時應訂立準則列明，在何種情況下，某些協議視爲不損害公眾利益。這些協議可能包括：

a) 專業守則，如醫生、牙醫、律師、會計師等的專業守則。專業守則可在法例開始時訂明豁免，但須由公平競爭委員會核准；

b) 企業間分擔基本或策略性研究工作的協議；及

c) 保障消費者權利之協議。

執法機構

8.22. 本會建議：

a) 設立公平競爭委員會，調查可能觸犯法例的個案，作出決定；

b) 設立上訴機關，聆聽不滿公平競爭委員會決定的申訴。

公平競爭委員會的組織

8.23. 本會建議：

a) 公平競爭委員會應爲獨立機構，不在政府行政架構內。

b) 公平競爭委員會應設有全職主席一人及其他成員，由特區行政首長委任。

職能

8.24. 公平競爭委員會應有下列職能：

a) 就公平競爭政策，向政府提出意見；

b) 確保公平競爭法得以切實施行；

c) 考慮並建議修改有關法例；

d) 委員會應有較寬闊的保障公眾利益職能，減低監管的需要，研究因政府監管導致市場缺乏競爭威脅(market contestability)的情況，向政府建議修改或取銷監管，並向公眾宣佈該建議。

權力

8.25. 本會建議公平競爭委員會應有下列權力：

a) 主動展開調查，也可根據其他方面提出的建議展開調查；

b) 在調查期間，如發現公司有違反法律規定的經營手法，發出通知要求該公司停止涉嫌違法行爲。

8.26. 此外，還需要考慮應否賦予委員會禁制權力。

處罰

8.27. 在公平競爭法中設有違反條款一和二的處罰條款是恰當的做法，尤以違反條款一更爲適合。若考慮判處罰款，罰款金額應以違法者從違法行爲所獲取的額外利潤，或受損害者之損失計算賠償。亦需考慮公平競爭委員會可否指定違法者向受損害者作出賠償。

上訴機關

8.28. 本會建議公平競爭委員會作出的決定，得由上訴機關覆核，而並非由法庭覆核。上訴機關有權作出最後裁決。上訴機關應與委員會有清晰的界限。

8.29. 上訴機關的主席應由特區行政首長委任。有案件上訴時，主席可召集特別審裁小組並主持聆訊，其他成員應熟識公平競爭及有關行業。

8.30. 審裁小組須把審查的詳細報告公開，但有關商業敏感的資料則除外。

行政安排

申訴途徑

8.31. 本會建議，公平競爭委員會考慮調查的投訴可有三個途徑：由委員會直接提出、由政府提出、由個別公司或個人提出。

委員會的規模及費用

8.32. 爲配合「小規模政府」，並盡量減低經費的原則，本會認爲公平競爭委員會的組織規模，可仿照申訴專員公署。審理案件的時候，組成小型的專家特別審裁小組，由委員會職員協助調查工作，避免聘用大量全職僱員，節約經費，同時有利於凝聚經驗。

財政來源

8.33. 公平競爭政策非單祇爲社會某些階層的福利，社會大眾均是受益人。本會建議，委員會的經費由公帑資助。

與政府監管企業機構的關係

8.34. 政府方面需要考慮：

a) 公平競爭法及現行各類牌照中有關違反競爭的條款的關係和配合；

b) 公平競爭委員會權力與獨立監管機構之關係。

8.35. 關於 a)項，本會認爲，對香港所有行業應取同樣準則，因此建議，受監管的企業應受公平競爭法內的違反公平競爭條款所約束。任何受監管企業，在公眾利益前提下，有需要實行或豁免條款規定時，可在牌照上、或公平競爭法附例、或各企業的監管法例內訂明。

8.36. 關於b)項，本會相信，爲保障消費者利益、也同時爲有利市場運作，電訊管理局及其他監管組織，須同時確保業內公平競爭，如涉及市場競爭和牌照修改的問題，應知會公平競爭委員會。

