JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION

SECTION OF ANTITRUST LAW, SECTION OF BUSINESS LAW AND SECTION OF INTERNATIONAL LAW

ON THE

HONG KONG COMMERCE AND ECONOMIC DEVELOPMENT BUREAU DETAILED PROPOSALS FOR A COMPETITION LAW

August 4, 2008

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law, the Section of Business Law and the Section of International Law (together, the "Sections") of the American Bar Association ("ABA")[1] respectfully submit these comments on aspects of the Detailed Proposals for a Competition Law ("Proposals") of Hong Kong's Commerce and Economic Development Bureau ("CEDB") set forth in a Public Consultation Paper ("Consultation Paper") published in May 2008.[2]

The Sections recognize the substantial thought and effort of the CEDB reflected in the Proposals, and appreciate the opportunity to offer these comments in the hope that they may assist in the completion of a competition law for Hong Kong (the "Competition Law"). The Sections are available to provide additional comments, or to participate in consultations with the CEDB, as appropriate. The Sections' comments reflect their considerable expertise and

[1] The members of the Working Group that drafted these comments are Yee Wah Chin, John William Daugherty, Jr., Shan Hu, Michael Knight, James R. Modrall, Simon Powell, David Rosner, David A. Schwartz, and Michael Yeh, with comments from Stephen W. Armstrong, Michael H. Byowitz, Thomas Cheng, Elizabeth Kraus, Abbott B. Lipsky, Jr., Yanbei Meng, and A. Paul Victor. The views stated in these comments do not necessarily reflect the views or opinions of the professional organizations with which the members of this Working Group are affiliated.

[2] The Proposals were recently published for public consultation on the CEDB's website at http://www.cedb.gov.hk/citb/ehtml/Consultation_Paper_Eng.pdf.

experience with U.S. law, and their substantial familiarity with antitrust/competition law internationally.

Executive Summary and General Comments

In these comments, the Sections address the possible extraterritorial application of the proposed Competition Law, the confidential treatment of sensitive business information, the leniency program, the consideration of intent, the substantial market power test, a merger control regime, exclusions and exemptions, the relationship of the proposed Competition Law with existing sector-specific laws, the treatment of intellectual property rights, private actions and other remedies, and the enforcement structure.

The Sections do not address aspects of the Proposals that are generally non-controversial. For example, the Sections welcome the adoption of the standard of reasonableness as the basic test against which competitive conduct is measured. We welcome the recommendation that the future Competition Commission keep guidelines listing the types of "hard core" anticompetitive conduct to a minimum, which balances the statement of principle in Proposal 28 that "[t]here 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," with the recognition in Paragraph 18 of Chapter III of the Consultation Paper (at 28) that "certain types of anti-competitive agreement. . .almost always have the effect of lessening competition and rarely have any redeeming economic benefit."

With respect to the expressed "objective" of the proposed Competition Law in Proposal 1 "to enhance economic efficiency and thus the benefit of consumers through promoting

sustainable competition,"[3] the Sections concur that enhanced economic efficiency should benefit consumers, either in the immediate term or in the longer term.[4] We suggest that, in considering economic efficiency, both dynamic and static efficiencies be taken into account. In the immediate term, when static efficiencies may be most apparent and dominant, consumer welfare is enhanced when consumers may purchase goods and services at low prices. Competition for the consumer's business should result in the most efficient producers prevailing in the immediate term. On the other hand, these immediate term results should be balanced against the longer term benefits that may result from dynamic efficiencies. Increased innovation and similar dynamic efficiencies may well generate longer term benefits that outweigh short or medium term effects. Moreover, to the extent the Consultation Paper's reference to "sustainable competition" is intended to refer to producer welfare, the Sections note that increased producer welfare is not clearly related to increased efficiency; a cartel that enables producers to reap monopoly profits would increase producer welfare but is almost certainly inefficient.

1. Extraterritoriality

The Consultation Paper does not address directly questions relating to the international dimension of the Competition Law. Some of the Proposals indicate that Hong Kong could intend to apply the Competition Law extraterritorially against an undertaking in another country, where that undertaking behaves in an anticompetitive manner that has an adverse effect within Hong Kong, without a specific provision to address the scope of the Competition Law. For

[3] Consultation Paper Chap. I, ¶ 1, at 4.

[4] The goals of competition law and how consumer welfare should be determined have been the subjects of much debate. See, e.g., Antitrust Modernization Commission ("AMC") Report and Recommendations ("AMC Report") Introduction and Recommendations 1.A., at 3 n.22, 26 n.22 (April 2007) available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf; Report on Antitrust Policy Objectives of the American Bar Association Section of Antitrust Law, February 12, 2003, available at http://www.abanet.org/antitrust/at-comments/2003/reports/policyobjectives.pdf.

example, Proposal 23 indicates that conduct rules should apply to "undertakings," which is broadly defined as individuals, companies or other entities engaging in economic activities. There is no limitation that the undertakings should be Hong Kong-based undertakings, nor that the economic activities they are engaging in be within the territory of Hong Kong. In fact, the Consultation Paper (Chap. III, ¶ 2, at 23) suggests that "the conduct rules should apply to all entities that engage in economic activity," a broad proposition.

Further, there is no suggestion that the Law will apply only if the agreement, decision or practice in question (i.e., the anticompetitive conduct) is, or is intended to be, implemented in Hong Kong, along the lines of section 2(3) of the United Kingdom's Competition Act 1998, which was specifically intended to give legislative effect in the UK to the "implementation doctrine" espoused by the European Court of Justice in *A Ahlstrom Oy v. Commission*, 1988 E.C.R. 5193 (the *Wood Pulp* case). In *Wood Pulp*, the ECJ, in considering a concerted practice among undertakings in several non-EC countries, concluded that the agreement had been *implemented* within the EC, which sufficed for it to have jurisdiction over the matter, and as a result it did not determine whether the EC recognized the "effects doctrine" (discussed below).

On this question, there has been extensive debate on whether a State may assert jurisdiction in the area of economic law only on the basis that the overseas undertaking has done something that has produced a commercial effect within that State, even though that undertaking has no presence in that State and has not committed any act there. The UK government has not accepted this idea, whereas U.S. law has recognized the "effects doctrine."[5]

These Comments do not address whether Hong Kong ought to follow the route taken by the UK, the United States or some other alternative. The Sections simply suggest that the Hong

[5] *See, e.g., United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

Kong Government make its position on this issue clear. The Sections believe that if Hong Kong decides to adopt some form of the "effects doctrine" then it should also adopt some limits on the doctrine's application, as in the United States. The United States applies its antitrust laws to conduct occurring outside its territorial limits when the anticompetitive effects within the territorial limits are substantial.[6]

There are many acceptable formulations of this principle. The United States generally limits antitrust law jurisdiction over foreign conduct to instances where the effect of that conduct on U.S. commerce is "direct, substantial, and reasonably foreseeable."[7] If Hong Kong's Competition Law is to include a measure to give its enforcers the ability to investigate conduct outside the territory of Hong Kong and to enforce Hong Kong's competition laws outside the territory of Hong Kong, then some form of similar limiting principle ought also to be adopted in the Law.

