

— Check against Delivery —

Leveling the Playing Field?

**Speech by Ms Anna Wu
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Good morning ladies and gentlemen. It is a pleasure to address you all and my thanks to the Hong Kong Institute of Chartered Secretaries for inviting me to speak at this important event.

This session on competition law has come at a fitting moment indeed. The completion of our engagement process and the forthcoming draft guidelines mark the end, and beginning, of important chapters for the Commission.

As we move even closer to making our cross sector competition law a reality in Hong Kong, the message to take back to your organisations is clear: if you want to play the game, you have to play by the rules.

I was asked to speak [^] on the topic “Leveling the Playing Field?” It is, of course, a reference to our unofficial slogan, “championing a level playing field”, which sets the stage for our role under the regime as referee, not regulator.

The Competition Ordinance seeks to protect competition, and ultimately consumers, by making harmful business practices that undermine the competitive process illegal. In our view, free markets are the best regulator of price and quality. Better prices, products and choices, as well as greater

business opportunities and growth, are the direct benefits of competition. The Commission's role is not to set prices, or tell you and your employers how to run your business. In a healthy, free economy, it is the market that will determine how you make these decisions. Our role is to make sure the businesses follow the rules, so that all have a level playing field. This concept may not be unfamiliar to you, particularly for those of you from companies with operations outside of Hong Kong.

There are three areas I want to focus on today.

First, I will give a brief update on where we are now, and where we will be in the coming months.

Next, I will talk a bit about cartels, and the harm they cause to our economy.

Lastly, I will touch on compliance, and your role in preparing your business for implementation of the new law.

Update on Commission activities

We spent the earlier part of this year finalising the cornerstones of a functioning competition authority including establishing an office and the necessary internal systems, and recruiting our key staff.

In fact, we have just very recently welcomed our latest, and certainly not least, member of the Executive team - our CEO, Dr. Stanley Wong. Dr Wong comes with an incredible pedigree working in or with competition authorities in Europe, America and Asia. He will be a great asset to the Commission and Hong Kong.

With our professional team on board we have been very busy meeting people across Hong Kong as we get our draft guidelines ready for public consultation.

In August we finalised our preliminary engagement process, where we met with a broad range of stakeholders, including many of the organisations represented here today. I want to devote a few minutes here to emphasise the value of these outreach exercises.

I am very happy to report that most organisations and business owners are taking their responsibilities to comply with the Ordinance seriously. Some businesses are already implementing steps to change practices which have the potential to contravene the Ordinance.

We also gained excellent insights into current trade practices in Hong Kong. This included very encouraging feedback from all businesses, big and small, and the public, all of whom were very interested in learning more about competition law.

Throughout the engagement process we have identified areas where businesses would value further guidance from us. We have sought to address some of these by incorporating more examples in the draft Guidelines. ^

We have a statutory function to educate and raise awareness, and we consider this to be a crucial role under the regime. As it is often said, prevention is better than the cure. Prevention often means reviewing and changing corporate governance and corporate culture. We hope to help companies get ready and be willing partners. ^ After we issue the draft guidelines, we will be turning our focus on raising public awareness of the new law and the benefits of competition more widely. Keep a look out for our upcoming TV, print and radio campaigns, and we also have more SME-focused publications on the way. As part of the consultation exercise over the draft guidelines we hope to more specifically focus on legal compliance and reduction of risk of violation.

While you have your role to play at the coal face of compliance and risk

management, so do we as advocates for competition. Only together can we really aim to achieve the cultural shift necessary for a high level of compliance with a cross sector competition law in Hong Kong.

Cartels

One area where your compliance work should already be a focus is in ensuring your organisations are free from cartels. Of all the anti-competitive conduct prohibited by the Ordinance, cartels are the most harmful and serious of them all, and you can expect that they will always be a priority for the Commission.

Cartels are arrangements to cooperate on pricing and other terms of supply between businesses that would otherwise be in competition with each other. This is widely understood to mean price fixing, restricting output, allocating markets and/or bid rigging.