8.37. 調查違反公平競爭的行爲，本會建議參考英國的模式，作出調節，以適應香港情況。英國方面設有獨立機構(壟斷及合併事務委員會)專責調查，並委任調查小組負責。本港方面，可由公平競爭委員會執行調查工作。關於受監管行業，可賦予委員會及監管機構權力，委任專家小組展開調查。上訴渠道與委員會獨自進行調查的上訴機關一樣。

總結

8.38. 香港經濟在過去成就驕人。但近年來，競爭對手紛紛進行經濟改革及採取鼓勵外資的法例和政策，加強他們在國際貿易方面的競爭能力。香港既沒有針對妨礙公平競爭行爲的清晰法規，也沒有執行機構來改善情況，爲維持領先地位，香港必須正視缺乏公平競爭機制對本地的競爭環境、以及對香港在國際貿易層面的影響。假如香港未能全面配合國際貿易對競爭和貿易政策的新要求，亦將有損於其在世界經濟上的地位。

8.39. 香港推行公平競爭政策的模式，宜因應本地的情況，包括文化及傳統。當前的問題不再是香港應否制定公平競爭法，而是公平競爭法應如何厘定。以確保香港未來的繁榮及經濟成就。要達到這個目標，有賴香港整個社會對公平競爭政策的積極參與和支持。

8.40. 消費者委員會參考了其他法定機構的設立，例如：行政申訴專員公署，平等機會委員會，個人資料私隱專員公署，及証券及期貨事務監察委員會。本會認爲香港有需要設立公平競爭委員會，以肩負本報告所提出的重大任務，成爲一個有實際效用和有效率的機構，而不是在法定機構名單上多增的一個機構。該委員會對確保香港未來的經濟發展有重大貢獻。要令香港的經濟持續增長，必須立即引入全面公平競爭政策，若不然，香港的經濟將難以保持星光燦爛的前景。

各地公平競爭法之目的／背景

地方	目的／背景
日本	法例禁止私有壟斷，不合理商業限制及不公平交易手法，防止經濟力量過度集中，排除對生產、銷售、價格、科技等不合理限制，及防止透過合併、協議及其他行爲引致不公平的商業活動。目的爲促進自由及公平競爭，鼓勵企業家創新及促進商業活動，提高就業機會及人民實際收入。(1947 年反壟斷法第 54 節)
中國	爲確保社會主義市場經濟的健全發展，鼓勵及保障公平競爭，制止不正當競爭的行爲，以及保護營商者及消費者的合法權利和利益。(1993 年中國反不正當競爭法第一條)
台灣	維護交易秩序及消費者權利，確保公平競爭，促進經濟之安定及繁榮。(1991 年公平交易法第一條)
英國	促進貨物及服務市場的有效分配，從而提高消費者權益和商業效率。(公平交易局 1996-97 週年計劃)
美國	促進開放市場的競爭。(1955 年司法部長國家委員會研究反托拉斯法例報告第一頁)
南韓	法例禁止商界濫用市場優勢及經濟力量過份集中，管制不適當的合謀活動及不公平經營手法。目的在促進公平及自由競爭，從而鼓勵商業活動的創新、保障消費者以及促進國家經濟平衡發展。(1980 年壟斷規例及公平交易法第一章)
澳洲	改善市場的競爭環境及效率，促進公平交易，在可能情況下鼓勵價格競爭，並在市場競爭不足時管制物價。(澳洲公平競爭及消費者事務委員會 1975 年年報)
歐洲聯盟	協調聯盟各國之間的經濟發展，[在環境保護前提下，維持非通脹性經濟增長，提供高就業機會及社會保障]，提高生活[及生活質素、凝聚經濟及社會力量、加強聯盟國之間的團結]。(羅馬條約第二條 — 1957 年歐洲聯盟條約)

涉及公平競爭法的營商例子

1. 本會曾接獲投訴，或注意到一些事例，可能構成限制性營商手法，在此本會特別聲明，由於職能所限，未能對所有的指稱一一加以核實。此外，亦由於本會的職能關係，所接獲投訴自然與消費者權益有關爲多，因此，其他影響商界的違反市場競爭的營商手法，未爲本會所知，因此以下事例未必能反映眞實個案的數目。