2. Confidentiality of Proceedings and Submissions, Generally and in the Leniency Program

The Sections welcome the CEDB's proposal to limit disclosure of confidential information provided to the Competition Commission. Protecting confidentiality encourages parties to participate in the review process fully, permitting them to make complete submissions of argument and evidence while keeping their proprietary information confidential to the extent possible and appropriate.

The Sections, however, have some concerns about the CEDB's confidentiality proposals. We suggest that further clarity is needed regarding (a) the scope of confidentiality protection

[6] 15 U.S.C. § 6a; *F. Hoffman-La-Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); U.S. Dep't of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations § 3.1 (April 1995). See also AMC Report Chap. II.D, Recommendation 42, at 215, 225-30, 236-39.

[7] 15 U.S.C. § 6a(1).

generally, and (b) the scope of confidentiality protection available in the leniency program.

a. Further clarity regarding the general scope of confidentiality protection.

Proposal 13 of the Consultation Paper expresses the sound principle that "[c]onfidential 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." However, the commentary in Paragraphs 16 and 17 of Chapter II of the Consultation Paper (at 18) raises concerns as to the scope of the protection provided "under the law."

Paragraph 16 discusses only information to which the Commission obtains access "[i]n the course of an investigation." This raises a question as to the treatment of confidential information obtained in other contexts. Paragraph 17 specifically contemplates the disclosure of confidential information to the Competition Tribunal or a court. The Sections suggest that the Competition Tribunal also be authorized to provide protection for confidential information disclosed during its proceedings.

Paragraph 17 also contemplates that the Commission may disclose confidential information when "necessary for the Commission to perform its duties under the Ordinance," and provides that "[a]ny person to whom the Commission discloses confidential information should then be subject to the same obligations of confidentiality as the Commission itself." The Sections have two observations in this area. First, because this provision depends on the Commission's permitting disclosure of confidential information, the reference to the "same obligation[]" might, in fact, be no obligation at all. Second, the Sections assume that the intent is to mandate "the same obligations of confidentiality" on the part of recipients of confidential information.

b. Further clarity regarding the scope of confidentiality protection in the leniency program.

Proposal 42 states that "[i]nformation provided to the Commission by a party granted leniency should not be discoverable in private proceedings." This raises the possibility that only those who ultimately are granted leniency would receive protection for their confidential information and that the Commission may disclose information provided by others. On the other hand, the Commentary in Paragraph 31 of Chapter IV indicates that this is not the CEDB's intent, since this paragraph states that "where parties to anti-competitive agreements provide information that is useful to the Commission in the context of leniency applications, such information should not be discoverable in private proceedings." Paragraph 31 does not condition protection of confidential information on whether leniency is granted, only on whether the information "is useful. . .in the context of leniency applications."

The Sections suggest that the final statute make explicit that all confidential information received in the leniency program is protected, regardless of whether the party making the disclosure ultimately is granted leniency. Otherwise, parties may hesitate to seek leniency, which would hinder the effectiveness of the leniency program.

It also may be helpful to clarify what proceedings would be considered "private proceedings" within the meaning of Paragraph 31. If the Commission is not to disclose confidential information in proceedings in Hong Kong, presumably it is also not to disclose such information in proceedings elsewhere. Similarly, it would be helpful to clarify whether a foreign competition authority could obtain confidential information from the Competition Commission that was obtained in leniency proceedings. At least one U. S. court has indicated it might consider documents related to foreign competition proceedings.[8] Parties with operations in

[8] *See, e.g., In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 10 n.17, 17-18 (D.D.C. 2004).

multiple jurisdictions must consider the global impact of their evidentiary acts in Hong King. Therefore, a broad and clear protection of confidential information would encourage disclosure to the Competition Commission.

3. Other Suggestions Regarding the Leniency Program

In the Sections' experience, a leniency program where there are no *per se* offenses under the law (Proposal 28) is unusual. On the other hand, the Consultation Paper (Chap. III, ¶ 18, at 28) recognizes that some types of conduct arguably are almost always anticompetitive and suggests that the Commission may issue guidelines on the treatment of such conduct, which presumably would require identifying it. Therefore, a leniency program may be practicable in the context of those types of conduct that are identified by the Commission as almost always anticompetitive and that are not otherwise subject to exemption from the Competition Law.

In the Sections' experience, an effective leniency program is instrumental to successful efforts to detect and prosecute cartels. An effective leniency program often will lead cartel members to disclose their conduct to authorities before an investigation is opened. In other cases, it will induce organizations already under investigation to abandon their cartel activities and to provide evidence against other cartel members.[9] The Sections therefore welcome the CEDB's Proposal 32 for a leniency program to be introduced by the Competition Commission. However, the specific details of this program, as well as the confidentiality aspects discussed above, will substantially affect its effectiveness. The Sections believe that an effective leniency program must have procedural transparency, generous or significant settlement discounts, legal certainty

[9] Scott Hammond, Director of Criminal Enforcement, U.S. Dep't of Justice, *Cornerstones of an Effective Leniency Program*, International Competition Network Workshop on Leniency Programs (Nov. 22, 2004), www.usdoj.gov/atr/public/speeches/206611.htm.

and the protection of confidentiality and privilege.[10]

To that end, the Sections suggest that the Law direct the Competition Commission to consider certain aspects in developing the leniency program: (a) the standard of information necessary to receive leniency, (b) the acceptability of oral submissions in leniency applications, (c) specific guidelines regarding the levels of leniency parties can expect, and (d) a "marker" process to encourage parties to communicate information regarding anticompetitive behavior.

a. There should be a clear and inviting standard for the leniency threshold.

Proposal 32 states that "[t]he 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." Paragraph 33 of Chapter III of the Consultation Paper (at 33) elaborates that "a party to an agreement who provides relevant information may have any subsequent penalty imposed by the authorities substantially reduced or even waived."

The Sections encourage the Competition Law's drafters to include a direction to the Competition Commission to establish standards for how information may be determined to be "helpful" or "relevant" to an investigation to qualify for leniency. Specific standards would provide transparency and predictability to parties evaluating whether to pursue leniency. A

[10] *See generally* Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on the Draft Information Bulletin on Sentencing and Leniency in Cartel Cases issued by the Competition Bureau of Canada, July 14, 2008, available at http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/comments-sentencing-CBC.pdf; Joint Comments of the ABA's Section of Antitrust Law, Section of Business Law and Section of International Law on Proposed Draft of the Competition Commission of India (General) Regulations, 200_ Draft Competition Commission (Lesser Penalty) Regulations, 200_Draft Competition Commission (Determination of Cost of Production) Regulations, 200_, May 13, 2008, at pp. 6-10, available at http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/ABA_India_Comments__(Regs)nonmergerdraftdhallcover.pdf; Joint Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the Commission of the European Communities' Request for Public Comment on the Draft EU Settlement Procedures, December 2007, available at http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/1Comments-EUDraftSettleProc.pdf.

meaningful but not overly burdensome information expectation would encourage parties to provide information about anticompetitive activity. Vague or overly burdensome standards, however, might deter potentially helpful parties from pursuing leniency lest they be adjudged not to meet the standard necessary for leniency while exposing themselves to prosecution.

