THE LAW SOCIETY OF HONG KONG 香港律師會

Comments on A Public Consultation Paper "Detailed Proposals for a Competition Law"

For the purposes of this response, the Public Consultation Paper is referred to as the "Consultation Paper."

Chapter II: Institutional Arrangements

The Competition Commission

An independent "two-tier" system

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

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

We agree there should be a two-tier structure. Members of the Board should serve on a pro-bono basis whilst the Chief Executive Officer of the Commission, who is appointed by the Board, and the staff constituting the Executive, should be employees of the Commission but not civil servants.

We accept the establishment of a regulatory body independent of Government can promote the effective and impartial enforcement of competition law. Whilst the Chairman of the Commission will be appointed by the Chief Executive, the other members of the Commission should be selected from a wide group of professionals and business groups. In this connection, we propose Law Society representation as such representatives would provide input from the legal perspective which is essential to the work of the Commission.

Powers and Function

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

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

Agreed. The legislation requires careful drafting to ensure the fundamental rights of individuals are safeguarded.

Investigation and Adjudication

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

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

We agree to these Proposals subject to the clear proviso that the fundamental legal rights of individuals would be safeguarded, e.g. the privilege against self-incrimination, legal professional privilege, etc.

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

Agreed.

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

There is the potential for situations to arise where all members of the Commission will have an interest in a matter under investigation (e.g. supply of utilities). Accordingly, it is more appropriate to deal with conflict of interest in a manner which differentiates between substantial interests and non substantial interests. For non substantial interests a member who in any way, directly or indirectly, has an interest in a matter being investigated by the Commission should disclose such interest before taking part in any deliberation or decision of the Commission. For substantial interests, disclosure should be made and the members concerned should excuse themselves.

Notification

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

Agreed.

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

Agreed. We consider that in any binding settlement, the rights of third parties to take private action should be preserved. Further, any binding settlement must be made public.

Confidential Information

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

The definition of "confidential information" should be precisely drafted to protect individuals and assist the Commission in the discharge of its duties. Any person to whom the Commission discloses "confidential information" should also be subject to the same obligations of confidentiality as the Commission itself.

We also propose there should be a mechanism for the parties to seek directions from the Court as regards disclosure of "confidential information".

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

Agreed.

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

Agreed.

The Competition Tribunal

Functions

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

Agreed.

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

Agreed

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

Agreed

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

While the informal procedures would prevent over-technical legal arguments from being raised and therefore enhance efficiency, the rules of evidence should not be excluded in their entirety. We maintain basic principles and procedures should be observed, e.g., the fundamental rules of evidence, the onus and burden of proof in the civil litigation system. This will ensure natural justice and that the hearing will be conducted fairly.

Right to seek review

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

Agreed.

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

Agreed.

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

Agreed.

Chapter III: Conduct Rules

Application of the Conduct Rules

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

1. **The Consultation Paper suggests the conduct rules should apply to all entities that engage in economic activity, irrespective of the legal status and source of finance of the undertaking. It is also proposed the definition of "undertaking" be set out in the law. The Law Society agrees the conduct rules should apply to all entities, and care should be taken to ensure this is effectively reflected in the definition of "undertaking".**

2. **It is suggested the definition should include any business, trade or profession, whether or not it is carried on for profit, as is the case under Singapore competition law[1], to reduce the possibility for any entities to successfully argue that they fall outside of the definition of "undertaking".**

3. **This definition also suggests that all separate legal entities are included, regardless of whether such undertakings are related or otherwise. This is notwithstanding the fact that (to use one example) a subsidiary has no real freedom to determine its course of action in the market and enjoys no real economic independence. We would therefore suggest the definition is amended in a manner similar to the UK guidelines issued by the Office of Fair Trading which states *"…an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal entity, enjoys no economic independence".***

Prohibition on anti-competitive agreements

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

1. **It is agreed the prohibition should cover concerted practices for the reasons set out in the Consultation Paper. The Consultation Paper cites the European Commission's definition of "concerted practice". It is noted that the definition of "concerted practice" includes a requirement that an undertaking should have "knowingly" substituted practical co-operation for the risks of competition, however the introduction of a mental element: (i) creates a loop-hole which potential offenders may seek to use; and (ii) impose an unrealistic and unreasonable burden of proof on the Commission which would be inconsistent with the legislation's objective of preventing anti competitive conduct regardless of the intent of the persons involved. It is the Law Society's view that this element should <u>not</u> be included.**

2. **It is also suggested this prohibition is stated to cover those agreements and concerted practice that have the purpose or effect of substantially lessening**

[1] Competition (Jersey) Law, 1995, sections 2 and 4

competition "in Hong Kong, or any part of Hong Kong", since the Commission should not have effects on other markets within its remit.

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

1. **Proposal 25 avoids naming specifics of types of anti-competitive agreements that would come under the radar and entrusts the Commission with the responsibility to issue guidelines. The degree of independence of this Commission will depend entirely on whom government eventually appoints as its members. Under UK and European competition regimes, there are non-exhaustive lists of examples of behaviour which may be regarded as anti-competitive, but these lists are merely for guidance and the particular facts of the case are looked at to determine whether the effect of the behaviour in question restricts or prevents competition before a decision on infringement is made.**

2. **The Law Society would therefore suggest that a list of anti-competitive conduct be provided. However, the Law Society is neutral on whether such list is included in the legislation itself or issued by the Commissioner before the legislation takes effect. In any case, the list should be stated to be non-exhaustive, and should be supplemented by guidelines when appropriate. By including a list of anti-competitive conduct (i) market participants are put on stronger notice as to forms of conduct that will be unacceptable; and (ii) there is less scope to frustrate the competition law through technical arguments as to whether a particular form of conduct is anti-competitive.**