2. 本會列舉下列眞實個案，旨在闡釋某些行爲，可能受公平競爭法禁止。本會並沒有對該些個案是否已違反公平競爭加以裁定，待本港有公平競爭法時，有關當局自然會對這些投訴作出調查。這些指控有可能屬實，也有可能未有充份的理據支持，又或者可能獲得公平競爭法的豁免。

企業是否有濫用市場支配力量？

3. 一些貨品供應商投訴兩間大型連鎖式零銷售的交易條款苛刻。連鎖店售賣貨品，供應商須付新入線費、宣傳費和推廣折扣等。

4. 一間進出口貿易商會投訴兩個貨櫃碼頭經營者加徵入閘費。該商會認爲此項收費並不合理，因爲其性質與碼頭處理費相同，而用家亦無其他選擇。

5. 一間主要氣體燃料公司向地產發展商提供優惠價格，吸引他們在廚房及浴室安裝煤氣。若發展商祇安裝供應煮食用氣體管道，則需多付 61.5%的費用。一位競爭者投訴該氣體燃料公司濫用其市場支配力量，因爲大部份顧客較喜用明火煮食。此外，由於法例和技術上的限制，其他形式的能源不可能有效地替代該管道式的氣體燃料。(法例限制：政府禁止在公路下用管道輸送石油氣。技術限制：當地產發展商決定在廚房或浴室祇安裝煤氣、石油氣或電力其中一種能源之後，用戶日後要轉換使用其他能源，就需要付出高昂的轉換代價。)

6. 供應商投訴大型零售商阻止他參加節目展銷會，若一定要參加展銷會，就會終止其供銷合約。

7. 有人投訴政府修訂工務政策後，令他的競爭對手同時成爲 ISO 9000 証書服務的監管者和服務提供者。

操縱價格？

8. 根據香港銀行公會條例第 21(a)條及銀行業條例第 12 和 14 條，政府容許銀行公會制定十五個月以下達$500,000 或以下的港元存款最高利率。這就是所謂利率協議(IRR)。這種利率卡特爾已維持了三十多年。直至 1994 年 8 月，政府接納了本會部份建議，把利率協議逐步放寬。銀行現時可自由決定七日或

以上定期存款的利率，但銀行公會仍然操縱各銀行的儲蓄、支票存款及七日以下之定期存款的利率。

9. 不少市民不滿油站出售的汽油及燃油價格劃一。此外，汽油公司差不多都同一時間宣佈調整汽油價格。

10. 由駕駛訓練導師組成的商會，決定每年調整價格的幅度及劃一課程收費。

11. 一些旅行社投訴一個旅遊業組織訂定最低旅行團收費，迫使所有會員遵守，即是說個別旅行社所訂的團費不能低過該組織所訂的收費下限，違反規定的旅行社會被該組織處罰(向政府旅行代理商註冊處申請牌照，先決條件是要成爲該組織的成員)。在 1996 年 10 月底，該組織取銷了韓國及泰國團的最低收費限制，但其他旅遊線的團費下限則一律不變。

12. 地產價格不斷攀升，不少買家和賣家不滿意由律師會仍然採用樓宇交易事務的定額收費。舉例，介乎$1,000,000 至$10,000,000 之間的物業買賣收費是樓價的 0.425%至 1%。《法律服務改革條例草案》已提議廢除定額收費，以容許自由競爭。

13. 置業者投訴物業代理商的佣金過高。不少代理商會根據商會的建議，把佣金定爲物業成交價的 1%。

14. 在招標的過程中，投訴人發覺幾間商業表格印刷公司的標價和每年的價格升幅幾乎完全相同，懷疑當中有操縱價格和串通投標的情況。

15. 由商業表格印刷商組成的商會在 1992 年 9 月成立。除處理一般商會事務外，還制定紙價及訂單的最低數額。

透過補貼及掠奪性定價作不公平競爭？

16. 私人出版商投訴一間由政府資助的貿易推廣機構，指其與商戶競爭出版貿易資訊雜誌。

17. 私人機構投訴一所由政府資助機關，割價來提供控制污染服務。

18. 一份新報紙在 1995 年加入市場，有人指一些發行商杯葛新報紙的發行。1995 年尾爆發的報紙減價戰，有幾張報紙採用的零售價策略，引起了不少公眾關注，它們的大幅削減售價，是否屬掠奪性定價，眾議紛紜。