The Sections suggest that an "added value" standard for the information disclosed by a leniency applicant, rather than a "compelling evidence" or "degree of corroboration" standard, may be optimal. Parties should be encouraged to add value to the Competition Commission's investigations in prosecuting anticompetitive behavior. Requiring parties to evaluate how compelling or corroborated prosecuting authorities will see their evidence before making a leniency application may be counterproductive, as it would place parties in the position of having to guess at their information's value. The effect would likely be to encourage party caution and avoidance of the leniency process out of concern that submissions would be judged insufficient.

b. The leniency program should allow parties to choose between an oral or a written submission.

The type of communication required to meet the immunity threshold is of substantial import. The Sections encourage the adoption of a process for providing "relevant information" in a relatively paperless manner. The European Commission's recent Draft Notice on the Conduct of Settlement Proceedings in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases allows parties to choose between a written or oral corporate statement. The United States generally permits parties to make submissions primarily orally. The Sections suggest that the experience in the United States indicates that a paperless process will encourage more informants to step forward. Requiring written submissions exclusively would impose an unnecessarily formal and costly dimension to enforcement that might have a chilling effect on some parties' willingness to provide information

to the Commission. The potential necessity to produce such writings pursuant to discovery requests in private actions contributes to this effect. The Sections suggest that oral statements would suffice to inform the Commission of the possible existence of a violation and to seek leniency.

c. There should be specific guidelines for reduction or waiver of penalties to give parties a precise basis to evaluate whether to pursue leniency.

The Consultation Paper indicates in Paragraph 33 of Chapter III (at 33) i that parties providing "relevant information may have any subsequent penalty imposed by the authorities reduced or even waived." Paragraph 33 further indicates that "[t]he extent of the relief given depends on factors such as whether the informant is the first party to the agreement to come forward, whether it cooperates through the investigation, and whether it has previously been active in encouraging other undertakings to take part in the agreement." The Sections welcome this approach but encourage the establishment of specific guidelines that elaborate on the general factors identified in Paragraph 33, and set forth the reduction or waiver that may be expected in each type of situation.

d. The "marker" process should be developed in a way that encourages parties to disclose their knowledge of anticompetitive behavior.

A marker system is consistent with the approach taken by antitrust authorities in the United States, Canada, and Australia, among others, and the recommendations of the Cartel Working Group of the International Competition Network ("ICN").[11] The Sections agree that the availability of a "marker" system, under which a party may receive priority in leniency (a

[11] *See* Competition Bureau (Canada), *Immunity Program Under the Competition Act* (2000) and *Responses to Frequently Asked Questions* (October 2005), *available at* http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2000&lg=e; U.S. Department of Justice *Corporate Leniency Policy*, available at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm; Australia Competition and Consumer Commission *Immunity Policy for Cartel Conduct* and *Immunity Policy Interpretation Guidelines* (August 2005), available at http://www.accc.gov.au/content/index.phtml/itemId/708758; International Competition Network, Cartel Working Group, http://www.internationalcompetitionnetwork.org/cartels/gen_framework2.html.

"marker") based upon the timing of its initial approach to the Commission, helps to destabilize cartels and provides incentives for corporations to act immediately upon the discovery of evidence indicating the existence of cartel conduct. The Sections therefore welcome the statement in Paragraph 33 of Chapter III of the Consultation Paper that a consideration in the "extent of relief given" is "whether the informant is the first party to the agreement to come forward." This incentive to be the first party to come forward may help overcome the reluctance that some entities in Hong Kong may otherwise feel. If there are insufficient incentives to be the first to come forward, entities may feel that the risks of coming forward, such as retaliation by business partners, outweigh the benefits.

The specifics of the marker process will affect its attractiveness and effectiveness. For example, the extent to which parties are required to come forward under their own name rather than anonymously may pose a deterrent. The United States and Canada presently allow parties to come forward anonymously. In fact, those jurisdictions will grant a marker on a no-names (anonymous) basis. The United States and Canada permit companies seeking a marker to do so on the basis of very limited information, such as the suspected type of infringement and the affected product. The Sections suggest that the Commission consider adopting an approach similar to that used in these North American jurisdictions. The experience of those jurisdictions over many years confirms that the provision of only a minimal amount of initial information is sufficient for a determination of whether the company seeking a marker is indeed the "first in" to initiate a claim for immunity, provided that the marker is subsequently perfected by the applicant providing the detailed information in its possession within a reasonable time period. Any implementation of the "marker" process in a way where the parties were locked into their initial submission for "marker" purposes (such as by considering the relevant date of submission to be

later if the initial submission is supplemented) might discourage further helpful communications that could jeopardize the "marker's" position in the queue. The quantum of evidence demanded for a "marker" also could be an encouragement or a deterrent, depending on the standard established. The extent of prosecutorial discretion involved in the marker process may also be a deterrent to parties desiring predictability.

4. The Consideration of Intent

On several occasions, the Consultation Paper indicates that conduct that has the purpose or effect of substantially lessening competition would violate the proposed Competition Law. (*E.g.*, Proposals 24, 28, Chap. III ¶18, at 23, 27, 28.) Conduct that has the effect of substantially lessening competition is the central concern of any competition law. On the other hand, the goal of every competitor is to gain an advantage over competitors and lessen competition. Therefore, conduct which has the intent but not the effect of substantially lessening competition, in the sense of enhancing a firm's market position, may merely reflect the aggressive competition that competition law is intended to foster. The Sections suggest that, with the exception of hard-core conduct, competitive conduct that was intended to lessen competition, but did not have the effect of substantially lessening competition, should not violate the Competition Law. In the case of hard-core conduct (i.e., agreements among competitors not to compete unaccompanied by any integration of economic activity), given the extensive experience that such conduct almost always has a substantial adverse effect on competition, the Sections agree that intent, with the requisite anticompetitive effect being presumed, is sufficient if the conduct is established.

5. "Substantial Market Power" Test

The Consultation Paper (Proposal 27) proposes that unilateral anticompetitive acts be subject to the Competition Law only where the perpetrator has "substantial market power." The

Sections welcome the Consultation Paper (Chap. III, ¶ 13, at 27) making clear that possession of substantial market power itself would not be illegal. As we discussed above, the Sections suggest that, with the exception of hard-core cartel activity, even conduct accompanied by anticompetitive intent should not be offensive under the Competition Law if it does not have the effect of substantially lessening competition. Otherwise, in the context of an entity with substantial market power, even competitive conduct might result in a finding of violation of the Law, resulting in monopolization offenses which would be inconsistent with the principle set forth in Proposal 28 of "no per se infringements" and the principle that possession of substantial market power alone is not illegal.

The Consultation Paper defines "substantial market power" by reference to the "dominant position" standard known in European Community law, but it suggests that "substantial market power" may be held by undertakings with a market share below that which would qualify as a "dominant position" under European Community law. At the same time, "substantial market power" is said to describe firms that "dominate" certain markets.[12] The Sections respectfully submit that introduction of a new test that is broader than the EU concept of "dominant position" would be undesirable from the perspective of legal certainty. The concept of "dominant position" is sufficiently flexible to be applied to Hong Kong. In particular, there is no suggestion in European Community law that an undertaking with a market share below 50% could not be found to hold a dominant position.