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

1. **We note the proposal to exclude vertical agreements from the scope of the prohibition, and the suggestion that the EU approach is followed, whereby vertical agreements that meet certain conditions are granted a block exemption order.**

2. **It is submitted that vertical agreements should be subject to the general prohibition in the same manner as horizontal agreements. The Law Society sees no rational basis for excluding vertical agreements and disagrees with the statements made in the Consultation Paper in this respect. We note the explanation is that the Commission should not be concerned with vertical agreements unless one of the parties to the agreement has substantial market power, and in this case, this should fall to be dealt with under Proposal 27. However, whilst many vertical agreements are pro-competitive, by promoting inter-brand competition for example, many other common vertical agreements can have substantial anti-competitive effects. For example, exclusive distribution agreements may restrict competition between alternative distributors. Similarly, exclusive purchasing agreements may restrict competition (by preventing the customer from sourcing products from alternative suppliers) between alternative suppliers for sales to a particular customer. In summary, excluding vertical agreements from the prohibition will mean that re-**

sale price fixing and many forms of exclusive dealing and tying arrangements will not be subject to the prohibition, even though such conduct could be highly anti-competitive (unless the conduct is that of an undertaking which has substantial market power, it abuses that power and the conduct substantially lessens competition).

3. **Non-dominant parties will be able to avoid the prohibition since they will not be subject to Proposal 27 which prohibits abuse of a dominant position. Firms which impose anti-competitive vertical restraints may not have sufficient market power to be considered "dominant", and even if they did, the mere fact that they have imposed such restraints may not amount to an abuse of their dominance. It is also possible that vertical agreements may be used to disguise a horizontal agreement between parties occupying the same level of a value chain.**

4. **In the UK, whilst vertical agreements were excluded from the scope of the prohibition on anti-competitive agreements in the Competition Act 1998, under a 2000 Order[2], the prohibition does not apply to any restrictions on competition between businesses at different levels of the production or distribution chain, unless they are restricting re-sale prices. However, the exclusion was repealed by a 2004 Order[3].**

5. **In addition, vertical agreements are also prohibited in the US[4] and Australia[5]. Whilst in some cases, it is only viable to have a single distributor due to the size of the Hong Kong market, then we accept that any contractual exclusivity will not have any practical effect on restricting competition which would otherwise have taken place. However, it is important that vertical agreements which do have the object or effect of hindering competition, such as fixing a re-seller's price or establishing a minimum re-sale price, do fall under the prohibition such that it will not need to be established whether they have an anti-competitive effect.**

6. **We suggest that certain exemptions are available for vertical agreements and not that they are not subject to a blanket exclusion, for instance if the Commission is satisfied that it benefits consumers, does not contain any excessive restrictions and otherwise does not materially reduces competition. Therefore, it is suggested that vertical agreements are prima facie subject to the prohibition (as it applies to horizontal agreements) but that vertical agreements may fall to be exempt or excluded under certain circumstances. This would mean that requirements to be satisfied to obtain such exemption would mean only pro-competitive vertical agreements would be exempted.**

7. **At this point, when including vertical agreements, the prohibition does not cover arrangements made between persons that form part of the same undertaking. Therefore, in the context of vertical agreements, parties to certain forms of agency agreements are not considered to be distinct undertakings, and therefore to this end, they will not be subject to the prohibition.**

[2] Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000
[3] Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004
[4] Shearman Act 1890, section 1
[5] Trade Practices Act 1974, section 45

8. **In addition, it should be noted that the exclusion of vertical agreements may be inconsistent with the approach taken under the Telecommunications Ordinance.**

Prohibition on abuse of substantial market power

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

1. **Under this proposal, substantial market power will only be prohibited if it has the effect of lessening competition. However, we note abuse of substantial market power in a manner which does not involve any form of agreement with other participants in the market or which does not have the effect of lessening competition would not be prohibited under this Proposal. In effect, a supplier of goods or services which has substantial market dominance would be free to impose inflated prices without breaching the proposed competition law because inflated pricing will not have the effect of lessening competition. Likewise, a group of industry participants could achieve the same effect so long as they did not actively collude in any way. Therefore, the Law Society suggests that:**

(i) this prohibition is not subject to the requirements that such abuse of power has the purpose or effect of substantially lessening competition; and

(ii) an unconscionable conduct regime be introduced either as part of the competition law legislation or in a separate piece of legislation in a manner similar to Australia,

Conduct to have "purpose or effect"

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

1. **The Law Society agrees that conduct should only be considered an infringement of the prohibition if it is by its nature anti-competitive and also has the purpose and/or effect of preventing, restricting or distorting competition. However, as we stated in our response to the consultation paper *"Promoting Competition – Maintaining our Economic Drive"* (13 February 2007), whilst certain historically monopolistic areas of business (e.g. telecommunications and broadcasting) may require help to become more competitive, there would be a danger in taking a "one size fits all" approach to the introduction of a general competition law. An example is the proposed merger of the KCR and MTR. Whilst clearly reducing competition, it has been argued that such a move would improve efficiency and lower ticket prices. So, in determining the "effect" of an activity, consideration should be given not only to objective facts to determine whether a party is acting anti-competitively, but also to economic and other relevant issues to determine whether in fact it is acting in an anti-competitive manner.**

Merger control proposals*: The Consultation Paper invited views on the following options for merger control regulation:*

1. **The Consultation Paper invited views on the following options for merger control regulation in sub paragraph 25:**

