

— Check against Delivery —

**Getting Ready for the Full Implementation
of the Competition Ordinance**

**Speech by Ms Anna Wu
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**at Speaker Luncheon Meeting
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Good afternoon ladies and gentleman.

Thank you Henry and the Hong Kong Institute of Directors for asking me to speak here today.

I'm grateful for the opportunity to talk through some of the more practical implications that Hong Kong's first cross-sector competition law will have for directors and their businesses.

I would like to cover three main issues with you today.

1. **A short history**. I will give a brief overview of the recent activities of the Competition Commission.
2. **A look to the future**. I want to give a preview of things to come and our progress towards full implementation of the Competition Ordinance.
3. **Implications for company managers and their role in helping businesses comply**. I will reflect on how the new law impacts your role and how you can particularly help ensure your companies are “ready, willing and able” for competition law in Hong Kong.

THE ROAD TO 2015

Although the path to a cross-sector competition law in Hong Kong goes as far back as the early 1990s, it was not until 2012 that the Competition Ordinance was finally enacted. Needless to say, the passage of the Ordinance came after very extensive public consultation and debates in LegCo.

At present, the substantive prohibitions against anti-competitive conduct and the Commission's investigation powers are not in effect. Only institutional architecture has been put into place, including:

- the appointment of the Commission members in May 2013; and
- the hiring of our professional staff from overseas and here in Hong Kong who began in their posts in the course of 2014.

The Commission's core work to date which is a prerequisite to the full commencement of the Ordinance has been the preparation of draft Guidelines on the Competition Rules and the relevant Commission procedures. Following a public engagement process in May, the set of six guidelines were published in October for public comment. These guidelines are intended to provide general guidance on how the Commission will interpret and apply relevant provisions of the Ordinance.

The Commission also has an advocacy role under the Ordinance, which we take very seriously and have begun in earnest. If you have used the MTR, read a newspaper, watched TV or listened to radio in the past months, you may have seen at least one of our public advertisements on the benefits of competition law for Hong Kong. If you haven't, I encourage you to check out our YouTube channel.

In addition, we hosted a series of competition law seminars specifically targeting SMEs. These are focussed on delivering simple and clear messages about the Ordinance. The Commission will continue to host more public seminars to keep businesses informed and updated.

Fair to say we had a very busy 2014! But an equally ambitious agenda lays ahead for 2015.

NEXT STEPS

We were extremely pleased to receive some very substantive comments on our draft guidelines. All 64 submissions are available on our website. We at the Commission are now busy considering those submissions and finalising the draft Guidelines to be ready to consult with LegCo later in the spring.

Continuing our transparent approach to helping people understand our decision making process, we will also release a Guide setting to the consultation process and the revised Guidelines. This Guide will explain how the Commission considered key submissions it received and why it did, or did not, make corresponding changes to the Guidelines.

We are also putting into place the internal procedures and policies for the Commission so we can be ready to be an effective law enforcer on Day 1.

In addition, the Government and Judiciary are moving forward in the months to come with a number of key elements:

- The Government will be proposing a number of pieces of subsidiary legislation required under the Ordinance; and
- The Competition Tribunal is working with stakeholders to finalise the relevant rules of procedure.

With all the various parties moving their pieces of the jigsaw into place, and we at the Commission being ready by mid 2015 we hope the Ordinance can take effect a short time thereafter.

But what are the rules of the game here in Hong Kong?

The Competition Ordinance

Competition law is not a new concept globally. Indeed Hong Kong is one of the last developed economies without a sector wide competition law. Whilst some of you may be familiar with competition laws from elsewhere – it is important to understand the local specifics here in Hong Kong.

So, what can and can't be done under our Ordinance?

Our draft Guidelines published in October provided a detailed examination of a wide range of types of conduct. I don't propose to try to summarise those lengthy documents here today. But to give you some context, I would like to spend a few moments highlighting a few of the key elements of the law:

The Ordinance provides for three prohibitions

- **The First Conduct Rule** targets all agreements which harm competition. We explain in the draft Guideline that this rule applies to agreements between competitors, as well as agreements between different levels of the supply chain such as between a manufacturer and a retailer, where they harm competition. The most serious of these are cartels that seek to price fix, share markets, limit output or rig bids.
- **The Second Conduct Rule** prevents undertakings with substantial market power from abusing that power. The law does not say big is bad. It is only when an undertaking seeks to use its market power to, for example, exclude a competitor from the market, that concerns may arise.
- **The Merger Rule** prohibits mergers that may have a substantial lessening of competition. At present, this is only of relevance to carrier licence holders in the telecommunications sector.

If we believe there is a contravention of the Competition Rules, the Commission has access to a wide range of solutions or remedies. The options we have in our toolbox means we will carefully assess each matter and consider how best to resolve the concerns we may have.

Where parties swiftly alter their conduct in response to the Commission's enquiries, this will increase the likelihood of the Commission taking no further action – especially in the early days of the law's application. When the Commission considers that remedial actions are warranted, it will inform the affected business of its views before taking action.

Ultimately though, if we consider it appropriate, we can commence proceedings in the Competition Tribunal. We won't do this without having talked to the businesses or individuals involved first.