Moreover, the Sections suggest that the drafters of the Competition Law consider the *Recommended Practices regarding Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws* ("Market Power Recommended Practices") recently issued by the ICN

[12] Consultation Paper Chap. III ¶12, at 26-27.

Unilateral Conduct Working Group.[13] The Market Power Recommended Practices for determining whether substantial market power exists include (1) a sound analytical framework firmly grounded in economic principles; (2) a comprehensive consideration of factors affecting competitive conditions in the market under investigation; (3) use of markets shares as an indication or starting point for the analysis; and (4) assessment of durability of market power, with a focus on barriers to entry or expansion.

The Sections respectfully submit that, as the ICN recommends, each market should be evaluated according to its own characteristics, and each undertaking's market power should be evaluated in light of the competitive forces operating in that market before a determination is made as to whether an undertaking has a dominant position or substantial market power. If a case-by-case, economics-based approach is employed, there is no apparent legal or regulatory advantage to introducing a new, lower standard for the application of rules on unilateral conduct. Consistent with both the Market Power Recommended Practices and the EC's expressed position, there should be no conclusive presumption that any particular market share level reflects the existence of a dominant position.

6. Merger Regulations

The Consultation Paper does not propose any merger control regime. However, a merger or acquisition that may be anticompetitive presumably would be subject to scrutiny under the competition law as an anticompetitive agreement.[14] As the Consultation Paper recognizes, Hong Kong is a unique economy and any merger regulations would need to be tailored to the needs

[13] The Market Power Recommended Practices, adopted at the ICN's 2008 meeting, may be found at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf.

[14] Any exemption of structural transaction agreements from the prohibition against conduct substantially lessening competition would be problematic. For example, a price fixing agreement might be structured as a joint venture agreement and arguably be exempt from the Law.

and characteristics of Hong Kong. Accordingly, the Sections concur with the Consultation Paper that any merger notification requirement should be voluntary, especially since the need for merger regulations is unclear. The Sections do not take a view as to which of the three options described in the Consultation Paper (Chap. III, ¶ 25, at 29-30) for a voluntary notification regime would be best for Hong Kong.

The Sections' comments with regard to the Consultation Paper's treatment of mergers focus on principles that have been important to the creation and implementation of successful merger control regimes, drawing upon the *Guiding Principles and Recommended Practices for Merger Notification and Review Procedures* ("Merger Review Recommended Practices")[15] adopted by the ICN where relevant. The principles outlined below may be helpful to the Hong Kong government should it decide to implement a merger control regime now or in the future. These principles suggest that any merger control regime should focus on completed mergers to avoid burdening merger parties with delay and the cost of notification, while allowing voluntary notification of intended mergers where parties desire greater certainty that a transaction is consistent with the Law.

a. A merger control regime should not be unduly burdensome.

Most mergers and acquisitions are unlikely to raise competition law concerns.[16] Given that only a relatively small number of transactions are likely to raise competition issues, it is

[15] The Merger Review Recommended Practices are available at http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf.

[16] In the United States, there is a mandatory notification requirement for transactions that meet certain thresholds and a two-stage merger review process. All but a few of the transactions that are notified in the United States are cleared during the initial 30-day review period. The second review period is triggered by a "second request" for information, which typically is issued only when the merger may raise antitrust issues and requires further examination. In 2006, only 2.6% of transactions notified in the United States were subject to a second request for information. Federal Trade Commission, Bureau of Competition and Department of Justice, Antitrust Division: Hart-Scott-Rodino Annual Report, Fiscal Year 2006 (2006) available at http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf.

reasonable to consider omitting a merger control regime in the Competition Law or imposing a voluntary notification regime such that the vast majority of transactions can proceed without any regulatory burden or delay. Singapore, for example, has implemented a voluntary notification regime.[17]

If the Hong Kong government chooses to implement a merger control regime consistent with its first option, it should clarify that even where parties choose to obtain the certainty of an affirmative clearance, the regime remains non-suspensive. This would allow notified transactions to close at any time after the notification has been filed, absent a formal order by the government not to implement the transaction pending review in those very few cases that are likely to raise antitrust issues within Hong Kong. It would also be consistent with the voluntary nature of the notification. A suspensive voluntary notification regime may result in few notifications. Brazil and Italy, for example, have implemented non-suspensive notification regimes.[18]

If the Hong Kong government imposes a voluntary merger notification requirement, the Sections respectfully recommend that the requirement be consistent with the ICN's Merger Review Recommended Practice that the information requested be limited to what is necessary "to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation."[19] Where possible,

[17] Singapore Competition Act, Ch. 50B § 56, *available at* http://statutes.agc.gov.sg.

[18] Italy Competition and Fair Trading Act, Law No. 287 of 10th October 1990 (in particular articles 5 through 7 and 16 through 19) contains the rules on the antitrust control of concentrations and joint ventures. Italy Regulation on Investigation Procedures, Presidential Decree, Law No. 217 of 30 April 1998 contains other procedural and enforcement rules. The Brazilian Antitrust Law (Law No. 8,884/94) obligates the submission of merger notifications pursuant to rules and procedures established by the Administrative Council for Economic Defense.

[19] Merger Review Recommended Practices § V.A.

the initial notification also should be limited to information that is readily identified and accessible. For example, the initial notification in the United States under the Hart-Scott-Rodino act includes information such as the value of the assets or voting securities to be acquired, reports filed with the Securities and Exchange Commission, and the parties' revenues categorized by recognized industry codes.[20]

Establishing a proper local nexus will help ensure that a merger control regime is not unduly burdensome. The ICN has recognized the importance of screening out transactions that are unlikely to result in appreciable competitive effects due to lack of a sufficient nexus with the jurisdiction. The ICN notes that "[r]equiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit."[21] The Sections respectfully suggest that any merger notification thresholds imposed by the Hong Kong government comport with the Merger Review Recommended Practice that the nexus to Hong Kong be based on activity in Hong Kong, "as measured by reference to the activities of at least two parties to the transaction."[22]

b. A merger control regime should be predictable.

To the extent that the Hong Kong government determines a merger control regime is appropriate, the Sections urge the government to implement the regime in a manner that is predictable for parties to a transaction. With regard to notification thresholds, the ICN recognizes that "clarity and simplicity" are essential for parties to determine whether a transaction is notifiable. The Merger Review Recommended Practices also state that "thresholds

[20] See Items 2(d), 4(a), 4(b), and 5 of the Hart-Scott-Rodino notification form, *available at* http://www.ftc.gov/bc/hsr/p989316PMNRulesandFormalInterpretationsElectronicSubmissionofForms-Form.pdf.

[21] Merger Review Recommended Practices § I.B., Comment 1.

[22] *Id.* § I.C.

should be based on objectively quantifiable criteria" and "information that is readily accessible to the merging parties."[23] These characteristics make it easier for parties to anticipate when a notification is required.