   (a) introduction of merger provisions that would be suitable in the Hong Kong context, e.g. provisions similar to the Telecommunications Ordinance, whereby the Commission would only investigate a completed merger if it considered that serious competition concerns were raised. There would be a defined period of time after a merger within which the Commission would have to commence its investigation. Mergers that had competition concerns could still be approved if there were counter-balancing benefits. To provide more certainty, where notified of an intended merger, the Commission could be requested to give clearance within a short, defined time-frame for a merger to proceed. These safeguards could be further enhanced by having a threshold transactional value below which the Commission would not take action;

   (b) introduction of merger provisions as broadly described above in the new law, but to delay enforcement of such provisions until after a review of the effect of the law; or

   (c) not to include merger provisions in the Bill initially, but rather to reconsider whether they might need to add such provisions only after a review of the effect of the new law.

2. **As stated in the Law Society's responses to the last consultation paper, the issue of merger control is difficult, given the nature of the political and economic environment in Hong Kong, which has always favoured less government intervention in the management of the economy compared to other developed economies. However, most jurisdictions have merger control regulations within their competition law, even economies which are much smaller than Hong Kong, (e.g. Singapore and Jersey). Accordingly, the Law Society sees no reason why merger control should not be a fundamental feature of Hong Kong's competition laws. Support can also be drawn from the telecommunications legislation in Hong Kong. Competition provisions have been in place since June 2000 in the Telecommunications Ordinance (Cap 106, ss.7 I-N, s.35A, ss.32 N-R and s.36C). Subsequently new provisions relating to mergers were inserted by virtue of the Telecommunications (Amendment) Ordinance 2003.**

3. **One of the benefits of merger control provisions is they enable mergers to proceed on the basis that, if approved, the risk of the merger agreement itself subsequently being held to be anti-competitive is reduced. In effect, merger control provisions can reduce uncertainty for merger participants.**

4. **If merger control legislation is introduced, the Law Society is of the view that the legislation should provide the Commission/Tribunal with power to intervene but should not require mandatory notification. In effect, this is the UK model and not the more bureaucratic EU model. In addition, it should be noted that option (a) may introduce substantial costs if a merger was required to be dissolved by the Commission after it had been completed. In addition, if merger control regulation is to be included, it must ensure that it adequately takes account of the large number of sectors which are already dominated by a monopolistic supplier or small group of oligopolistic suppliers.**

5. **In the event that merger controls are not included in the legislation, the Law Society is of the view that the new competition law should provide that the safeguards against abuse of market device such as inflated power and anti-competitive vertical agreements are included in the legislation. Without such provisions the usefulness of the competition law will be significantly eroded.**

6. **For completeness, the Law Society also submits the following:**

   (a) **It does not accept (as suggested in paragraph 24 of the Consultation Paper) that due to the likely situations where merger control laws may apply in Hong Kong, there should be formal "safe harbours" related to market share percentages. The extent to which a merger between two or more entities or particular market shares would have anti-competitive effects would inevitably vary from industry to industry. Thus, such market share thresholds are of limited usefulness and could serve to defeat the real intent of merger control provisions.**

   (b) **It supports the introduction of merger control provisions as soon as possible.**

Penalties for engaging in anti-competitive conduct

Proposal 29: *Infringement of the conduct rules should be subject to civil, but not criminal, penalties. Fines of up to $10 million could be imposed by the Commission. More serious penalties, including higher fines and disqualification from holding a directorship or a management role in any company for up to five years, could be imposed by the Tribunal, on application by the Commission.*

1. **Of these proposals, the Law Society agrees with the proposals in relation to civil but not criminal penalties and disqualification orders. However, in order for the higher fines with sufficient deterrent value to be imposable by the Tribunal to be "safe" from legal challenges, the Law Society submits that there must be scope for penalties to be criminal in nature.**

2. **This arises from the relatively recent Court of Final Appeal ruling in *Koon Wing Yee v Insider Dealing Tribunal* (FACV 19 of 2007, 18 March 2008). Sir Anthony Mason NPJ held that heavy fines may be (and, in the case at hand, was) criminal in nature given the penal effect of such fines. In such situations, any such fines imposed as a result of civil proceedings (as would be the case under the proposed Commission and Tribunal proceedings) would be constitutionally invalid.**

3. **As such, if there is no scope for financial penalties to be treated as criminal in nature and be prosecuted in courts (which, incidentally, is now an option for market manipulation charges similar to that found in *Koon Wing Yee*, pursuant to the Securities and Futures Ordinance), there is a risk that:**

   (a) **any heavy fines imposed by the Tribunal would be struck down as unconstitutional; or**

   (b) **in order to ensure compliance with the *Basic Law* and the *Hong Kong Bill of Rights Ordinance*, the Tribunal would hand down relatively small fines which**

fail to have any significant deterrent effect on infringers of competition legislation.

