

## **Fostering compliance with the Competition Ordinance**

**Keynote Speech by Ms Rose Webb**

**Senior Executive Director, Competition Commission**

**at Hong Kong GRC Summit 2014**

**20 May 2014**

Good morning Ladies and Gentlemen.

Let me begin by thanking you Martin for your kind invitation to speak here today. This is my first occasion to address an audience in Hong Kong since my appointment as Senior Executive Director at the Competition Commission and I am delighted to be here with you.

The fact you have placed competition law at the heart of today's conference is a clear recognition that, if not already, the Competition Ordinance will soon be a key consideration in effective compliance strategies – a message we, at the Commission, are keen for companies here in Hong Kong to fully understand.

It is often said, and nowhere more true than in competition law, that prevention is better than cure. Your role at the coalface of compliance and risk management is essential in ensuring that companies are ready for the full implementation of the Competition Ordinance

This morning I would like to do three things.

- First, I'd like to provide you with a brief recap on the background to the Competition Ordinance and an update on where we are at in preparing for its implementation.
- Second, I want to explore with you some of the ways in which our work in the Commission in the coming months will be of importance to you in compliance functions.
- Third and finally, I want to leave you with a few signposts for your roadmap in preparing for "Day 1" of the Ordinance.

However, if I may, let me begin with a few words on my own background.

As you can no doubt recognise from my accent, I am from Australia and have been active in public service there for over 25 years in varying roles – including at the Australian Securities and Investment Commission and most recently at the Australian Competition and Consumer Commission. Depending on your perspective, I have been either fortunate or unfortunate to bear witness when compliance in Australia has gone wrong – whether it be breaches of environmental standards, misleading trading practices or harmful cartel conduct.

Indeed, although Australia has had competition law for over 40 years, companies continue to overlook the importance of stringent and effective compliance processes.

This not only has resulted in lengthy investigations into illegal conduct by the regulator – but has resulted in significant and painful fines and adverse public scrutiny for the companies concerned.

Although I may only have been with the Competition Commission in Hong Kong for just over three weeks – it is already clear to me the immediate priority is to ensure companies here avoid the mistakes made by companies elsewhere.

Right now you and the companies you represent have an opportunity to take stock of your agreements and practices in Hong Kong ahead of implementation. That is why I am here today; to reinforce some of the key messages to effective compliance strategies.

### **Context - The Competition Ordinance**

Before outlining the rules that we at the Commission will enforce, let me set out some context to the Ordinance – which may be familiar to some of you here.

It is internationally recognised that Hong Kong has long been one of the freest economies in the world. However, as you will be aware, Hong Kong had also been a rather unusual anomaly amongst sophisticated economies in not having any sector-wide competition law.

The Government recognised some years back that competition law and a free economy work hand in hand. The Government recognised that for Hong Kong consumers, a healthy market ensures they have access to a variety of goods and services at competitive prices. For businesses and entrepreneurs, competition encourages them to meet consumer demands by providing the right products at the right price and quality; driving more efficient business practices and innovation across the region.

After lengthy rounds of consultation and many hundreds of submissions to LegCo from SMEs, trade associations, the Chambers, large businesses, and a host of other organisations, the Competition Ordinance was adopted in June 2012.

Since then, the necessary preparatory work and institutional framework has taken shape.

- In April 2013, Anna Wu, the Chairperson and 13 other members of the Competition Commission (Commission) were appointed by the Chief Executive.
- The Judiciary appointed the President and Deputy President of the Competition Tribunal (Tribunal) in July 2013.
- For the past couple of months, the senior management and staff have been gradually coming online and have started work in gearing up for “implementation day” – a point I will return to later on.

## **The Competition Rules**

I will now turn to the specific rules in the Ordinance. Those familiar with competition laws in other parts of the world will feel rather at home when they flick through our rules here in Hong Kong. They are inspired in many ways by the experienced and established regimes elsewhere – particularly those systems in the European Union, UK, Australia and Singapore.

The Ordinance has three prohibitions.

- The First Conduct Rule targets all anti-competitive agreements which adversely impact on competition. This covers a range of practices – the most serious of which are hard-core cartels which engage in price-fixing, market allocation, output restriction or bid-rigging.

For agreements other than these serious ones, the First Conduct Rule applies to agreements between undertakings with combined annual turnover exceeding HK\$ 200 million.

However, the First Conduct Rule is not a blanket prohibition. Agreements are excluded from the rule if they satisfy the exclusion criteria in relation to enhancing overall economic efficiency, or if they are made to comply with a legal requirement, or if they are for services of general economic interest entrusted by government.

- The Second Conduct Rule prohibits undertakings with a substantial degree of market power from abusing this power to prevent, restrict or distort competition. Undertakings with annual turnover not exceeding HK\$ 40 million are deemed not to have substantial market power and are excluded from the rule.
- Third, The Merger Rule prohibits mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong. However, the scope of application of the merger rule is limited at present to mergers relating to telecommunication carrier licence holders.