The Sections respectfully suggest the creation of an informal, voluntary pre-notification consultation capability, which will help make the merger notification process more predictable for parties. The United States has implemented such a process through the Federal Trade Commission's Premerger Notification Office. This office handles questions on a blind basis about the notification thresholds and information that is necessary to complete the Hart-Scott-Rodino notification, and parties may (but are not required to) make use of this capability. This practice also is reflected in the ICN's recommendations.[24]

Where a merger is subject to a full investigation, publication of the government's final decision can increase the predictability of the process for parties. Over time, publication of detailed statements explaining the reasons for the government's decisions creates a body of precedent that provides guidance to parties who are considering a merger. The decisions or statements may provide parties insight as to the types of mergers that are typically notified, how the government defines relevant markets, and the theories on which the government has challenged mergers.

c. A merger control regime should be structured such that decisions are made in a timely manner.

Because most transactions do not raise competition law concerns, it is important to have in place procedures that allow for a quick review and approval of such transactions. As the ICN recognizes, "many jurisdictions achieve this objective by employing review procedures that

[23] *Id.* § II.

[24] *Id.* § V.C.

allow such non-problematic transactions to proceed following a preliminary review undertaking during an abbreviated initial review period, and subjecting only transactions that raise material competitive concerns to more extended review periods."[25] Both the United States and the European Union follow this model in different ways.[26]

If the Hong Kong government decides to implement a non-suspensive merger regime as suggested by the first option, the Sections respectfully suggest that the regime be structured such that decisions can be made in a timely manner. The Sections welcome the government's recognition in the Consultation Paper that a decision should be made "within a short, defined time-frame."[27] A timely decision provides parties with the certainty to proceed. Even in a non-suspensive merger regime, parties may choose to delay closing until there is a final decision, because the costs of undoing or restructuring a transaction after it has closed may be great.

7. The Treatment of Intellectual Property Rights

The Consultation Paper presents no proposals on the treatment of intellectual property rights ("IPRs") under the proposed Competition Law. The Sections support this approach, because IPRs do not require distinctive treatment under competition law. IPRs do not automatically convey market power, and when they do in particular circumstances, the antitrust laws apply to determine whether that market power has been exercised in ways beyond the lawful exclusionary scope of the IPRs to eliminate or substantially restrict competition in that

[25] ICN: Implementation Handbook, Chap. 3, ¶ 3 (April 2006), *available at* http://internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ImplementationHandbookApril2006.pdf.

[26] For example, in the United States, the period for initial review (or "waiting period") is 30 days (or 15 days in the case of a cash tender offer). The second review is reserved for the small percentage of cases that raise substantive legal concerns and thus lasts for an indeterminate amount of time that depends on when the parties substantially comply with the second request for information. Once the parties have certified that they are in "substantial compliance," the length of the second waiting period in most cases is an additional 30 days (or 10 days in the case of a cash tender offer). 15 U.S.C. § 18a(b)(1), (e)(2).

[27] Consultation Paper, Chap. III, ¶ 25(a), at 30.

market. These concerns more commonly arise when the IPRs involved are patent rights. Especially in the context of Hong Kong's unique economy, where trademarks and copyrights are more often involved than patents, there is even less need to single out IPRs for special treatment in a competition law.

8. Exemptions and Exclusions

In order to ensure that the Competition Law's application does not preclude other important social and policy objectives, the Consultation Paper proposes that a procedure and criteria be established to exempt certain restrictive practices from the Law. The Sections believe that exemptions to competition laws should be very restricted and clearly specified, to limit market distortions that may otherwise result.[28] In the interest of legal certainty, the Competition Law should clearly set out the criteria that would need to be satisfied for otherwise impermissible practices to benefit from exemption. Such criteria should be objective, economics-based, and clearly directed to ensuring that the ultimate test for exemption is that there is a substantial societal interest that overrides consumer welfare, there is no way to achieve the objective other than by exemption, and the exemption is narrowly tailored to assure the minimum negative impact on consumer welfare. The criteria set out in Article 81(3) of the EC Treaty could serve as a useful starting point. To clarify on the interpretation of the standards built into the text of the Competition Law, it would also be useful for the Commission to issue guidelines on their interpretation.

Based on experience both in the United States and in the European Union, the Sections counsel against introducing a formal system for the issuance of exemptions, but rather suggest

[28] *See* Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions in Response to Request for Public Comment by the AMC available at http://www.abanet.org/antitrust/at-comments/2005/11-05/general-immunities-comm.pdf**;** AMC Report Chap. IV.B, supra n.4.

requiring undertakings to assess the legality of their own conduct, with guidance in the form of guidelines, block exemptions and informal consultation with the Commission. Governmental bodies, being further removed from the market than the undertakings involved, cannot assess the effect of proposed behavior without an in-depth and costly case-by-case investigation. The Sections therefore submit that an optional system for undertakings to seek advice on the Commission's interpretation of the Competition Law as applied to proposed conduct would be preferable to a binding formal exemption system. In the United States, undertakings can request a "business review letter" or an "advisory opinion" assessing the application of antitrust law to proposed conduct, but do not receive formal exemptions. In the European Union, the formal individual exemption system introduced in 1962 was eliminated in 2003 after its cost and delays were found to outweigh the benefits. In both jurisdictions, undertakings now are required to assess the application of competition law to their own conduct, with the possibility of seeking non-binding advice from the competition authorities.

a. Exemptions on grounds of conduct's economic benefit

Proposal 46 proposes an exemption if an agreement "yields economic benefits that outweigh the potential anti-competitive harm." Paragraphs 4 and 5 of Chapter VII emphasize that such exemptions would be granted only where the restriction is no broader than necessary to obtain the identified goal and does not permit the undertakings concerned the "possibility" of monopolizing a market. Especially, in light of the principle set forth in Proposal 28 of no per se infringements, the Sections believe that such an exemption is unnecessary. If such an exemption is nevertheless included, we suggest that it not be extended to "hard core" conduct, so as not to potentially diminish the efficacy of the leniency program.

b. Block exemptions

The Consultation Paper (at 51) indicates that the Competition Law would set out

procedures for the Commission to follow in issuing block exemptions. As noted, the Sections question the need for block exemptions, and note that the United States has no such system and in recent years the European Union has reconsidered the utility of many long-standing block exemptions. In any event, the Sections recommend that block exemptions, if issued, should be precisely defined and definite in duration. Each block exemption should confer on the Commission the power to withdraw the exemption in the event that a particular agreement or practice has a detrimental effect on competition.

c. Exclusion for services of general economic interest

Consistent with the approach in some jurisdictions, the Consultation Paper suggests in Proposal 48 that undertakings "entrusted with the operation of services of general economic interest" be excluded from scrutiny under the Law. The Consultation Paper proposes applying the Law in a fashion similar to the European Union's, leaving discretion as to what constitutes "general economic interest" for the government to specify. It notes (Chap. VII, ¶ 11, at 52-53) that in other jurisdictions, "[t]he services covered. . .are generally those that entail specific public service obligations. . .typically services provided by the 'big network' industries in sectors such as public transport, water supply, power supply or postal services, where large-scale investments in infrastructure or facilities are required to ensure the wide availability of services to the public."