4. **Therefore, the Law Society does not agree with the Consultation Paper's proposal for fines to be "civil" only. Instead, similar with the existing regime for market misconduct under the Securities and Futures Ordinance (Cap 571), the Commission should have the option of either bringing "civil" regulatory proceedings to the Tribunal, or "criminal" proceedings to the Courts, depending on the level of fines which are sought in individual cases.**

5. **For the avoidance of doubt, criminal sanctions (including imprisonment) should also apply where parties give false information to the Commission in the course of any investigations, or where there is any failure to obey Commission directions, and Tribunal or Court orders.**

6. **In addition, the Law Society notes that the proposals relating to penalties make no mention of the right for the Commission and/or the Tribunal to seek or (if constitutionally possible as noted above) impose daily fines for continuing breaches of competition law. We submit that absent such a mechanism (whether pursued as a civil or criminal matter), the deterrent value of any penalties may be limited.**

Power to make directions

Proposal 30: *The Commission should have the power to make such directions as it considers appropriate to –*

a) bring the infringement of the conduct rules to an end
b) eliminate the harmful effect of such infringement
c) prevent the re-occurrence of such infringement

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

1. **Proposal 30 suggests that the Commission should have the power to direct the ending, eliminating or preventing of anti-competitive conduct. Meanwhile, Proposal 31 provides for the Tribunal to have the power to make interim "cease and desist" orders pending any decision on whether particular conduct may constitute infringements of the competition legislation.**

2. **The Law Society supports these proposals, together with the limitations as discussed in paragraph 32 of the Consultation Paper in respect of interim orders. We agree with the explanations given therein.**

Leniency programme

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

1. **The Law Society supports these proposals, together with the limitations as discussed in paragraph 32 of the Consultation Paper in respect of interim orders. We agree with the explanations given therein.**

2. **Proposal 32 recommends a leniency programme to encourage parties engaging in anti-competitive conduct to come forward with information to assist with investigations. However, such a programme does not provide immunity from any private action for damages (paragraph 34, Consultation Paper).**

3. **The Law Society agrees that this is a useful in the investigation context. Additionally, it may also make anti-competitive cartels less stable, with each party to the cartel potentially becoming more suspicious of the possibility of "whistleblowing" to the Commission.**

4. **As a supplementary point, we suggest that any leniency programme does not give immunity to the party providing relevant information to an investigation from being named in the public domain. This would ensure that:**

   (a) private parties will be able to identify fully the parties against whom legal proceedings can be brought for anti-competitive behaviour; and

   (b) a wrongdoing party granted leniency does, as a deterrent from future illegal conduct, at least receive some negative publicity from its own anti-competitive acts or omissions.

Chapter IV: Private Action

Right to take private action

Proposal 33: *Parties should have the right to take both "follow-on" and "stand-alone" private action.*

1. **There is nothing controversial in providing for the right to private parties to institute "follow-on" actions where a breach of competition law has occurred, and a finding made by the relevant authority that an infringement has occurred. As the Commerce and Economic Development Bureau ("CEDB") noted in the Consultation Paper, this is common-place in the competition law regimes of jurisdictions similar to Hong Kong.**

2. **Potentially more controversial is to provide for "stand-alone" private actions, where a private party proposes to bring an action against another party which it believes has breached the competition law provisions, but where no finding of breach has been made.**

3. **Follow-on actions are far simpler to pursue than stand-alone actions - there is no need to prove liability, and so the issues are limited generally to questions of causation and quantum. For a private party therefore, generally speaking, where it is possible, taking a "follow-on" action will be preferable to instituting a "stand-alone" action.**

4. **However, there may well be occasions where taking a "follow-on" action is not possible. Undoubtedly, resource concerns will mean that the Commission will not make investigation into and/or take enforcement proceedings for every potential breach of competition law. This is recognised in the Consultation Paper at paragraph 5 of Chapter IV, where it states *"the Competition Commission would simply not be able to investigate all potential cases of anti-competitive conduct"*. Without the potential for the taking of a "stand-alone" action, a private party aggrieved by the conduct of another may be left without recourse unless provision is made for the possibility of taking a "stand-alone" action.**

5. **We would not anticipate an inundation of "stand-alone" actions, for a number of reasons, but the Law Society believes that there are likely to be some occasions where such an action might be taken and that the law should therefore provide for the same so that an aggrieved party might have recourse in relation to the relevant conduct, and not be precluded from seeking redress simply because the Commission is unable or unwilling to take up the cause.**

6. **Having said that, it is important that this should only be a *supplement* to the work of the Commission. Public enforcement by the Commission would remain the principal means of enforcing competition law in Hong Kong, and the Commission would have strict duties to do so. The fact that a private party might take a "stand-alone" action should have no effect on the duties of the Commission to enforce Hong Kong's competition laws publicly.**

Standing of a Party Intending to take Private Action

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

Again, we see this as uncontroversial and consistent with the general law as to who has the relevant "standing" to sue another for the damages he claims to have suffered as a consequence of conduct of that other party. The rules as to standing should be no different to those that apply under the general law of Hong Kong.

The Law Society sees no justification for limiting the standing of consumers or other end-users to bring private actions. Issues such as the possibility of parties bringing unmeritorious claims or the potential for "excessive" litigation can be dealt with in other ways, and are discussed herein.

Hearing of Private Cases

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

1. **Given that the CEDB proposes setting up a specialist tribunal to hear competition matters, it would seem sensible for private actions which deal with competition matters to come before that specialist tribunal. In the UK, where parties have a choice between bringing "follow-on" proceedings in the High Court or the Competition Appeal Tribunal ("CAT"), all "follow-on" actions have been brought in the CAT, which tends to show that complainants prefer the CAT as the venue**

for resolving competition disputes over the High Court.

