

— Check against Delivery —

Competition Law and Business: Sword or Shield?

**Speech by Ms Anna Wu
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Ladies and gentlemen, I am delighted to be in Singapore to take part in this conference.

As I recall, when I was here last year, we were at a very early stage of launching the new competition regime in Hong Kong. Since then, I am pleased to say that we have made considerable progress in terms of turning our Competition Ordinance into a reality. We now have all the hallmarks of a functioning competition agency – we have new offices, a permanent expert staff (some of whom are in the audience with you today in fact) and we have even started to attract the attention of media – and it hasn't always been praise you won't be surprised to hear! We are also getting ready to issue our very first set of draft guidelines on how we will actually apply the competition rules. These guidelines – and this really is a milestone – will be published for consultation in the coming weeks so I urge you to keep an eye out. If all goes well, we hope to begin business in mid 2015.

A key part of our early outreach activities involves educating businesses on how they can benefit from competition law and I am therefore very glad to have the opportunity to contribute to the topic of today's panel discussion: 'Competition Law and Business: Sword or Shield'. In this context, I would like to start with how competition law benefits business. I will then go on to address our new competition law in Hong Kong and explain how it takes an approach to enforcement which is nuanced and balanced, robustly protecting the competitive process while minimising the compliance burden on businesses.

Competition law is good for business

As you all know, there is an abundance of research showing that competition regimes lead to substantial savings for *consumers*.

For example, the US Federal Trade Commission has estimated that it saved American consumers USD 1 billion in 2013 as a result of its merger and non-merger-related actions. Similarly, in the UK, the former Office of Fair Trading estimated that it had saved consumers at least GBP 422 million per year between 2010 and 2013.

From the *consumer's* perspective, it is an oft-repeated statement that competition law leads to lower prices and better choice – a statement with which we very much agree at the Hong Kong Competition Commission.

But what about *businesses*? It is less often discussed how competition law benefits them. And while it may be obvious to many of us here, I think it is worth spelling out a few of the reasons why competition law is good for business:

- **First, open markets:** Competition law prevents companies from abusing their power in a market and creating entry barriers to the detriment of other businesses. Competition law ensures that markets remain open – so other companies – new entrants, the new kids on the block – will have the chance to enter into and expand in new and existing markets. Open markets create opportunities. Competition law is the guardian of opportunity.
- **Second, efficiency and innovation:** Where competition flourishes, companies cannot ‘rest on their laurels’ - they will be forced to do their utmost to win customers. This will include seeking ways to provide their product or service more efficiently and creating innovative new products to gain advantages over their competitors. Of course, let's not forget that businesses are consumers too. And just like consumers, they will benefit where efficiencies and innovations are passed down the supply chain. To give you an example, the retailer of a product benefits when the manufacturer has a more efficient production process. If the upstream market is competitive, and that's where competition law comes in, this leads to lower prices for the retailer.

- **Third, fairer dealings.** Where companies are required to play fair, this ensures more beneficial commercial relationships. For example, competition law can prevent the powerful supplier from imposing certain restrictions on its distributors controlling the extent to which they compete with each other. This ensures the distributor has the freedom to try to win customers from its rivals with a better price or offering – the very essence of the competitive process.

Of course, we all know there will be those that argue that competition regimes are bad for business. In Hong Kong, we see reports in the media week in week out which make these arguments. We are told that our new competition law will encroach on the freedom of the market. We hear that compliance with the new law will impose additional high costs for businesses. It's all a lot of needless red tape!

These arguments are not compelling. Let me give you two examples of how competition policies have benefitted Hong Kong. In the second half of the 1990s, the telephone monopoly was terminated resulting in more operators, new technology and cheaper services. Termination of the monopoly was coupled with the obligation to allow interconnection between networks and portability of numbers for users. This new regime meant that consumers could walk with their numbers to another operator and operators would no longer be excluded from any network. The second example which occurred during the same period was the removal of an agreed monthly deposit interest rate between bankers, a modest beginning perhaps, but it is easy to see how the breakdown of the bank cartel benefitted everyone, consumers and business alike.

I would argue that competition regimes *preserve* and promote rather than fetter the functioning of the free market. It is undeniable that powerful businesses often build barriers or engage in conduct which harms the competitive process and, in turn, the free market. Indeed, the natural tendency of some firms in some sectors may be to collude with each other or otherwise abuse their position, rather than to compete on the merits. It is well recognised today that the free market cannot always ensure a competitive outcome – especially where the powerful position of the firms has become entrenched. Although I would agree with Adam Smith that generally the *invisible hand* of the market should deliver the optimum result, the market has to be free to do its work. In so far as protecting the competitive process is concerned, there

will be times when the *guiding hand* of competition law is needed.