Undertakings may apply for decisions from the Commission as to whether their agreement or conduct is excluded or exempted. The Commission may also issue a block exemption to exempt a particular category of agreements, if those agreements satisfy the criteria relating to a relevant exclusion.

To encourage compliance with the competition rules, the Ordinance provides for a range of remedies which the Commission could seek. We may:

- Issue warning notices, infringement notices and seek Commitments in response to conduct we consider may contravene the Ordinance; and/or
- Commence proceedings in the Competition Tribunal seeking remedies including fines of up to 10% of an undertaking's annual local turnover per

contravention for a maximum period of three years. In addition to cease and desist orders, we could also seek orders disqualifying directors from managing a company if they are involved in the illegal behaviour.

The choice of remedy will, of course, depend on the severity of the conduct and the most proportionate means to bring an end to any illegal behaviour.

So, that hopefully gives you a bit of the context and detail on the Ordinance itself. But where are we in terms of timeline for implementation?

- The Commission's target is to complete all the preparatory works concerning the Commission by the first half of 2015. For this timeline to be achieved we need to develop and finalise a set of guidelines in consultation with LegCo and other interested persons.
- Next week, the Commission will be appearing before the Economic Development Panel of LegCo – and following that in the coming months we will be approaching major stakeholder groups to inform them of our preliminary thinking and hear their expectation on the guidelines.
- We then expect to be ready in September to publish draft guidelines for consultation – which we will revise in light of comments and submissions received. It will then be for the Government to formally set a date for implementation.

That's a long introduction into what I would really like to focus on this morning – namely what we at the Commission can and will be doing for you and your companies in the coming months - encouraging and fostering effective compliance.

### **Compliance resources**

To some, I may be preaching to the converted. But as the Commission's Chairperson has said, whilst competition has deep roots in Hong Kong, we should not assume that competition always comes naturally to businesses here.

For that reason, you and we at the Commission have a joint mission to prepare businesses for implementation.

We are actively working on a range of measures that can and I believe ought to form part of your compliance toolkit.

#### **1. Education and advocacy**

First, education and advocacy.

For those who questioned whether competition law would be a reality here in Hong Kong, there can now be no doubt we are on a clear path to implementation. One of our key tasks in the coming months is to highlight to the public and businesses that very simple message: the Ordinance is coming.

In that way, the Commission has an on-going role to inform the Hong Kong public about the benefits of competition to the Hong Kong economy and the need for them to be aware of and to comply with the Ordinance.

Our work both before and after the Ordinance comes into full effect will continue to stress the importance to Hong Kong of a dynamic, competitive market.

You will see a lot of our Chairperson, the Commissioners and me and my colleagues in the coming months. We will be out there listening to better understand any concerns with how to comply with the Ordinance. And, at the same time, clearly advocating the importance of taking time now to assess and where necessary adjust your behaviour.

The phased implementation of the Ordinance has allowed time for businesses to review their trade practices and make adjustments so that they will be better prepared when the Ordinance is in full effect.

The Commission wants businesses trading in Hong Kong to be ready, willing and able to comply with the Ordinance.

As a starting point I encourage you to review our website that was recently launched at [www.compcomm.hk](http://www.compcomm.hk). This is an important public interface and engagement platform that we will be using to disseminate materials. It is constantly being updated – and I encourage you to become familiar with its contents.

In addition, as you would expect and in line with best practice internationally, the Commission will be preparing a number of publications and outreach materials that ought to assist companies in their preparations for implementation.

## **2. Guidelines**

Our second major piece of work is on drafting guidelines.

It is common practice for competition authorities around the world to supplement their competition laws with guidelines which assist businesses and the general public understand how the regulator intends to interpret the laws.

The Commission is required under the Ordinance to develop a set of specific guidelines on a number of aspects of the Ordinance. Namely

- how the Commission will interpret and give effect to the First and Second Conduct Rules;
- how applications for a decision or block exemption order are to be made and handled by the Commission;
- how complaints may be made to the Commission;
- procedures for deciding whether or not and how to conduct an investigation;

and

- how the Commission may interpret and give effect to the Merger Rule.

The guidelines however are not part of the formal legislation and they will not bind the Tribunal and Courts of Hong Kong in interpreting the Ordinance.

In addition, the guidelines will not and cannot limit the application of the Ordinance or exempt certain conduct from the Ordinance. The Commission is empowered to make decisions about exemption applications on a case by case basis once the law comes into full effect.

As Anna Wu, our Chairperson has already indicated, we plan to begin talking to major stakeholders later this month on some of the underlying themes of our legal framework and some general aspects of and approaches to the guideline drafting work.

All together, we believe the Guidelines will be an important package for you – and we look forward to an exchange of views in the coming months to ensure they are fit for the purpose you need them.

### **Your role**

And now to what is most interest to you – what can you do?