2. **Complainants may well prefer the CAT over the High Court due to the fact that it is (or is considered to be) less formal, as well as a quicker and cheaper way in which to resolve the competition-related dispute. These are all issues discussed in paragraph 11 of Chapter IV. In any event, the Tribunal is intended to be a specialist tribunal for competition law related matters and, over time, should build up considerable expertise in this area. It would seem odd to provide for such a specialist tribunal and then for matters of competition law to be brought before a different tribunal.**

3. **The same rationale must apply, only *a fortiori*, to "stand-alone" actions, where the court/tribunal would have to determine liability issues as well as causation/quantum issues. In determining liability, the court/tribunal will need to assess and make decisions on competition related issues.**

4. **The Law Society therefore agrees that private cases involving only competition matters should be heard only by the Tribunal.**

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

1. **The question of how "composite" claims ought to be handled is more difficult.**

2. **We are not wholly enamoured of the approach proposed in the Consultation Paper. This approach would give the Court discretion to transfer the competition parts of the claim to the Tribunal, or alternatively to determine the entire claim itself. What is not suggested is that the entire claim could be transferred to the Tribunal for further handling that is both the competition law elements and the non-competition elements.**

3. **We consider that the Tribunal ought to have jurisdiction over, and the ability to determine "composite" claims, in their entirety, in appropriate cases for similar reasons as were discussed under Proposal 35. The Tribunal should be well able to determine matters other than pure competition-related issues, as the current tribunal which hears appeals from decisions of the Telecommunications Authority - the Telecommunications (Competition Provisions) Appeal Board - is often called upon to do. We see no reason why the Commission should not be granted jurisdiction over "composite" claims, to enable the Court (in circumstances such as those referred to in paragraphs 12 and 13 of Chapter IV of the Consultation Paper) to remit the claim to the Tribunal in its entirety.**

4. **It is we believe, preferable that the claim is determined by one body or another in the vast majority of cases, rather than one part being determined by the Court and the other part by the Tribunal. We see it as unnecessarily complex to provide for a procedure where a part of the claim might be remitted to the Tribunal, whilst**

another part is retained in the Court. We can see the potential for abuse by parties, and consider this adds unnecessarily to the costs and time that might otherwise be involved in claims, especially where (as is envisaged by the CEDB), the original High Court proceedings might be stayed pending appeals against decisions on competition related matters made by the Tribunal. Having said this, if the CEDB wishes to retain the possibility of the Court determining a part of the matter, and the Tribunal another part, then the Law Society has no objection to this, on the understanding that that procedure is reserved for the most unusual of cases, and is used sparingly.

5. **The Consultation Paper discusses the proposed method of transfer of composite claims (or, at least the competition parts of them) from the Court to the Tribunal, but it does not consider how a claim commenced in the Tribunal, which later becomes a composite claim might be transferred from the Tribunal to the Court. Presumably, the Tribunal would have no authority to proceed with the claim, and would be obliged to transfer the claim, or - at the very least - the non-competition parts of the claim to the Court. Such a procedure ought to be provided for.**

6. **Accordingly, we consider that the Tribunal ought to have full jurisdiction over composite claims. What is more difficult is whether the High Court should also retain some residual jurisdiction over such claims, or whether, where there is a claim which contains a competition element, the High Court ought to be obliged to relinquish jurisdiction to the Tribunal. There is an argument that there should be no overlap in this regard, and that the Tribunal ought to have the exclusive right to determine not just claims which are solely competition related but also composite claims. Although the CEDB does not make reference to this, it does discuss the issue of jurisdictional conflict and overlap at paragraph 11 of Chapter IV. This solution has merit, and should be seriously considered.**

7. **However, the jurisdictional conflict/overlap issue should not be over-emphasised. As noted earlier, in the UK a private party might bring a "follow-on" action in either the High Court or the CAT. This does not appear to have caused concern in the UK, nor any problems - as it happens, parties have universally chosen the CAT route over the High Court route. Accordingly, the Law Society feels that, to maintain maximum flexibility, the High Court should also retain residual jurisdiction over such claims, so that in an appropriate case (perhaps where the competition element is but a minor part of the claim, and/or not complex) the High Court might determine the entire matter rather than the Tribunal.**

Safeguards Against Excessive Litigation

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

1. **The Law Society agrees with this proposal. As under general law, there ought to be provisions enabling a claim to be dismissed at an early stage if it can be shown that the claim is without merit or vexatious.**

2. **Consideration might be given to adopting the wording used in the "*Whitebook*",**

Order 18, rule 19, which enables a Court to strike out a pleading which:

(i) discloses no reasonable cause of action (or defence);
(ii) is scandalous, frivolous or vexatious;
(iii) may prejudice, embarrass or delay the fair trial of the matter; or
(iv) is otherwise an abuse of process.

3. **Similarly, there should be provisions enabling "judgments" to be entered in default, in appropriate circumstances, and to enable applications for "summary judgment" to be made, where there is no defence to the claim. Again, guidance might be sought from the provisions of the *Whitebook,* see Order 14.**

4. **The Tribunal should also have similar powers to the Court to impose "punitive" costs awards in "appropriate" cases. Without limiting the Tribunal's discretion to award costs on such a basis in any appropriate case, similar to the position under the High Court rules, it might be considered appropriate to do so where, for example, proceedings are scandalous or vexatious, or where they are initiated or prosecuted maliciously, or for an ulterior motive, or in an oppressive manner. Proceedings instituted or prosecuted in such circumstances as to constitute an affront to the Tribunal could properly be the subject of a direction for the taxation of the successful party's costs on an indemnity basis. Such principles should also apply to those defending cases, where, for example, the claimant has been driven to bring its claim as a consequence of the defendant's oppressive conduct, or if the defendant had ulterior motives.**

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

1. **This proposal appears to be a sensible way of dealing with the possible situation it is intended to address.**

2. **We note that this scenario is, in practice, unlikely to arise often. First, as a general proposition we would expect there to be more "follow-on" than "stand-alone" actions, for reasons expressed elsewhere herein.**