But what about the costs of compliance for business?

It is my belief that it is simple for most companies to remain on the right side of the law and compliance costs should be relatively low. This is also true in the Hong Kong context:

- **First of all**, for the vast majority of Hong Kong businesses, compliance with the Competition Ordinance should be straight forward. For SMEs, provided that they don't fix prices, don't allocate markets, don't restrict output and don't rig bids – the “4 no nos” if you will – they should have a low risk of contravening the law. There are also de minimis exemptions for SMEs. For larger businesses who might have substantial market power they will also have to ensure they don't abuse that power. Our overall message is “act fairly and compete on a level playing field” and you will be just fine. In appropriate cases, we will also look at exemptions to soften the blow.
- **Second**, our guidelines. Under the Competition Ordinance, we are tasked with developing a set of guidelines that explain how the Commission will interpret the competition rules. These guidelines will provide valuable assistance to businesses who want to assess whether their commercial arrangements comply with the law. Our guidelines will be practical, clear and user friendly for businesses operating in Hong Kong. They will draw on international best practice naturally but they will be tailored too to the realities of our economy. The guidelines will make compliance with the Competition Ordinance as simple as possible.

There are two types of relationship that are relevant to an assessment under the ‘shield or sword’ analogy – between businesses inter se and between the Commission and business. Competition law may be used by business as both a shield and a sword. Competition law is a shield for business because it enables businesses to resist anti-competitive terms which might otherwise constrain their freedom to operate, it is the right to say ‘no’ and not to yield to unreasonable demands. It is a sword because it allows businesses to lodge complaints and use the full rigour of the law. The shield protects and the sword strikes. These are the direct consequences of an enforceable

regime, the credibility of which stands or falls with its effectiveness and fairness.

Our law provides for the Commission to take in complaints, conduct investigations, accept commitments, bring proceedings before the Competition Tribunal and to provide exemptions. It also allows private parties to bring follow on actions for damages consequent upon an admission or finding of liability.

Our law provides for balance

The need for balance dictated our model of split responsibilities between the Commission and the Tribunal. Any over-zealous use of the sword by the Commission can be judicially reviewed.

Balance means ensuring that the law is not applied in a way which is overly-zealous or overly-lenient. If the regulatory “sword” is too sharp, beneficial business practices could be prevented – or “chilled” as we say. The possible benefits of competition, such as allowing new products to be brought to the market, increased efficiency and lower costs, lower prices could be lost. Similarly, if the exemptions shield is too easily available we can end up excluding conduct from scope of the rules too readily. In the worst case, this could allow anti-competitive practices with no valid commercial justification to pass under the radar.

How then do we get the balance right? Well our competition law in Hong Kong adopts a nuanced approach which ensures that enforcement is robust where it needs to be but adopts a more ‘softly softly’ approach where harm to competition is less obvious. Recognising that competition law is a new phenomenon in Hong Kong, the regime is also being introduced in a graduated way – so at least for now, mergers will not come within the scope of the regime except in the telecoms sector.

We also achieve balance by providing for two different enforcement routes depending on the seriousness of conduct in question:

- **In respect of what we term serious anti-competitive agreements and**

arrangements (in particular price-fixing, bid-rigging, market allocation and output limitation) or abuse of substantial market power the Commission can pursue the company directly before the Competition Tribunal. Most companies will already know that these forms of anti-competitive conduct will not be tolerated. The Ordinance equips the Commission with an array of tools to investigate such conduct, including the power to require production of documents and information, and to conduct “dawn raids” on business premises. All of this ensures that the Commission will be able to wield its sword effectively against practices which are most harmful to competition.

- **For the lower end anti-competitive agreement**, the Commission is required in the first instance to issue a warning notice before launching proceedings before the Tribunal. In practice, this gives companies a grace period within which to cease the relevant conduct. The warning notice procedure gives companies – which in many cases may not yet be familiar with competition law - the chance to bring themselves into compliance before any enforcement action is taken. This is a useful mechanism in a new law and is something that has a role to play in a transition phase. We have all heard the criticism that competition law is opaque, you don’t know what risks you are running until the authority tells you. The warning notice mechanism seeks to address that concern in the context of a new regime which, let’s face it, can require a cultural shift.

With that, I hope I have given some flavour of how the Competition Ordinance will be of benefit to businesses in Hong Kong, and I look forward to hearing my fellow panelists’ contributions on this topic.

Thank you.

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