排擠競爭對手協定？

19. 電視台投訴其對手推銷廣告的手法，向顧客提供大幅度優惠折扣，附帶條件是要顧客在折扣期內不得在其他電視台賣廣告。

20. 兩間連鎖式超級市場規限供應商獨家爲他們提供某些產品，不准這些產品在對方的連鎖店銷售。

21. 私人屋苑業主立案法團，不滿一間廣播機構要業主承諾，將來不讓新競爭者使用網絡，才爲他們提供服務。

22. 安裝衛星電視接收系統的公司，禁止用戶使用經由該公司安裝的網絡接收其他廣播節目，雖然敷設網絡的費用全部由業主立案法團負擔，在法律上的擁有權屬於業主法團。

不容許降低零售價？

23. 教科書出版商協會提議零售商不能予顧客低於九五折優惠。一度擬向違反規定的零售商不再供應書本銷售。

24. 一批小型傳呼公司投訴由大型傳呼公司組成的商會，曾議定把每月服務費定於$230-$360 之內。

強迫搭賣？

25. 有學生投訴他們不能單購買教科書或其習作簿。即使學生毋須購買該教科書，若他們要買習作簿，便必需與教科書一併購買。

26. 一些財務機構曾規定他們的顧客需向指定的保險公司爲按揭物業投保。此外，若顧客想獲按揭服務，他們亦需聘用這些機構所指定的律師和物業估價師。

27. 物業管理經理和業主立案法團投訴，必須採用電梯供應商的維修服務。

貿易及非貿易服務

貿易服務

1. 貿易服務的定義是：在本地生產及提供(售予客戶)的服務，而這些服務是售予身在外地的人士(例如以電話作股票買賣)或旅港的外地人使用(例如訓練服務)。這些服務一般是生產及提供同時進行的。定義亦包括在本地生產，但在外國提供的服務，例如香港爲基地的航空公司售賣機票給外國顧客。

2. 貿易服務廣泛地包括：出入口、批發、旅遊、運輸、倉庫、通訊、批發銀行、財務(不包括銀行服務)、保險、傳媒、廣告、市場研究、建造、專業服務、及如專上教育等[1]。這些類別中亦包括若干非貿易的服務，例如銀行業的港幣存款及通訊業中的本地電話服務。

非貿易服務

3. 非貿易服務大多是無形的，不能儲存及難以傳送。其交易一般須買賣雙方有個人接觸，因此多數非貿易服務，都是在當地生產，也同時提供給當地消費者使用。非貿易服務不單是資訊密集，亦是人力資源密集的行業，其生產過程大部份依賴本地資源，包括技術勞工、基本建設及土地。

4. 非貿易服務包括：專業服務(例如法律及會計)、醫療及牙醫、社區、政府及社會服務、公用事業、本地傳媒(如本地電視廣播)、零售銀行服務(例如港幣存款、按揭貸款)及其他零售業(如酒樓和超級市場)。這裏所指的非貿易服務，亦包括本地公司爲在港的外資公司或跨國公司的提供服務。

5. 貿易抑或是非貿易服務的分別，部份取決於買方的規模，例如祇有大公司可選擇世界任何一個金融中心的銀行服務，但對經濟增長起重要作用的小型公司，則實際上只可選擇在香港提供的服務。

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[1] 香港政府秘書處， *Study on Promotion of Hong Kong Services*, 1995 年 4 月 13 日。

公平競爭政策：亞洲經驗

日本

1. 日本是亞洲最早引入公平競爭法的國家。該法例是在 1947 年引入。

2. 法例的目的是爲：「禁止私有的壟斷、不合理的貿易限制及不公平的貿易行爲；禁止經濟力量過度集中；消除對生產、售賣、價格、技術及其他類似的不合理限制；及禁止所有其他以不公平合併、協議及其他限制方式進行的商業活動；推動自由及公平競爭；促進企業創新；鼓勵企業進行商業活動，提高就業水平及國民實質收入；並由此推動國民經濟的民主及整體發展，以及保障消費者的利益。」