3. **Secondly, we would expect it would only be on a very rare occasion that a private party would proceed immediately to a "stand-alone" action without first seeking to engage the Commission to investigate into the matter and to take action. It is only after the Commission has refused to take up a particular investigation or, after investigation, decides not to proceed with enforcement, that we would expect a private party to proceed to take "stand-alone" action.**

4. **Accordingly, it would only be in very rare cases that the Commission would not have been notified of a claim by a private party before the "stand-alone" action commenced. However, as noted at the start of this section, we have no objection to the proposals in this regard, which seem sensible to address this question on the odd occasion this might occur.**

5. **As noted in the Consultation Paper, appropriate safeguards should be included in the legislation to ensure that no prejudice is suffered by a complainant/claimant as a consequence of the delays which might occur if a matter is adjourned to enable the Commission to conduct an enquiry. But, given that the power to adjourn would be in the hands of the Tribunal, and all parties and the Commission might make representations to it, these are matters that the Tribunal will undoubtedly take into account in the exercise of its discretion to adjourn.**

Intervention by the Commission

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

1. **Whilst we have reservations about the Commission becoming involved in private disputes between private parties, especially where the Commission may have decided not to undertake investigation into the matter at an earlier stage, and the prejudice that might be caused to the rights of one or other of the private parties as a result of the intervention, on balance the Law Society agrees that, in exceptional cases, such intervention might be warranted and should be provided for, so long as appropriate safeguards are put in place.**

2. **In this regard, we do not agree with the proposal that the Commission should be entitled to make submissions in writing to the Tribunal, without being given leave to do so by the Tribunal. We consider that the Commission should be required to obtain the permission of the Tribunal to intervene in all cases, and it should have no unilateral right to do so, when it wishes, until such permission is sought and granted.**

3. **When seeking permission to intervene, the Commission should be required to provide a clear basis for that intervention, and the right should be exercisable only in those cases where the Commission can show that it is truly able to assist, and/or those that involve very important, broader policy considerations of real interest or concern to the Commission. Clearly the number of those cases will be few and far between. There should also be the possibility for orders for costs being made against the Commission where it intervenes in the Tribunal (or the Court, as the case may be) proceedings, where the Tribunal (or Court) in its discretion feels such an order to be justified.**

Representative Actions

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

1. **Given that the CEDB wishes to introduce the right of private action, it seems to follow that, to encourage the use of these provisions by consumers and SMEs, there is merit is the proposition that representative actions be allowed under the legislation, subject to appropriate safeguards, to prevent abuse.**

2. **Accordingly, the Law Society supports the proposal that representative actions be provided for in the proposed legislation. Such actions will benefit potential claimants, who might otherwise not bring a claim, as well as promote compliance with the new competition legislation, as entities subject to the law would be more wary of breaching its terms if private action was more likely to ensue as a result.**

3. **We note that the CEDB quite rightly draws the distinction between representative actions and class actions; we would not support the introduction of class actions (as seen in the USA) into Hong Kong law, and we note this is not proposed in the Consultation Paper. Essentially, the difference between "class actions" and "representative actions" is that in a representative action the representative body does not have a pecuniary interest in the outcome of the action and acts in a quasi public interest capacity. The concerns which are often raised as regards "class actions" - that they are run in the interests of the law firm (i.e. the agent) and not for the class (i.e. the principal) - do not therefore arise in representative actions.**

4. **We also agree with the proposal that the representative body should have to undergo some form of "vetting" process to ensure that it is truly a body representative of the group it purports to represent. One way is - as suggested by the CEDB - by requiring the relevant body to obtain the permission of the Tribunal to represent the relevant group in a particular case. Consideration might also be given to conferring representative status (and therefore standing) on certain bodies by way of specific designation (for example, upon the Consumer Council) on a permanent basis. This would be in addition to the ability of the Tribunal to grant representative status on a body on a case by case basis, and not in place of that ability.**

5. **In short we support the concept of representative actions as:**

    - **encouraging compliance with the competition law generally;**
    - **affording an avenue for redress for individual consumers and/or SMEs who might otherwise not have the resources or for some other reason may not seek redress;**
    - **encouraging those who have breached competition laws to seek to resolve claims made against them for the same and/or voluntarily to offer compensation to those harmed as a consequence of the breach;**
    - **and supporting and encouraging the use of private actions generally.**

6. **The Consultation Paper does not indicate which model of representative action it would prefer to see adopted - the model which would see a representative action brought on behalf of named individuals or the model which would see an action brought on behalf of "consumers at large". Both models have their plus and minus points, and we would ask the CEDB to clarify which model it intends to adopt in the proposed legislation regarding representative actions, and indicate why. There are variants in the models, and these issues need to be explored more fully before the legislation is drafted. However, the Law Society would have some concerns if the model proposed to be adopted were the "consumers at large" model, which although not the same as a "class action" is more akin to this form of proceeding.**

7. **The CEDB does not address other matters potentially arising in relation to representative actions - how claimants are to be identified, publicising claims or potential claims, the management of funds received and the concept of *cy pres* (the court directing how funds are to be disbursed, if not all the funds recovered are to be disbursed to the claimants), for example. If the concept of representative actions is to be adopted then such matters as these will need to be addressed.**

Scope of Remedies

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

1. **This is agreed.**

2. **However, consideration needs to be given as to how decisions of the Tribunal are to be given the force of law when the Tribunal adjudicates the rights of individual private parties inter se, so that those decisions might be enforced as judgments of the High Court, and in the same manner as judgments of the High Court. There is little point in giving the Tribunal the power to impose an injunction, if there is no remedy for the party taking the benefit of that injunction if the injuncted party simply ignores that order.**

