Preparing for the Implementation of the Hong Kong Competition Law

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at the 9th Annual Asian Competition Law Conference 2013
10 December 2013

Introduction

I am very pleased to be here with you and to share with you some of my recent thoughts in my capacity as the Chairperson of the newly established Competition Commission of Hong Kong.

Last year the Secretary for Commerce and Economic Development addressed this same Competition Conference announcing the enactment of the Competition Ordinance. The legislating process had not been easy. It had taken nearly three years, 38 Bill Committee meetings and 5 full days of the whole Legislative Council meetings to turn the bill into a law. However, if we look at the history of the development of a competition regime for Hong Kong, this legislative process is only one, although the most important one, of the episodes.

History of introducing Competition Law in Hong Kong

So let me start by fast backward a bit to see where we came from. The subject of a competition law for Hong Kong first surfaced in 1994, when the Consumer Council commenced a series of studies on business competitiveness in Hong Kong. These studies included bank deposit interest rates, supermarkets, fuel, broadcasting, telecommunications and residential property.

Under the auspices of the Consumer Council, I was involved with the breakup of the bank deposit interest rate cartel and the recommendations to merge the broadcasting and telecommunications authorities as well as to change the licensing regime from a technology specific one to a technology neutral one. The Council also recommended the requirement for interconnections to be made between different providers of telecommunications services. These recommendations resulted in new technologies being introduced more quickly, licensing regimes being rationalized and the broadcasting and telecommunications authorities merging into the Communications Authority of today.

In response to the Consumer Council's reports on competitiveness, the government established the Competition Policy Advisory Group (COMPAG) in 1997. In 2006, COMPAG recommended that a cross sector competition law be introduced and various consultations followed.

This long story sets the scene for where we are, and where we are going.

So where are we now? The Competition Ordinance, though enacted, has not come into full operation. It was a deliberate design for the Ordinance to phase in implementation. The institutional provisions of the law have commenced for establishing the Competition Commission and the Competition Tribunal. These two bodies and the government then have to work very hard in their respective areas to lay down the infrastructure for the eventual enforcement of the law.

Establishment of Competition Commission

I and my fellow Commission members (some of them are with us in this Conference) were appointed to the Commission in May this year. Since then, we have established our governance structure and internal rules, and drawn up a roadmap that serves to guide the preparatory work necessary for the full commencement of the Ordinance. We have rolled up our sleeves on the key tasks, namely, recruitment of a top quality professional team, drafting of regulatory guidelines and documents which are required under the Ordinance, and building a network with the competition authorities of other jurisdictions to learn from their experience and expertise.

We are moving full speed on the recruitment front, especially regarding the recruitment of the top executives for the Commission, which include the Chief Executive Officer, his or her deputy and the directors of the functional divisions. Our recruitment sources candidates both from overseas and locally with a view to getting the right mix of talents and experience. We hope by the first quarter of 2014 the top management tier will take a clear shape. Then we can team up the mid-level and supporting staff, develop the necessary working procedures and protocols, and set up all the organizational infrastructure that we need.

Drafting regulatory guidelines as the first priority

Drafting regulatory guidelines is a first priority task because the Ordinance requires the Commission to draw them up and consult stakeholders and the Legislative Council on them before the Ordinance can be fully enforceable. We are aware of the expectation of some stakeholders that they want the guidelines to provide clarity on what business practices may be considered anti-competitive and what are not. Some also expect that the guidelines would draw a line between what types of behavior or agreements may be exempted from the conduct rules and what are not. In reality I am afraid that whatever lines we draw are going to be dotted ones. We need to strike a balance that when we strive to provide good and informed guidance to businesses we will not tie the hands of the Commission unnecessarily.

We expect that the forthcoming discussion on the draft guidelines with stakeholders will be very iterative – a process through which we can better understand the concerns and needs of the business sector, and the businesses will better appreciate the requirements of the Ordinance and the value of competition. We have planned advocacy activities and

development of risk assessment tools and compliance programmes for use by businesses, and they will go side by side the discussion on the draft guidelines. The engagement process is therefore a multi-purposive one. The best result is not just to have the guidelines accepted by stakeholders, but deeply understood by them.

We are now doing groundwork for the draft guidelines – through consultancy studies and discussion with relevant regulators. Programme-wise, we plan to start canvassing views from stakeholders in the first half of 2014, to be followed by a wider engagement and consultation exercise in the second half of the year, and then the subsequent consultation with the Legislature. We expect that the process may take some 15 months to complete, which is already a fairly tight schedule, but if everything goes as planned, we may be able to see full commencement of the Ordinance in 2015.

Drawing overseas experience in other jurisdictions

Our start-up situation is certainly not unique. We have the late-comer's advantage as there is plenty of experience that we can draw upon from the competition authorities in other jurisdictions. International and regional competition events like this Conference are sources of inspiration for us. We have just joined the International Competition Network – I am aware that many colleagues in the room are also members to this Network and we look forward to deepening technical cooperation with you. My early warning – I am going to knock on your door, tap into your experience, and throw you numerous questions that have been recurring in my mind.