Unfortunately for your workload, our answer is - quite a lot. To assist in the effectiveness of the Ordinance, you have an important role in risk awareness and risk management – and I would like to take some time to go through both of those aspects now.

### **1. Risk awareness**

The Commission cannot be the sole voice in advocating competition law compliance. And indeed, nor is it the Commission's task to be specifically advising companies on their businesses and their strategies – and any resulting risks. That is where we ask for your support in educating your companies.

There are, of course, different ways to ensure that business complies with the Ordinance – and we at the Commission are not here to lecture you on your business.

However, what is key to effective risk management in competition law is instilling a compliance culture in an organisation. I am sure you are well aware of this from your compliance work in other areas of the law.

A compliance culture means that managers at all levels of a business, from the top down, need to demonstrate a commitment to complying with the law. The board and senior management must take overall responsibility for instilling this commitment to compliance – but it is the sales force, the contract negotiators and your business

teams that need to be aware.

We recognise that there may be hurdles in some companies – and in some places rather intransigent attitudes – the “we’ve been doing this for years, why do we need to stop now?” school of thought.

As well as outlining the rules, it is thus always prudent to highlight the realities of non-compliance as a means to press the message home to your colleagues. Companies can have good compliance in competition law AND a strong profit margin. The two are not diametrically opposed. It may be useful to stress in addition a number of headline points:

- **Cartels don’t make money.** If the Commission uncovers your illegal behaviour, there is no guarantee that the penalty will be any lower than what you hope to gain from entering into the price-fixing or other similar illegal behaviour, in the first place. Trying to make a cost-based analysis of compliance or out-run our penalties is unlikely to work.
- **Penalties hurt.** Aside from fines and the risk of director disqualification and any reputational impact on your business, third parties will have the ability to seek damages against you for any proven anti-competitive conduct.
- **Short term gains help no one.** Anti-competitive practices are inefficient. Companies that operate behind the curtains of an illegal agreement have weaker incentives to control costs and to innovate. Competing fairly is the best way to win.
- **Your conduct harms Hong Kong.** Less efficient companies reduce efficiency across the city and undermine its long-term competitiveness. We should be focussing on enhancing Hong Kong’s place as a free and competitive marketplace.

But aside from educating your colleagues, it is important you are ready to deal and effectively manage any illegal conduct. This brings me onto your second key role – assessing and dealing with suspicious conduct.

## **2. Risk management**

Just because the Commission will gradually be providing you with a range of tools to assist with compliance, it does not mean you need to wait until the Ordinance is fully in force to start managing and mitigating any risks.

If not already, now is the time to be considering your business practices and relationships and assessing for yourselves whether you may have some issues to be dealt with.

As I am sure you would be keen to explain to me, compliance doesn’t happen overnight. An effective compliance strategy is not a reactive strategy – if you wait until we knock on your door, you will have lost your opportunity to minimise your

risks.

We at the Commission recognise that for some issues, resolving competition law concerns is not an immediate action. It may take some time, for example, to change business practices and culture that may have been the way you have done things for many years.

We do ask you start reviewing your agreements and business relationships and considering just how compliant they are with the principles of the Ordinance. If you have operations abroad and have stopped certain practices there due to competition law compliance – ask yourself is it still necessary you undertake those activities to do here in Hong Kong?

Let me give you an example relating to Cartels.

If a business is involved in a secret cartel, our advice is simple – they should get out of it and get out of it now. Not only is it harming Hong Kong consumers and the economy, it is unnecessarily exposes a business to legal, financial and reputational risks.

The Ordinance considers price fixing and market sharing as a particularly serious breaches of the law. For those doing so, we at the Commission will be able to seek a penalty of up to 10% of your Hong Kong turnover for up to three years of the contravention. We may also seek a director disqualification order against persons involved or connected to the illegal behaviour.

For cartelists, a quiet life will soon be coming to an end. If you are a cartel member and do nothing, be prepared that your business partners will soon take the decision out of your hands. As soon as the Ordinance is in force, we will be actively encouraging whistleblowing and reporting of cartels through a leniency policy. As shown in many other countries, there are many businesses who are willing to whistle-blow on their business partners in exchange for immunity.

Therefore, it would be unfortunate if your businesses had this opportunity to comply now – but actively chose not to.

## **Conclusion**

But I'd like to leave you with a few positive concluding thoughts.

The implementation of the Ordinance is a real opportunity for Hong Kong to enhance its role as a champion of the free market – it is thus a win-win for both the public and the wider economy.

Competitive markets are healthier markets – and our work at the Commission will drive at delivering those benefits to you – as consumers and businesses.

Please don't worry if you are sitting there and wondering if you maybe should leave the room now to begin a competition law audit of your business - there is no need to



panic. You have sufficient time to assess the impact of the Ordinance and will in the coming months have further tools to assist you in making the necessary risk management decisions.

I look forward to the coming months and engaging in dialogue with you on compliance and the Ordinance and the challenges of enforcement beyond that.

Thank you for your time today.

\* \* \*