3. **Accordingly, the scope of the remedies proposed is agreed by the Law Society, but consideration needs to be given to enforcement issues.**

Reference to the leniency programme

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

1. **We agree with the CEDB's statement that the Commission's decision to grant leniency should not have any impact on third party rights to seek compensation.**

2. **In relation to the discoverability of information to the Commission in the context of leniency applications in subsequent private proceedings, we agree that certain measures should be put in place so as to safeguard the integrity of the leniency regime. However, we cannot agree with the proposal that this requires that all information/documents submitted to the Commission "*that [are] useful to the Commission in the context of leniency applications*" should thereafter be shielded from disclosure in private actions. This goes too far, and is unnecessary in terms of protecting the integrity of the leniency programme.**

3. **We consider it would suffice for the general disclosure rules to be amended so defendants who have made leniency applications should not be required to disclose the leniency application itself to the claimant, but general disclosure rules should**

continue to apply to documents that were already in existence at the time the leniency application was made. That is, the potential defendant could not thwart a claimant by the simple expedient of sending all documentation to the Commission at the time of the leniency application, to ensure incriminating documentation that was in existence and would be discoverable in any private proceedings which might be commenced was no longer subject to disclosure in those subsequent proceedings.

4. **That is, documents created for the purposes of the application for leniency would be protected from disclosure, but not pre-existing documents which came into existence prior to and for purposes other than the leniency application. Any blanket exclusion from disclosing and inspecting pre-existing documents would confer advantages on the alleged wrong-doer in the litigation that it would not have obtained but for the application for leniency. This would be wrong.**

Chapter V: Issues of Concern to Small and Medium-Sized Enterprises ("SME")

a) "De minimis" approach

Proposal 43: *The Commission should be required in its guidelines to clarify that it would not pursue an agreement where the aggregate market share of the parties to the agreement did not exceed a certain level, except where "hard core" conduct was involved. The guidelines should give clear examples of what would be considered "hard core" conduct.*

1. **Small or specialist market sectors may well be dominated by SMEs. There is therefore no justification for them to be exempted**.

b) Exemptions for "vertical" agreements

1. **See our comments on Proposal 26 on vertical agreements.**

Chapter VI: Relationship with Existing Sector-Specific Laws

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

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

1. **Chapter VI of the Consultation Paper proposes that competition provisions in the Telecommunications and Broadcasting Ordinances be repealed to the extent that they duplicate provisions included in the cross-sector Competition Ordinance.**

2. **The Law Society supports this proposal, as it will assist in ensuring that anti-competitive conduct in all sectors of the economy will be treated equally (with the exception, of course, of those sectors excluded from the ambit of the proposed law).**

3. **Additionally, it will ensure that the new competition law is able to deal with anti-competitive conduct that crosses more than one sector, including the telecommunications or broadcasting sectors. Historically, the sector-specific nature of the competition provisions in the Telecommunications and Broadcasting Ordinances has given rise to difficulties when the Telecommunications Authority (TA) and the Broadcasting Authority (BA) have attempted to address such conduct. This problem should be removed upon the introduction of a general competition law that also applies to their respective sectors.**

4. **As noted in the Consultation Paper, the proposal may also reduce the risk of inconsistent decision-making and the unnecessary duplication of resources. In this context, it is notable that there are currently unexplained differences in the scope and wording of otherwise analogous provisions in the sector-specific competition laws. Issues arising from these present drafting inconsistencies will fall away if the sector-specific provisions are repealed.**

5. **However, it is noted that the Consultation Paper does not specifically explain how the existing merger control provisions in the Telecommunications Ordinance may be dealt with if a merger control regime is excluded from the Competition Ordinance. As it is proposed that only provisions that are duplicated in the sector-specific and general competition laws be repealed, it seems the telecommunications sector would remain subject to the existing merger control provisions in such circumstances. If this is the case, it may be appropriate for the Government to explain the basis for this position.**

6. **Chapter VI also contains a proposal that, once the new Competition Ordinance is in place, the TA and BA should share with the Competition Commission jurisdiction in respect of the enforcement aspect of competition matters in their respective sectors. It is noted in the Consultation Paper that clear procedural rules would need to be implemented to clarify the circumstances in which each regulator will investigate relevant cases.**

7. **The Law Society supports this proposal, to the extent that it will provide for continued utilisation of the specialist knowledge that has developed in the TA and BA in relation to competition issues in their respective sectors. However, as noted in the Consultation Paper, this also raises the issue of inconsistent application of the law by the Competition Commission, the TA and the BA. It will be important that there is ongoing dialogue between these regulatory bodies in relation to their approaches to relevant competition law issues, in order to mitigate this risk, and to reduce reliance on Competition Tribunal review hearings as a mechanism to harmonise decision-making.**

Chapter VII: Exemptions and Exclusions

Exemption on grounds of economic benefit

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

A party to an anti-competitive agreement may apply to the Commission for an exemption if it has grounds to believe that such an exemption should be granted.

General comments

1. **In our response to the November 2006 public discussion document we proposed that the competition law should allow for exclusions or exemptions on the grounds of "public benefit" (covering public policy or justifiable economic grounds) encompassing:**

   (a) Specific statutory exclusions for certain undertakings;
   (b) Exemptions applied for by undertakings on a case by case basis;
   (c) Block exemptions granted for specific categories of agreement.