3. 上述條文可分爲三個重要的部份。首先，日本的公平競爭法正如英國、美國及歐洲聯盟的公平競爭政策，主要是關注「經濟力量過度集中」及「消除不合理限制」。前者有部份的工作是打破龐大的商業合併(即日本財閥)，而後者則是以法例形式，禁止任何特定的限制貿易行爲出現[1]。一個重要的環節是有關提高就業水平及國民實質收入。

4. 日本的公平競爭法有其特色之處。它是在公平競爭法中，特別提倡以保障消費者利益爲法例目的。這點是非常重要的，因在這之前，公平競爭法主要是爲處理商人之間的事宜。消費者利益只是公平競爭法的附屬目的。

中國大陸

5. 1993 年 9 月中國大陸第八屆全國人大常務委員會第三次會議通過了《不正當競爭法》[2]。制訂此法的目的在於，「保障社會主義市場經濟健康發展，鼓勵和保護公平競爭，制止不正當的競爭行爲，保護經營者和消費者的合法權益」(第 1 條)。

6. 此法例禁止的行爲包括：「操縱價格」(第 15 條)及「掠奪性定價」(第 11 條)。此法例還具體規定保護商標及專利權。此法例一些特點包括：「禁止假冒他人註冊商標」；「擅自使用知名商品特有的名稱、包裝或裝璜」；「擅自使用他人的企業名稱或者姓名」；及「在商品上僞做或者冒用認証標誌，名優標誌等質量標誌」(第 5 條)。

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[1] 條款 2(9)列明不公平貿易行爲，包括不公正的歧視他人行爲及交易價格、勸誘或強迫對手的顧客與己交易、以限制條件與其他市場參予者交易、利用議價地位、及進行干預、勸誘、調查或強迫的行爲。

[2] Encyclopaedia of Chinese Law, Vol. II.

7. 此法例亦規限政府部門及經營者的行爲，如「政府及其所屬部門不得濫用行政權力」(第 7 條)及「經營者不採用財物或者其他手段進行賄路以銷售或者購賣商品」(第 8 條)。這兩則法例十分重要，因爲它可確保公平競爭。這些法例在不同國家也有以版權法及反貪污法的形式出現。

8. 執行監察檢查工作的部門在「縣級以上」(第 16 條)。監察檢查部門擁有權力要經營者，有利害關係的人士及証人進行查詢(第 17 條(一))；又有權查閱協議內容、賬部、收條單據等(第 17 條(二))；也可以檢查與不正當競爭行爲有關的財物(第 17 條(三))。

9. 有關當局曾草擬《反壟斷法》；以處理壟斷的事宜，唯目前仍在草擬階段，並未成爲正式的法例。

台灣

10. 1980 年代後期，台灣在面對內外快速轉變的環境下，了解到他們的經濟秩序和結構再也不能適應全球市場經濟急劇增長的需要。在 1991 年，台灣引入公平競爭法，並以《公平交易法》的形式出現。此法的着眼點在於促進經齊發展。法例的第 1 條清楚指出，法例的目的是「保護公平交易及消費者權益，確保公平競爭，加速經濟穩定及增長」。

11. 法例對競爭、壟斷[3]及禁止操縱價格、或合謀杯葛競爭對手的貿易行爲有清晰的定義。法例並有極大的篇幅處理使用未授權的名字和模仿証明標誌(第 20 至 22 條)。

12. 台灣成立了公平交易委員會，負責執行公平競爭法。法例第 25 條規定，賦予公平交易委員會權力去制定政策及規則，主持聆訊，調查及裁決違反法例的事宜。委員會亦有權給予經營者豁免許可[4]，但豁免期不可超過三年。申請延長豁免須在到期前向委員會申請。

在制訂《公平交易法》期間，受關注的問題

13. 在台灣引入公平競爭法的初期，政府與民間對新增法例都抱有疑慮。這些疑慮主要是《公平交易法》規範的制定與實施會否妨礙台灣的商業活動。

14. 監管規範包括壟斷、合併、及縱向限制條款方面的規定，這特別引起台灣的疑慮。因爲在法例研擬時，台灣的經濟規模較之今日更小，且在台灣能夠擁有市場優勢的公司，大多爲公營事業或取得特許經營的企業。再加上，台灣