Cartels essentially cheat consumers and businesses by artificially inflating prices and costs across the supply chain. They reduce choice and innovation by shielding members from having to compete and invest in product development and research. By illegally controlling markets, cartels lock out honest and more efficient businesses and can destroy consumer confidence in an entire industry.

Rigging bids in public infrastructure, residential and commercial projects passes these inflated costs onto everyone through higher taxes, rates and rents. All in all, cartels are bad news for any economy, dampening our overall domestic and international competitiveness and restricting economic growth. They create an unlevel playing field because they simply exclude those who play fair.

Cartels have long been condemned in jurisdictions that have a competition law. Though not the case in Hong Kong, they are often treated as criminal

offences that carry with them possible jail time for individuals involved. In keeping with international norms, cartels are explicitly referred to in the Competition Ordinance as serious anti-competitive conduct.

^ In order to tackle cartels, the Competition Commission will need evidence. Cartels are usually deliberate and those engaging in cartels try to keep them secret. This makes them difficult to detect. However, there are various tools and approaches to flush out cartels.

First, one can identify industries where cartels are more likely to occur. A smaller number of players, standardised products, easily visible prices, frequent contact between competing sales teams or other means of keeping a close eye on your competitors all increase the likelihood of cartel behaviour.

You can also monitor pricing trends. While you need to be very careful about leaping to the wrong conclusions, patterns of inexplicable price increases or steadily increasing prices in a market with falling costs may indicate that something is not quite right.

However, the vast experience of overseas competition authorities has demonstrated that a leniency program, offering immunity to the first member of a cartel to come forward to the Commission, is the single most effective and important tool to identify, investigate, stop and deter cartels.

It is a rarity for any enforcement agency to offer full immunity for alleged offenders in exchange for cooperation, but that is the hallmark of cartel immunity programs all around the world.

Such programs, sometimes referred to as leniency policies, encourage cartelists to confess and implicate other members and provide direct first-hand evidence of cartels that would otherwise go undetected. In exchange, they get full immunity from any proceedings in respect of that conduct.

First and foremost, offering immunity is designed to disrupt cartels. Everyone in a cartel knows that all it takes is for one person to come forward, and the rest will face serious consequences. Additionally, with the cooperation of the immunity applicant evidence is obtained more quickly and efficiently, leading to a prompt resolution of an investigation.

By making identification and enforcement more likely, the offer of immunity provides an important deterrent and destabilizing effect on the formation and continuation of new and existing cartels.

We will be issuing a draft leniency policy outlining how the Commission will administer its cartel immunity program in the near future, so you should also keep a look out for this.

Compliance and your role

Chartered Secretaries all have a key role to play in building a culture of compliance – not just within your own organisations, but in Hong Kong as a whole. Chartered Secretaries by nature deal with compliance issues. Collectively, they form a very strong voice in building a culture of acceptance of a level playing field.

A compliance culture means that everyone at all levels of a business, from the top down, makes a commitment to comply with the law. While the board and senior management has overall responsibility for instilling this culture and making the strategic decisions, the people dealing with the day-day operations also need to understand and comply with the rules.

Organisations can have high compliance with competition law AND perform strongly in their market by competing as efficient, innovative players in their field.

You don't need to wait for the Commission's guidelines to start managing and mitigating any risks – particularly if your organisation is involved in a cartel. Our advice will be the same to all businesses, large and small, – get out now.

And if you choose to do nothing, be prepared that your business partners may soon take the decision out of your hands. They may decide to seek immunity. The enforceability of commercial arrangements may be at risk and actions from claimants and regulators may follow. Don't forget that the law also provides for director's disqualification orders. Because of the globalized nature of competition law, you may get caught up elsewhere in Singapore, Malaysia, mainland China or elsewhere as well. It is worth considering tidying up business models and adopt a universal or uniform one so that a business does not face different problems at different places. As soon as the Ordinance is in force, we will be making full use of our investigation powers and leniency policy under the Ordinance.

Conclusion

We truly are on the cusp of a cross-sector competition law regime that will necessitate a radical shift in the way business is conducted in Hong Kong.

^ If you get familiar with the rules and stick to them, competition in Hong Kong will thrive and playing fair would become second nature.

Thank you.