2. **We note that the Proposals include somewhat broader exclusions and exemptions (including the undefined term "economic benefit" without indicating who the recipients of such benefit should be – the public or the undertaking itself, or some general benefit to Hong Kong's economy?) and further propose that the conduct rules are not to apply to Government or statutory bodies. The scope of these Proposals should be clarified since, as they currently stand, they are likely to dilute considerably the effectiveness of the proposed competition law.**

3. **A potential lack of clarity is recognised in the rather vague wording of Paragraph 2 of the Proposals stating that exemptions and exclusions should only be allowed where clearly shown to "enhance efficiency or achieve other important social or public policy objectives" and that "the areas that are eligible for exemption or exclusion may change as technology and economic organisation evolve". In our view there should be clear provisions and mechanisms in place to define and update or amend any exemptions or exclusions as required in the light of any relevant changes.**

4. **This Proposal provides an exemption in relation to what is already by definition an anti-competitive agreement that fulfils the following criteria:**

   (a) The economic benefits outweigh any anti-competitive harm;
   (b) The restrictions are indispensable to the attainment of the economic benefit (confusingly expressed as "not imposing restrictions which are not indispensable");
   (c) The agreement does not result in the elimination of competition in respect of a substantial part of the goods or services in question;
   (d) The parties to the agreement demonstrate that the economic benefit has a direct causal link with the agreement and also that its value is sufficiently significant to outweigh any anti-competitive effect.

5. **It is not clear to us (nor would it be easy to advise) what kind of anti-competitive agreement this Proposal is intended to exempt. It is potentially very wide and could negate the whole purpose of the proposed competition law. It should be clarified whether the above criteria are separate or cumulative. In any event since many agreements between undertakings (which by definition will be engaged in economic activity) are likely to have economic benefit this ground for exemption is likely to**

be relied on by many large economic concerns to avoid the intended purposes of the law altogether.

6. **The Proposal provides that a party to the agreement in question may apply to the Commission for an exemption or make a "self assessment". Detailed provisions for this procedure are required, including the exemption criteria: the documents to be provided; the timing of the procedure; etc. Since the application for exemption and self-assessment procedures would exist in parallel, at least initially, clear guidance on the advantages and disadvantages (including any legal consequences) of each procedure should be made available.**

7. **We further doubt that it is appropriate to have a self-assessment system in place at the outset of the new competition law, since at such time, there is unlikely to be in place the necessary guidance (for example in the form of block exemptions, case law, etc) for undertakings to be able to undertake any effective self-assessment.**

Block exemptions

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

1. **Block exemptions are proposed in respect of specific categories of agreement that are likely to result in economic benefits that outweigh any anti-competitive harm. Such block exemptions are common in EU competition law and are generally regarded as a good thing; they are particularly important in relation to "self-assessment" procedures.**

2. **We support the statement that such block exemptions will be subject to a public consultation process, as we consider this fundamental to the adoption of an effective block exemption.**

3. **In the Law Society's earlier submissions we indicated that the new law should not apply where existing regulatory schemes are in place (e.g. in respect of professional organisations).**

4. **In any event it would be helpful to have further indication of the timing of the adoption of any block exemptions. On the one hand, where there is a system of self-assessment (as proposed), it is very important to have block exemptions in place in order to provide much needed guidance in respect of specific types of agreements. On the other hand, block exemptions in other jurisdictions represent the results of the relevant authority's review of such agreements in previous cases. (The European Commission, for example, has been unwilling to adopt block exemptions in relation to sectors of which it has no/little previous experience, most recently in relation to the tramp shipping sector.)**

5. **It may be appropriate to start the process of the adoption of block exemptions in advance of the new competition law coming into force, in order to ensure that guidance is available, where possible, from the start of the new law in order to provide as much legal certainty for undertakings as possible.**

Exclusion on the grounds of public interest

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

1. **The Proposals provide for a general exclusion to the competition law for any undertaking entrusted with the operation of services of general economic interest. As accepted in the Proposals (at paragraph 9), in other jurisdictions there is no clear definition of what exactly constitutes a "service of general economic interest", and the concept has been established by case law or guidelines. Clarification of how the Commission will define this term and therefore the scope of the exclusion is required, and such guidance should be available prior to the adoption of the new competition law.**

2. **As indicated above, such further guidance will be particularly important where a system of self-assessment is in place.**

Exclusion on public policy grounds

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

1. **Whilst we accept that public policy may require exclusions, we do not support a general exclusion from the prohibition of anti-competitive conduct where the Chief Executive-in-Council "considers that there are sound reasons of public policy for so doing" and there are "overriding public policy considerations This exclusion clearly has the potential to be very wide-ranging in scope, and also involves a subjective test.**

2. **If such a proposal is to be adopted, clear guidance is required prior to adoption on the meaning of "overriding public policy considerations" given the potential wide scope of this exclusion.**

Non-application to the Government and statutory bodies

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

1. **The Proposals provide for the non-application of the competition rules to "Government or statutory bodies". Although consistent with other competition law regimes (e.g. the EU), it is important that there is a clear definition of exactly what bodies are covered by this exemption in order to provide legal certainty as to the extent of the exemption.**

2. **In order to prevent any potential abuse of this exemption, provisions should also be included to the effect that if any body that would normally fall within in the exemption acts in a manner inconsistent with the granting of the exemption (for**

example, as a commercial entity) then the exemption will no longer apply. The Competition Commission should also have the power to withdraw the benefit of the general exemption in individual cases, where appropriate.

Chapter VIII

The Law Society notes the CEDB proposes to finalise the draft legislation after this consultation exercise. The Law Society considers it is appropriate for the Administration to issue a White Paper in order to provide a comprehensive overview of its policies.

The Law Society of Hong Kong
11 July 2008

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