



Proposal for a general competition law for Hong Kong

The Competition Policy Review Committee (CPRC), which was appointed by the Hong Kong government to review the existing competition policy, issued a set of recommendations (CPRC Recommendations) in June 2006 advocating the adoption of a general, economy-wide competition law (proposed competition law).

This note briefly outlines the current sector specific competition framework and then considers key aspects of the CPRC Recommendations.

Introduction

The Competition Policy Review Committee (CPRC), which was appointed by the Hong Kong government to review the existing competition policy, issued a set of recommendations (CPRC Recommendations) in June 2006 advocating the adoption of a general, economy-wide competition law (proposed competition law).

This note briefly outlines the current sector specific competition framework and then considers key aspects of the CPRC Recommendations.

Current competition regime in Hong Kong

Previously, the government did not consider competition policy to be a high priority on its legislative agenda. In response to the Consumer Council's 1996 report advocating the adoption of a general competition law, the government created the Competition Policy Advisory Group (Compag) to deal with competition issues on an ad hoc basis. The public may lodge complaints of alleged anti-competitive behaviour with Compag for it to investigate, and Compag may also initiate its own investigations. However, given the absence of a competition law, Compag does not have any statutory powers to investigate, enforce or impose sanctions.

Instead, the government introduced sector-specific competition regimes in 2000 that apply only to the telecommunications and broadcasting sectors. These regimes regulate anti-competitive conduct and abuse of dominance and, for the telecommunications sector only, merger control.

Key recommendations of CPRC

The chief executive of Hong Kong specifically identified competition as one of the key items on the government's agenda in his policy address in October 2005. As a first step, he appointed the CPRC to review existing competition policy and the CPRC Recommendations were published on 4 July 2006. Key points follow.

Who will the proposed competition law apply to?

The CPRC recommended that the proposed competition law should apply to all sectors of the economy, with the government determining certain carve-outs in defined circumstances.

As for the existing sector specific competition regimes, the CPRC proposed that they be retained at least in the first few years of a general competition law.

What conduct will the proposed competition law regulate?

According to the CPRC, the proposed competition law should focus on conduct that runs counter to the objectives of the competition policy (which objectives are to enhance economic efficiency and the free flow of trade, thereby also benefiting consumers), rather than on market structures, and thus it has recommended against the inclusion of a merger control regime. In specifying the types of conduct to be prohibited, the CPRC has attempted to prioritise those that have been the subject of consumer complaints made to the Compag in recent years. The CPRC recommended that general and broadly drafted provisions be introduced to combat the following activities:

- price fixing;
- bid rigging;
- market allocation;
- sales and production quotas;
- joint boycotts;
- unfair or discriminatory standards; and
- abuse of a dominant market position.

However, these activities should only constitute offences under the proposed competition law if they are carried out with anti-competitive intent (ie the intent to distort the market) or have the effect of distorting normal market operation and lessening competition.

The CPRC recognised the inherent uncertainty of such general prohibitions and has thus recommended that appropriate guidelines be issued to supplement the legislation. These guidelines should cover:

- examples and descriptions of conduct that would be considered to be anti-competitive;
- explanations as to how the regulator might determine intent and anti-competitive effect; and
- discussions of cases both from Hong Kong under the existing telecommunications and broadcasting competition regimes, and from overseas jurisdictions with similar legislation.

Regulatory framework: competition commission and tribunal

The CPRC recommended that a single regulatory authority, to be known as the competition commission, be established under the proposed competition law. The commission will have a two-tier structure, comprising a governing board (with members representing different interest groups including business, professional, consumer and government) and an executive arm to be staffed by individuals with expertise in law, economics and accounting.

The commission will be equipped with investigative powers, which should include the power to:

- require written or oral information;
- require production of documents or other records or data; and
- enter and inspect premises and seize relevant documentary evidence with a warrant issued by the court.

The CPRC recognised that the proposed powers of the commission are extensive and has recommended that it be required to draw up its own administrative guidelines and procedures regarding the exercise of its powers in consultation with relevant stakeholders.

The commission will also assume the following roles:

- advocacy – to enhance and promote public awareness and understanding of competition issues; and
- review – to keep the scope of the proposed competition law under review and highlight to the government the areas that should be changed.

In addition to the commission, the CPRC has also considered whether a competition tribunal should be established using one of the following alternative models:

- model one – the tribunal would have powers of adjudication and sanction while the competition commission would have investigative powers; or
- model two – the tribunal would operate as a review body, reviewing the competition commission's decisions.

The CPRC has recommended the first model to the government.

Sanctions

The CPRC considered that civil penalties would be a sufficient deterrent, and hence it did not propose to the government that criminal sanctions be introduced. The CPRC recommended the adoption of the following civil liabilities for breaches of the proposed competition law:

- penalties/fines;
- directors disqualification orders;
- final and interim cease and desist orders; and
- administrative settlements in lieu of formal proceedings: although not strictly part of the CPRC Recommendations, the CPRC in its presentation materials recommended that the government adopt rules to enable administrative settlement in lieu of formal proceedings.

Private enforcement?

The CPRC noted that parties affected by anti-competitive conduct should be entitled to take their own civil action for the recovery of damages suffered and that proven anti-competitive conduct could be cited as grounds for claiming damages. These actions are akin to third party

damages actions, which are available in the US and the EU. Further, the CPRC stated that parties aggrieved by the outcome of cases, or penalties handed down, should have access to judicial review. It is not clear from the CPRC Recommendations what is required to establish standing in these private enforcement claims.

Next steps

The CPRC has recommended, and the government has agreed, that a public consultation will be carried out to determine whether there is a need for a general competition law as proposed by the CPRC. The public consultation should begin at the end of 2006.

For further information please contact	Connie Carnabuci T + 852 2846 3300 E connie.carnabuci@freshfields.com
	Richard Chalk T + 852 2846 3466 E richard.chalk@freshfields.com