In order to promote legal certainty, the Sections recommend that regulations issued under the Law include a list of services that are designated to be of general economic interest. This list could then be modified by Orders-in-Council. Such regulations would help to avoid costly and time-consuming litigation. The Sections also suggest that the services be included in such a list only if there are legal mechanisms that address anticompetitive conduct by providers of those services, i.e. sector-specific laws. Nonetheless, as the Sections observe below with respect to

sector-specific laws, we concur with the conclusion in the Consultation Paper that the Competition Law ought to apply to all sectors. Therefore, it is important that any such list of services be extremely limited, and that more needs to be involved than a public service obligation to justify the inclusion of a service in the list.[29]

d. Exclusion of conduct on public policy grounds

The Consultation Paper (at 53-54) envisages that the Chief Executive-in-Council would have the power to exclude the Law from application to certain designated conduct by the issuance of Orders-in-Council. The Sections respectfully submit that providing for *ad hoc* exemptions is not in the interest of legal certainty, or an effective leniency program, and creates the potential for allowing anticompetitive conduct on the part of politically powerful interests. If the Law nonetheless provides for such *ad hoc* exemptions, the Sections recommend that the Law include criteria for the issuance of such exemptions and that Orders-in-Council issued by the Chief Executive be reviewable through the normal and established channels of judicial review, and be subject to the same forms of scrutiny.

e. Non-application to the Government and statutory bodies

The Consultation Paper (at 54) proposes that the Competition Law not apply to the Government or statutory bodies. "Statutory bodies" are not defined. The Sections respectfully submit that the proposed exemption is unnecessary in view of other proposed exemptions and would be inconsistent with the need for legal certainty. Where Government operates statutory bodies that are not engaged in an "economic activity," they would already be exempt from the Competition Law because they would not be undertakings. Where Government operates

[29] The Sections note the small number of sector-specific regulations currently in Hong Kong and suggest that any exclusion be limited to those sectors. We also note that the concept of services of general economic interest in Article 86 of the EC Treaty has been interpreted very narrowly by both the European Commission and the European courts.

statutory bodies that provide services in the general economic interest, they would already be exempt from the Law by virtue of Proposal 48. Where Government operates statutory bodies that are engaged in economic activities as opposed to more traditional functions, those statutory bodies should be expected to compete and be subject to the same legal standards as their competitors, whether or not they are ultimately created or controlled by the Government.

9. Relationship with Existing Sector-Specific Laws

In Hong Kong, two sectors of the economy are currently subject to competition laws, the telecommunications and broadcasting industries. Both the Telecommunications Ordinance and the Broadcasting Ordinance contain prohibitions against anticompetitive behavior for industry participants.

Chapter VI of the Consultation Paper (at 48-49) notes that the Competition Law ought to apply to all sectors, including the telecommunications and broadcasting sectors. It therefore proposes a limited repeal of the old laws (as contained in the Telecommunications and Broadcasting Ordinances) to the extent that these provisions overlap with the provisions of the Law. Where there is no overlap, the current laws regulating the telecommunications and broadcasting industries will remain in force. However, the existing regulators apparently will have concurrent jurisdiction with the Commission over competition matters in their sectors.

As the Consultation Paper recognizes, under this proposal there is potential for inconsistent interpretations of the Competition Law by different regulators. The Consultation Paper also recognizes the need for effective communication between the various regulators, to ensure that competition issues in the telecommunications and broadcasting sectors are investigated by the appropriate body.

The Sections agree that, as a matter of principle: (1) the Competition Law should apply to

all sectors of the economy, including the telecommunications and broadcasting industries: and (2) the enactment of the Competition Law should be the occasion to repeal the provisions in the current sector specific laws that overlap with the Law. We also suggest that the risks and burdens of inconsistent results of concurrent competition law jurisdiction argue against establishing concurrent jurisdiction.

10. Private Actions and Other Remedies

As a general principle, the Sections support the creation of private rights of action, including representative actions, to address competition law violations. Private enforcement may enable those harmed directly by anticompetitive conduct to recover their losses and it can enhance greatly the deterrent effect provided by competition authority prosecutions. We urge, however, that care be taken in developing the detailed rules and policies that will govern such proceedings. Striking the right balance between affording victims effective recovery, on the one hand, and chilling legitimate efficiency-enhancing conduct, on the other, can be difficult. Any system of private enforcement should be structured to provide appropriate incentives for injured parties to pursue legitimate claims, but it must also protect the due process rights of all involved and protect against potential abuse.

The comments in this section address some aspects of the proposals regarding private actions and remedies that particularly raise these considerations.

a. Follow-on actions

Proposal 33 states that "[p]arties should have the right to take both 'follow-on' and 'stand-alone' private action." Paragraph 3 of Chapter IV defines a follow-on action as "one that is brought by a private party seeking a remedy in respect of conduct that has been found by the competition authority to have infringed the conduct rules." Although the proposal is not explicit, it appears to suggest that private parties in follow-on cases need not prove liability, only damages.

In the United States, private plaintiffs are required to prove both liability and damages, even in cases that follow successful government actions, although a litigated final judgment against a defendant in an antitrust case brought by the government is admissible as prima facie evidence of the underlying antitrust violation in subsequent litigation[30] and can be res judicata. While requiring this additional step adds complexity and expense to follow-on private cases, it is necessary to protect the due process rights of all litigants, particularly where issues about the scope and effect of a violation remain in the subsequent litigation.

Admissibility of a prior final judgment against a defendant is a powerful tool for private plaintiffs. It is one that is available in the United States only with respect to matters that were put at issue, directly determined, and necessarily decided in the earlier case.[31] Thus, the evidentiary value of the prior judgment is limited to issues that have survived the rigors of the judicial system. We urge that the CEDB consider adopting a similar limitation on the scope and weight to be afforded to findings of infringement by a competition authority in subsequent follow-on actions. The Sections recognize that the scope of discovery available in Hong Kong to private plaintiffs may be much more limited than that available in the United States. Nonetheless, we respectfully submit that due process and fairness argue that conditions on the use of infringement findings are appropriate.

b. Standing generally

Proposal 34 provides that "[a]ny person who has suffered loss or damage from a breach of the Ordinance should have the right to bring private proceedings seeking damages." Paragraph 8 of Chapter IV makes clear that this proposal is meant to provide "unrestricted

[30] Similarly, a guilty plea offered by a defendant in a government action is admissible in a follow-on private suit. 15 U.S.C. § 16.

[31] *Id.*

standing" to any party who believes it has suffered loss or damage as a result of a violation, including consumers and other end-user purchasers.

As an initial comment, we note that in the United States standing is limited to parties who have allegedly suffered "antitrust injury," which is defined generally as "injury of the type the antitrust laws were intended to prevent."[32] Thus, for instance, a competitor typically would not have standing to challenge a merger of two rivals on the theory that the merged firm would be in a better position to reduce prices and thus take away its sales. Although the competitor indeed may be injured, its injury does not stem from conduct that the antitrust laws would condemn. Similarly, conduct that injures a particular competitor but is not alleged to injure competition as a whole does not give rise to antitrust standing.[33] U.S. courts also require that the alleged antitrust violation form a material and substantial cause of the plaintiff's injury. Thus, for instance, where a plaintiff-competitor's business had been in decline for other reasons prior to the alleged anticompetitive conduct, it may be unable to establish that the defendant's actions were the cause of its harm and thus may lack standing.[34]

These practical limitations on standing serve to weed out improperly formed antitrust claims, reducing the burden on businesses and on the courts. Accordingly, we suggest that similar limiting principles be considered with regard to standing for private litigants under Hong Kong's competition law.

c. Indirect Purchaser Standing

Whether indirect purchasers should have the right to sue for damages long has been a

[32] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109-10 (1986).