When I say our start-up situation is not unique I must readily add that from another angle every competition jurisdiction is unique – especially in terms of the specific challenges faced by the competition authorities in their local contexts. This is the subject which I will now turn to, on the implementation challenges of competition law in Hong Kong.

What SMEs will expect from the Competition Ordinance

I must start from the issue of the small and medium-size enterprises. SMEs should benefit from a competition law but in the case of Hong Kong we have heard various concerns expressed by some SMEs starting with the legislative stage. SMEs take up some 98% of Hong Kong's businesses. If we lose support from them, we will lose almost everything. Some SMEs fear that the implementation of the competition law will be burdensome on them in terms of compliance cost. Some want to see greater certainty that they will not be penalized if they unwittingly breach the law on the argument that whatever they do the impact on the market will be small given their sizes.

The Competition Ordinance has built-in *de minimis* arrangements under both the first and second conduct rules, and the provision for the Commission to issue warning notices for contravention of the first conduct rule which does not involve serious anti-competitive conduct. The arrangements should have given some reasonable comfort to the SMEs and

we need to make sure that the SMEs understand the design of the Ordinance. However, the Ordinance is not meant to exclude SMEs from all responsibilities – especially in cases where serious anti-competitive conduct is involved. Complaints about bid-rigging and market allocation are not rare in some sectors, a widely reported example recently is the construction sector involving building maintenance where SMEs also have a great presence. Therefore, the flip side of providing comfort to SMEs is indeed a more fundamental paradigm shift in business practices. And we think the latter approach is the more promising way to go. We hope to persuade SME's that a paradigm shift will provide a more level playing field for them and that business success should be built on innovation and meritocracy, not on distortion or artificial constructs. We need to help SMEs understand some of their old practices are risky, and address their capacity constraint and help them change. The supplementary use of enforcement powers and advocacy is essential in this context.

Enforcement challenge on import-export trade and transactions through global platforms

Hong Kong is an import-export hub and this presents another type of challenge to us. Both of the two conduct rules in the Ordinance apply to agreements and practices by undertakings outside Hong Kong if their conducts affect competition in Hong Kong. Being a trade hub and accounting for almost 3% of the world's import-export trade, the extra-territorial application of the conduct rules mean that in our future enforcement we need to address, for example, how regional export cartels may impact on us, and how economic activities across the borders shall be taken into account. This will present enforcement challenge and involve plenty of jurisdiction interface issues. And perhaps more fundamentally, the trade pattern of Hong Kong will pose conceptual challenge to us because whether and how we include undertakings outside Hong Kong for a specific case will have great significance on how we define the relevant market, set threshold that indicate market power, and to assess market impact in Hong Kong. This characteristic of Hong Kong's economy makes the conference's focus on Regional Economic Integration particularly pertinent. In today's world, many international conglomerates have presence in multiple jurisdictions. Electronic transactions and internet have also made the world 'flat' in the words of Thomas Friedman. Services and goods are now delivered globally on universal platforms. A global commercial grid involving all the brand names in e-business linking up consumers, retails shops and manufacturers all over the world is just mind boggling. The universal operator may not want to have different and separate business models for different parts of the world. And how should a competition authority respond to such a global phenomenon? The need for greater collaboration between different jurisdictions comes naturally to mind.

Managing public expectation poses another challenge

Managing public expectation is also a challenge. This is not surprising as Hong Kong has a very vibrant civil society, and within it a vociferous mass media – no offence to the media

friends here in the room. What is specific to the competition law is the very diverse expectation that we have heard during the legislative process. Some fear that the Competition Commission will become too intrusive to the 'normal' economic transactions taking place under Hong Kong's laissez-faire regime, and some fear that we are just a toothless tiger. We need public expectation on us so that our future work will be trusted, but we also have to manage that such expectation is within our authority to deliver under the law. For example, our law does not empower us to ask undertakings to reduce consumer prices. Our law also does not break up monopolies or oligopolies and cannot discipline them insofar as they are not abusing their market power. The exception is the telecommunications sector which will be subject to the mergers rule. We will need lots of public relation and education effort to get the expectation level right, and a realistic enforcement plan to deliver what is expected from us.

Conclusion

Our Competition Ordinance, when drafted, made extensive reference to the legal concepts as contained in the UK and EU competition laws. This provides us with some shortcuts and a rich jurisprudence to draw from. However, we still have to think through carefully how the Competition Ordinance should be customized in the local context. Some of our reflection may go into the guidelines drafting process, some may eventually guide our enforcement priorities when the Ordinance has fully commenced.

Our competition law is still young and kicking. I am sure you will have lots of insight for me regarding how best to nurture it.

Thank you.