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[3] 壟斷的定義是指市場不存在競爭對手，或當公司擁有市場支配力量斥除競爭。

[4] 給予豁免許可須符合下列七個理由其中之一，這包括：降低生產成本，增加技術效率，參與聯合研究及發展，保証或促進出品，加強貿易效率，回應經濟衰退及促進中、小型企業的競爭政爭效率。

對國際出口採取的開放政策，常常被引爲台灣不必急於引進《公平交易法》的基礎。

15. 法例對合資及策略式聯盟的規定亦引起了疑慮。有些商人表示他們需要某程度的縱向融合，例如全國的供應商網絡及統一價格，以達致有效運作及建立公司的市場形象。

16. 基於上述的疑慮，台灣在實施公平競爭法時，做了下列工作：

a) 委託學者專家按適當的理論基礎作專案研究。

b) 每季定期向工商團體及學者專家提出政策討論，並使他們了解過去案件的執行情況，及往後的政策目標和策略。

c) 舉辦公開論壇，讓公眾明瞭《公平交易法》所要求的公平競爭規則。

d) 爲公司管理階層開辦深入的特別訓練課程，作爲公平競爭事務委員會與公司的溝通橋樑。

e) 與公司的領導階層舉行特別的會議。

f) 提供行政指導，讓公司了解一些可能是違反公平交易法的傳統慣行。

g) 促進公平競爭事務委員會與其他監管機構的行政合作。

h) 有效使用大眾傳播媒體，以促進了解、知識法例。

南韓

17. 在引入公平競爭法之前，南韓絕大部份的產品的市場屬獨佔或寡頭壟斷，由國內大聯合企業支配。事實上，穩定物價是當時「迫切的經濟目標」。[5]

18. 在70年代後期發生的第二次石油危機，促使南韓重新評定過去的經濟表現。當時一致的意見認爲該國的經濟應以市場力量帶動，減低政府及制度上的干預。結果在 1980 年 12 月引入《壟斷規例及公平交易法案》(Monopoly Regulation and Fair Trade Act)。

19. 有意見認爲需要探討國內大聯合企業的經濟力量過度集中，因此在擬訂上述法案時，對大公司市場支配力量的影響力也十分注意。南韓公平競爭法的其中一個特色是針對「大企業組別」(large enterprise group)的出現(第 8-3 條)。條例規訂大企業須依照從總統頒佈的法令標準行事。

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[5] K. U. Lee 在 1995 年 6 月的國際公平交易研討會上發表的南韓競爭政策文章。

20. 屬大企業組別的成員被視爲擁有優越的經濟力量的公司；因此須接受一些不會加諸其他公司的限制，例如：限制企業合併(Restrictions on Combination of Enterprises)(第 7 條)、或同時兼任其他公司職銜(第 7(2)條)及禁止互相合併(第 7-3 條)。[6]

21. 根據南韓的《壟斷規例及公平交易法案》(第 9 章)，公平交易委員會負責執行公平競爭法。委員會設於經濟計劃委員會下，主要職責是「在經濟委員會部長對有關事件作出決定或處理前，由公平交易委員會負責考慮法例規定的事宜」(第 26 條)。因此，南韓公平交易委員會的角色主要是進行處理及調查的工作，而經濟委員會部長則是對違反條例作出決策的機關。事實上，很多事件也是由經濟委員會或其他人士遞交公平交易委員會處理的。

22. 自引入及實施該法例後，南韓的經濟從政府帶領、高度管制的情況，轉變爲自由經濟市場。南韓政府亦表示公平競爭政策的引入有助該國的國際、雙邊及多邊貿易談判。

新加坡

23. 新加坡像香港一樣，沒有制訂公平競爭法來監察及推動經濟內部競爭。但是新加坡的經濟結構與香港的不同。因此，新加坡制訂公平競爭法的需要和香港有別。香港的公司絕大部份是由私人擁有，但新加坡很多主要的公司不是跨國企業，便是與政府有聯繫的企業(Government Linked Corporations)。由於上述的聯繫，新加坡政府可以在公眾利益的前提下，影響這些企業，促進相互之間的競爭。