[33] *See, e.g., Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000) (injury to a single competitor is insufficient to show that competition itself was harmed; plaintiff must at least allege that exclusion of the competitor "results in the elimination of a superior product or a lower-cost alternative").

[34] *See, e.g., Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992).

source of controversy in the United States. No such right exists under federal antitrust law,[35] although a majority of states have allowed indirect purchaser suits under their state competition statutes.[36] Moreover, federal courts generally do not recognize the "passing-on" defense, by which defendants in an antitrust suit would escape damages if they could show that overcharges to direct purchaser plaintiffs had been passed on through the chain of distribution.[37]

Although the desirability of these results is debatable, they are at least consistent with one another, as allowing indirect purchaser suits without recognizing a pass-on defense would expose antitrust defendants to the possibility of multiple damage awards for the same overcharge, while permitting a pass-on defense without allowing indirect purchasers to recover damages theoretically would enable defendants to escape paying for their anticompetitive conduct. Thus, as a theoretical principle, the availability of indirect purchaser actions and allowance of a pass-on defense go hand-in-hand and the Sections previously have urged that the allowance of one necessitates the allowance of the other.[38]

As there are conflicts inherent between concurrent direct and indirect purchaser litigation, it is important that any system permitting both direct and indirect purchaser actions be designed in a way that it is likely to both reap the benefit of allowing recovery by the actual victims of a

[35] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (prohibiting claims by indirect purchasers under federal antitrust laws).

[36] In its Report, the AMC found that more than thirty-five of the fifty U.S. states, through legislation or court decisions, permit both direct and indirect purchaser suits. AMC Report, supra n.4, at 269.

[37] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (prohibiting passing-on defense except in limited instances in which a defendant can show that the purchaser (i) raised its price downstream in response to an overcharge, (ii) did not lose sales or profit margin thereafter, and (iii) would not have raised its price absent any overcharge).

[38] Joint Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on the Commission of the European Communities' White Paper on Damages Actions for Breach of The EC Antitrust Rules 18 (June 30, 2008) ("ABA Comments on EC Damages White Paper"), *available at* http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/CommentsECWP.pdf. The Sections noted further in this report that allowing a pass-on defense raises additional issues regarding burdens of proof that must be handled with care and consistency.

violation and ensure that damages awards were consistent and not duplicative.[39]

d. Hearings and Case Administration

Proposals 35-39 address various aspects of hearings and case administration. Perhaps most importantly, Proposals 35 and 36 set forth a system by which the Competition Tribunal would hear all "competition only" cases, while the courts in "composite" cases (*i.e.*, those involving both competition and non-competition claims) would have authority either to decide all issues themselves or to refer competition claims made in such cases to the Tribunal for determination. While the Sections recognize the additional flexibility this approach provides, we caution that dual administration models create certain challenges, and can result in inconsistent results. We therefore urge that if such a system is to be adopted, care be taken to ensure that all litigants be afforded appropriate due process regardless of the forum chosen. Due process considerations may be particularly important with regard to Tribunal hearings, which are expected to be conducted in "a relatively less formal procedural setting that should allow for complex competition issues to be settled in a timely manner and at a lower cost to all parties involved."[40] Moreover, under any such dual-enforcement system, it will be important to achieve relative consistency between Tribunal and court-based decisions.

Proposals 37-39 would afford the Tribunal (and courts) authority to strike out any action considered to be without merit or vexatious, to allow for adjournment of a private case pending the outcome of a Commission investigation in appropriate circumstances, and to allow for limited intervention by the Commission in private litigations with the agreement of the Tribunal

[39] In 2004, the Section of Antitrust Law issued a Report to the AMC addressing both the pass-on defense and the issue of indirect purchaser standing, and offering one possible approach to minimize the conflict. ABA Section of Antitrust Law Report on Remedies *available at* http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc. In its Report, the AMC made detailed recommendations for one possible approach to this issue. AMC Report, Chap. II.B, supra n.4.

[40] Consultation Paper at 37 (Chap. IV, ¶ 10).

or the courts. The Sections agree in principle that each of these measures, if properly administered, would allow for more efficient case administration.

e. Representative Actions

Proposal 40 would permit representative actions with the permission of the Competition Tribunal once the Tribunal has reached the view that the proposed representative can fairly and adequately represent the interests of the parties concerned. As the CEDB has recognized, representative actions give consumers and small and medium-sized enterprises "an avenue for pursuing cases in a manner that would minimize their time and monetary commitment" and thus would increase the deterrent effect of the Competition Law since "businesses that breached the law could find themselves having to pay damages to all those who had been affected, not just those who were sufficiently motivated, or otherwise able, to pursue claims."[41] We agree in general that such representative litigation can further the sound policy goals of providing for full compensation of victims and enhancing deterrence.

It will be important under any system of representative actions, however, to ensure that procedural safeguards are in place to avoid abusive litigation, eliminate unnecessary costs, and ensure that antitrust victims are adequately represented. To that end, we welcome the CEDB's inclusion of a requirement that the Tribunal must find the proposed representative to be a fair and adequate representative of the interests of the parties concerned. The Sections respectfully suggest that specific criteria be developed for assessing proposed representative claims and for ensuring adequacy of representation.

In the United States, representative plaintiffs in class action lawsuits must move for "certification" of the class by demonstrating that various requirements have been met. These

[41] Consultation Paper at 41 (Chap. IV, ¶ 25).

include (i) numerosity (that the proposed group is of sufficient size that joinder of individual actions would be impractical), (ii) commonality (that there are questions of law or fact that are common to all members of the group), (iii) typicality (that the claims of the representative are typical of the claims of all group members), and (iv) adequacy (that the representative and its chosen counsel will fairly and adequately represent the interests of all group members).[42] In addition, the court must find that a class action is maintainable because (a) the prosecution of separate actions would risk inconsistent outcomes that could establish incompatible standards for opponents of the class, or that could impair or impede the rights of group members who were not parties to the individual actions; or (b) the actions or non-actions of parties opposing the class are generally applicable to the entire class; or (c) the court finds that questions of law or fact common to members of the class predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[43]

As the Sections recently have noted in comments before the European Commission, "[t]hese requirements promote numerous goals, including protecting the due process rights of plaintiffs while also protecting the defendants' rights of defense."[44] We respectfully suggest that the CEDB consider adopting similar criteria.

In addition, other considerations relating to representative actions merit careful thought as the Law is drafted. Such considerations include:

- **Whether to employ an "opt-in" or "opt-out" mechanism for participation by putative members of the representative group.** Opt-in participation tends to reduce concerns of the adequacy of representation since interested parties must be generally

[42] Fed. R. Civ. P. 23(a).