In Hong Kong, the Tribunal, rather than the Commission, is the decision maker. This differs from jurisdictions such as Europe and Singapore. It will be for the Tribunal to decide whether there has been a contravention, and what penalties, if any, should be imposed. The Tribunal has a wide discretion to make orders, including:

- imposing a fine of up to 10% of an undertaking's Group Hong Kong turnover;
- disqualifying directors from acting in a certain capacity, including as a director, founder or manager of a company, for up to five years;
- fining individuals who are involved in a contravention of a competition rule;
- requiring parties to make restitution for any loss or damage suffered as a result of their contravention; and
- requiring that payment be made to the Government or other specified person not exceeding the amount of profit gained or loss avoided as a result of the contravention.

The Ordinance also prevents indemnities being offered to employees, officers and agents for a contravention i.e. you cannot be insured or shielded from the financial pain of a penalty.

And on that note, let me now move on to your role under the new law.

THE ROLE OF DIRECTORS IN SHAPING COMPLIANCE

Directors – both executives and independent directors - are the drivers of commercial strategy in a business. With that, you bear the responsibility for the actions of your company at all levels.

If we look overseas, there are a number of jurisdictions where competition agencies have sought remedies against the directors of a company for competition law contraventions. A 2007 study commissioned by the UK competition authority showed that director

disqualification is seen as the second most effective deterrent by business respondents (after criminal penalties).

In 2008, in relation to the global marine hoses cartel, three individuals were disqualified from acting as UK company directors for periods of between five and seven years. Similarly in 2014 the Federal Court of Australia made an order disqualifying the managing director from managing a corporation for three years as a result of the company's involvement in a cartel. A consideration of the court in making the disqualification order was that the managing director demonstrated a "gravely inadequate understanding of the proper role of a Managing Director and the duty he owed" to the company as a result of his "completely deficient understanding of Australian competition law". In addition to his disqualification, he was ordered to pay a penalty of AUD\$250,000 (that's HK\$1.5 million) and to undergo annual competition compliance training for the next five years.

That possibility for director disqualification will also exist in Hong Kong. This reflects the level of importance that the law places on directors taking their responsibilities for ensuring compliance with the Competition Ordinance. Specifically, the Ordinance allows a director to be disqualified if

- the company has contravened a competition rule; and
- the director's conduct makes the person unfit to be concerned in the management of a company.

The law makes no distinction between the duties of non-executive directors and directors.

So what can you practically do to mitigate the risks and protect you and your company?

For those of you who are non-executive directors, your role on the boards of companies is crucial to effective and credible systems of corporate governance. By being the independent voice – you can effectively exercise independent judgment and carry weight in board discussions and influence the direction of the businesses' activities.

For those of you who are part of the executive team, your role in the day to day management of the business will be critical to embedding values into your corporate culture that are consistent with competition law.

Here are two key ways as a starting point to ensure your business does not contravene the Competition Rules.

First, by bringing competition compliance to the board’s attention.

In recent years topics such as anti-bribery, corruption, internal anti-fraud controls, health and safety and environmental concerns have all gained prominence on the board agenda. As a result, structures and processes have developed across companies to better manage the myriad of risks arising from these issues. I encourage you to get the Competition Ordinance onto your board agenda and to keep it there.

Second, by instilling a competition compliant corporate culture.

If your company doesn’t yet have a competition law compliance program in place, now is the time to address this. Don’t wait for a court to order you to do it – I can assure you it will be much more costly (and invasive) this way. After one of the world’s largest companies was found to be liable for its “central role” in the ebooks cartel in the US, the court ordered, amongst other things, the appointment of an external monitor to monitor the company’s antitrust compliance and to conduct annual compliance audits.

Compliance from my perspective requires three key step-changes in the culture of an organisation.

- **Commitment.** A clear commitment to competition and compliance with the law is required from the very top to bottom of an organisation, from the strategic decision making to the day-to-day operations of the business. A policy or company statement from the board and senior management helps bring home the message to the entire organisation that this is an issue to be taken seriously.
- **Identify your risks.** This is an essential process. We are strongly encouraging companies to begin in earnest internal reviews of

existing business practices and to seek legal advice where appropriate.

- **Mitigate and monitor.** Ensure that appropriate processes are put in place to mitigate risk and change risky practices now. This can include staff training to promote a better understanding of core competition law principles and the adoption of policies and internal reporting mechanisms. Doing it once won't be sufficient – businesses evolve, management and other staff come and go. It is equally important to have regular reviews to ensure ongoing compliance, as well as implement mechanisms to help you detect any potential new risks.

We are aware that, especially for large businesses, compliance with the Competition Ordinance cannot be achieved at the flick of a switch. However, the Competition Ordinance has been in place now since 2012 and for the past year our message has been loud and clear – full implementation is coming very soon, so get ready. I encourage you to convey this message within your companies, if you haven't already.

CONCLUSION

I hope that the points I've raised today have prompted your interest in learning more about competition law.

I'm a firm believer in the values of competition law and the key role the Ordinance will have in ensuring Hong Kong remains a competitive, dynamic and free market. To achieve this, Hong Kong requires you and your colleagues to embrace our new law and to help us, the Commission, in developing a culture of compliance across all sectors of our economy.