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[6] 例如：條例禁止大企業組別的公司「取得或擁有一間取得或擁有該公司股份的附屬公司股份」(第 7-3(1) 條)。此外，公司必需「在取得或擁有上述股份的 6 個月內除去股份」(第 7-3(2) 條)。

比較各地監管壟斷及商業經營手法之法例

	地方						
競爭事項	日本	中國大陸	台灣	英國	美國	南韓	歐洲聯盟
壟斷	反壟斷法，第 3, 21, 22, 23, 24 條公平交易委員會 1982 年第 15 號通告第 14 條	1993 年反不正當競爭法，第 6 條	1991 年公平交易法，第十條	1948 年壟斷及限制行爲法；1965 年壟斷及合併法；1973 年公平交易法，第 1, 2 條	1890 年謝爾曼法案第 2 條	1980 年壟斷規例及公平交易法，第 3 條	1957 年羅馬條約，第 86 條
公司合併	反壟斷法第 15, 16, 18 條		1991 年公平交易法，第十一條	1965 年壟斷及合併法；1973 年公平交易法第五部分	1890 年謝爾曼法案第 1 條；1914 年克萊頓法案第 7 條	1980 年壟斷規例及公平交易法，第 7 條	1957 年羅馬條約，第 85 條
合謀協議	反壟斷法，第 24-3, 24-4 條		1991 年公平交易法，第十，十九條	1976 年限制行爲法第 6(1)d 條	1890 年謝爾曼法案，第 1 條	1980 年壟斷規例及公平易法，第 11 條	1957 年條羅馬條約，第 85 條
控股公司	反壟斷法，第 9, 10, 11, 18 條				1914 年克萊頓法案，第 7 條；1950 年 Celler-Kefauver 法案	1980 年壟斷規例及公平交易法，第 7-2 條	
互兼董事職位	反壟斷法，第 13 條				1914 年克萊頓法案，第 8, 10 條	1980 年壟斷規例及公平交易法，第 7(2) 條	
合資企業	反壟斷法，第 24-4 條			1973 年公平交易法，第 65, 66 條；1976 年限制行爲法，第 6 條	謝爾曼法第 1 條；1914 年克萊頓法案，第 7 條；1914 年聯邦貿易委員會法案，第 5 條	1980 年壟斷規例及公平交易法，第 11 條	
行業聯會	反壟斷法，第 8 條			1976 年限制行爲法，第 8 條；1976 年零售價法，第 4 條	不適用	1980 年壟斷規例及公平交易法，第 18 條	
操縱價格(橫向)	反壟斷法，第 18-2 條	1993 年反不正當競爭法，第 15 條	1991 年公平交易法，第十八條	1976 年限制行爲法，第 6(1)a, 11(2)a 條	1890 年謝爾曼法案第 1 條	1980 年壟斷規例及公平交易法，第 3(1) 條	1957 年羅馬條約，第 85(a), 86(a)條
規定零售價(縱向操縱價格)	反壟斷法，第 24-2 條；公平交易委員會 1982 年第 15 號通告第 12 條		1991 年公平交易法，第十八條	1964 年, 1976 年零售價法	1980 年謝爾曼法案，第 1 條	1980 年壟斷規例及公平交易法，第 20 條	1957 年羅馬條約，第 85(a), 86(a)條
價格歧視	公平交易委員會 1982 年第 15 號通告第 3, 4 條		1991 年公平貿易法，第十九條	1976 年限制行爲法，第 6(1)b 條	1936 年 Robinson Patman 法案	1980 年壟斷規例及公平交易法，第 3(1) 條	1957 年羅馬條約，第 85(d), 86(c)條