[43] Fed. R. Civ. P. 23(b).

[44] ABA Comments on EC Damages White Paper, supra n.35, at 29.

informed of the matter in order to make the decision to opt in; however opt-in participation also may result in under-deterrence as a result of lower damages awards, particularly where only a relatively small percentage of actual victims participate in the litigation. By contrast, an opt-out system would tend to ensure wider participation but also raises additional concerns about adequacy of representation.

- **Ensuring effective notice to all putative members of the represented group.** Regardless of the participation model employed, it is critically important that putative members of the represented group receive adequate notice of the litigation and have an opportunity to make an informed decision on participation.

- **Ensuring that parties who do not participate in a representative action do not thereby lose their due process rights.** While a verdict in a representative action may not legally bind potential plaintiffs who did not participate, the outcome can have significant practical consequences. For example, a decision in one case may have strong practical implications for the next, or a large damages award in one case may leave defendants without adequate resources to pay additional future claims.

- **Managing overlapping representative actions.** Whether an opt-in or opt-out model is employed, the potential exists for multiple and concurrent cases over the same conduct. To eliminate undue complexity and expense in such situations, a system for managing multiple cases efficiently should be developed. In the United States, a multidistrict litigation procedure is used to consolidate all lawsuits filed in various federal courts before a single court for purposes of pretrial discovery and motions practice. Similar approaches may be taken with cases filed in the same court. Canadian law allows for the designation of one court as the "lead jurisdiction" in such cases. Where the overlapping actions are sequential instead of concurrent, factors similar to those of follow-on actions should be taken into account. Any such system should be designed to safeguard due process rights of all litigants while reducing undue burden and expense on litigants.

- **Ensuring that defendants are afforded adequate opportunity to present the full range of factual and legal defenses to the claims of various group members.** Defenses may vary in important respects for different plaintiffs within the represented group, and defendants must be afforded the opportunity to present all potential defenses adequately. Thus, any system must include adequate protections. In U.S. class action cases, courts typically deny class certification, or split proposed classes into smaller sub-classes, where defendants would otherwise be unable to present all defenses.

These are just some of the issues that warrant careful consideration in adopting and implementing a system of representative actions.

f. Scope of Remedies

Proposal 41 provides that the Tribunal should have available to it a full panoply of

remedies, including the use of injunctive relief, damages awards, termination or variation of offending agreements, and "other such relief as the Tribunal deems appropriate." The Sections believe this full range of remedies is appropriate, as it affords the Tribunal (and the courts) the tools necessary to eliminate anticompetitive behavior, restore competition and fully compensate victims. We note, however, that the current proposal does not set forth any policy goals for a remedial system nor offer guidance for the adoption or implementation of specific remedies in specific cases. In implementing any new competition law system, the Sections believe it will be important to assess and describe appropriate remedial approaches, and to offer guidance to the courts and to the Tribunal on determining remedies in specific cases. Such remedies would be an important complement to the penalties and directions that the Commission and the Tribunal may impose under Proposals 29-31.

Issues such as whether and when to allow for damages beyond compensatory damages, when (or if) to require restitution, whether or when to consider defendants' unjust enrichment as a basis for assessing damages, how to approach specific calculations of damages, and how to apportion damages so as to avoid duplicative recovery, all should be addressed in implementing any new system of competition law. While detailed comments on remedies at this stage would go beyond the scope of the current proposal, the Sections would welcome the opportunity to provide additional input as specific remedy proposals are developed.

g. Reference to Leniency Program

Proposal 42 states that any leniency granted to a party by the Commission should have no impact on private rights of action nor should information provided by a party granted leniency be discoverable in private proceedings. The CEDB recognizes the balance that must be struck between encouraging cooperation with Commission investigations and protecting the rights of victims to compensation.

The Sections agree that information offered in the context of the leniency program (including the application for leniency itself) should not be discoverable in subsequent private litigation. As we recently noted in comments to the European Community, affording private plaintiffs access to such information would:

> significantly reduce the attractiveness of the leniency programs by providing the leniency applicant's civil adversaries with extremely damaging evidence, which would not necessarily exist or be disclosed but for its participation in the leniency process. Given the importance of leniency programs in uncovering and efficiently investigating cartel activity, the burden clearly outweighs the benefit.[45]

The Sections take no position, however, on whether a grant of leniency or immunity with regard to a Commission action should extend to subsequent private rights of action, at least with regard to the first successful applicant in cartel investigations. Although allowing the first applicant to escape civil liability may result in a windfall, it would provide a powerful incentive to promptly disclose misconduct. Moreover, if joint and several liability is present, victims of the anticompetitive conduct still would be entitled to recover their damages from other members of the cartel and thus could be fully compensated. The CEDB also may wish to consider whether to require the successful leniency applicant to cooperate fully with private plaintiffs in the subsequent litigation of their damages actions in return for remedy benefits for such applicants in private actions. Such cooperation could provide private plaintiffs with a powerful tool in uncovering and prosecuting conspiracies, while encouraging entities to utilize the leniency program.

11. Enforcement Structure

The Sections welcome Proposals 3 through 15 to establish an independent Competition

[45] ABA Comments on EC Damages White Paper, supra n.35, at 39.

Commission with appointed Commissioners and a full-time executive arm. While we have reservations about combining investigative and adjudicatory powers within the Competition Commission, such structures generally have worked adequately, especially where the two functions are clearly separated within the enforcer. Similarly, the Sections recognize both the advantages and potential pitfalls of a special Competition Tribunal, such as described in Proposals 16 through 22, and believe that the Consultation Paper presents a model that may achieve the desired balance between specialized expertise and desirable perspective of the broader context in which competition law operates.

The Sections note, however, that the requirement that the member of the Commission who chairs the Investigation Committee recuse himself from the consideration of a complaint made by the Investigation Committee would appear to leave the Commission almost always, if not always, with an even number of decision-making Commissioners. This may lead to tie votes that hamper the Commission's effectiveness.

The Sections welcome the emphasis in the Consultation Paper on ensuring that the Tribunal will have the necessary expertise, by requiring the appointment of non-judicial members with economics, commercial or competition law expertise. (Proposal 17.) We assume the Chief Executive will have established a process for appointing the non-judicial members that will achieve that result. We also note that the Tribunal may admit new evidence not entered before the Commission and may not be bound by rules of evidence. (Proposals 18, 19.) Moreover, Paragraph 24 of Chapter II of the Consultation Paper (at 21) indicates that the Tribunal may "substitute its own decision" for that of the Commission. The Sections assume that the Tribunal will establish procedures that will ensure due process and fairness in these situations. We suggest that it may be more efficacious if the Tribunal is limited to reviewing the

propriety of the Commission's decision. Permitting *de novo* review may result in every adverse decision being appealed, and effectively render the Commission redundant and prolong proceedings.

Conclusion

We hope these suggestions are helpful and we would be pleased to offer any further assistance that may be helpful as Hong Kong finalizes its Competition Law. The Sections recognize the substantial work that the CEDB has accomplished in developing the Proposals, and appreciate the CEDB's consideration of our comments and those of others as it continues with its mission.