競爭事項	地方						
	日本	中國大陸	台灣	英國	美國	南韓	歐洲聯盟
掠奪性定價	1982 年公平交易委員會第 15 號通告第 6 條	1993 年反不正當競爭法，第 11 條	1991 年公平交易法，第十九條	1976 年限制行爲法，第 30 條		1980 年壟斷規例及公平交易法，第 3(1)條	1957 年羅馬條約，第 86(a)條
牟取暴利之售價	1982 年公平交易委員會第 15 號通告第 7 條		1991 年公平交易法，第十九條			1980 年壟斷規例及公平交易法，第 3(1)條	1957 年羅馬條約第 85(a)，86(a)條
市場分割				1976 年限制行爲法，第 6(1)f，11(2)e 條	1890 年謝爾曼法案，第 1 條		1957 年羅馬條約，第 85(c)條
排斥競爭對手的專營行爲	1982 年公平交易委員會第 15 號通告第 11 條	1993 年反不正當競爭法，第 6 條	1991 年公平交易法，第十九條	1976 年零售價法，第 5 條	1914 年克萊頓法案，第 3 條		
杯葛及拒絕交易	1982 年公平交易委員會第 15 號通告第 1，2 條		1991 年公平交易法，第十九條	1976 年零售價法第 1，2 條	1890 年謝爾曼法案，第 1 條		
強迫搭賣	1982 年公平交易委員會第 15 號通告第 10 條	1993 年反不正當競爭法，第 12 條	1991 年公平交易法，第十九條		1890 年謝爾曼法案，第 1 條；1914 年克萊頓法案，第 3 條		1957 年羅馬條約，第 85(e)，86(d)條
欺詐性廣告	1982 年公平交易委員會第 15 號通告第 8 條	1993 年反不正當競爭法，第 9 條	1991 年公平交易法，第二十，廿一條		1914 年聯邦貿易委員會法案，第 5，12 條		
餌誘式廣告	1982 年公平交易委員會第 15 號通告第 9 條	1993 年反不正當競爭法，第 13 條			1914 年聯邦貿易委員會法案，第 5，12 條		
毀謗性廣告		1993 年反不正當競爭法，第 14 條	1991 年公平交易法，第廿二條				
層壓式銷售			1991 年公平交易法，第廿三條		1914 年聯邦貿易委員會法案，第 5，12 條		
干預同業經營運	1982 年公平交易委員會第 15 號通告第 1，2 條	1993 年反不正當競爭法，第 10 條	1991 年公平交易法，第十九條				
非法獲取商業資料			1991 年公平交易法，第十九條				
盜用商標		1993 年反不正當競爭法，第 5 條	1991 年公平交易法，第二十條				

競爭事項	地方						
	日本	中國大陸	台灣	英國	美國	南韓	歐洲聯盟
政府人員濫用權力		1993 年反不正當競爭法，第 7 條					
賄賂行爲		1993 年反不正當競爭法，第 8 條					
專責機構	反壟斷法第 27 節至 88-3 條	無	1991 年公平交易法，第廿五至廿九條	1948 年壟斷及限制行爲法；1973 年公平交易法，第 1, 2 條	1914 年聯邦貿易委員會法案	1980 年壟斷規例及公平交易法，第 9 章	無
專責法庭	無	無	無	1956 年限制行爲法；1976 年限制行爲法庭法	無	無	無

監管經營手法的不同方式

涉及競爭事項	在本港之選擇	
	選擇一 一般方式	選擇二 切合實際環境之方式
市場分隔	✓	✓(第一條)
杯葛及拒絕交易	✓	✓(第一條及二)
牟取暴利之售價	✓	✓(第一條及二)
合謀協議	✓	✓(第一條及二)
獨家專營	✓	✓(第一條及二)
掠奪性定價	✓	✓(第一條及二)
價格歧視	✓	✓(第一條及二)
操縱價格(橫向)	✓	✓(第一條及二)
限制零售價(操縱價格 - 縱向)	✓	✓(第一條及二)
強迫搭賣	✓	✓(第一條及二)
壟斷	✓	
業務合併	✓	
餌誘式廣告	✓	
虛假廣告	✓	
毀謗性廣告	✓	
控股公司	✓	
非法獲取商業資料	✓	
干預同業營運	✓	
互兼董事職位	✓	
合資企業	✓	
層壓式銷售	✓	
行業聯會	✓	
未經消費者同意售出的貨品	✓	
盜用商標	✓	*
政府人員濫用權力	✓	*

註： *已結合於現行法例內

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