

**What Can You Expect from the Hong Kong Competition Ordinance
Countdown to implementation in 2015 – less than 12 months to prepare**

**Speech by Ms Anna WU Hung-yuk
Chairperson, Competition Commission**

**at “Competition Law in Asia Pacific : What can you expect in 2014?”
3 April 2014**

It is always a great pleasure for me to speak on competition issues, and particularly so when the audience is interested.

Introduction

But before I move on, I want to qualify today’s topic a little bit. “Countdown to implementation in 2015” – yes, this is what we are aiming at: commencing the Competition Ordinance in the first half of 2015. I will let you know more of our plan later on. “Less than 12 months to prepare” – I doubt it. The Competition Ordinance was passed in June 2012 with a design to phase in implementation such that businesses would have time to get familiar with the law and to get prepared. So the preparation work should have started well before now. Many of my friends in the profession tell me that they are well versed in competition law because their clients or their companies have been making acquisitions and doing business the world over and they have developed menus for their work. In all likelihood you are way ahead of me. But if, an unfortunate “if” that you have not yet started thinking about the preparation for the commencement of the Ordinance, I would urge you to get focused and to catch up.

Preparatory work towards full commencement of the Ordinance

So let me first zoom in on what you would expect to see in the coming months. For the Competition Ordinance to be fully commenced, there are a number of preparatory work going in parallel - some of them are with the Competition Commission. Some are with other parties.

The key task with the Commission is the development of regulatory guidelines and the consultation on them with the Legislative Council and any other appropriate persons – this is so required under the Ordinance. There are five sets of guidelines, some counted seven, depending on how you group them. They cover the three Rules, namely, the First Conduct and Second Conduct rules that regulate cartel behavior and abuse of market power, and the Merger rule which applies to the telecommunications sector. We are supposed to set out the Commission’s interpretation of the rules and the way we intend to apply them. The other

guidelines cover mostly procedural details for handling of complaints and conducting investigations.

It is a most common practice for competition regulators to provide guidelines to supplement their competition laws. There are tons of guidelines out there, for example, those produced by the competition authorities of the EU, the UK, Australia, Singapore and Malaysia which are reference jurisdictions for the Competition Ordinance. The International Competition Network also has many useful resources on best practices and guidance. But still, we have to select and judge what elements from this wealth of resources are suitable for us. We have a legal consultant helping us on the groundwork and initial drafting, but we need to think through issues and cannot just do a copy and paste job.

Guidelines are enforcement interpretation, not legal interpretation

There are two main factors that we must not forget. Firstly, unlike many of our counterparts, the Competition Ordinance gives the Commission the power to enforce but not the power to adjudicate or to award any pecuniary penalty. We have to take a case to the Competition Tribunal to rule on contravention of a competition rule and the associated application of pecuniary penalty. Therefore when we say we interpret the competition rules in our forthcoming guidelines, we are talking about interpretation from the Commission's perspective of enforcement, not legal interpretation. The Ordinance has stated clearly and put beyond any doubt that guidelines issued by the Commission are not part of the law. The Commission of course is given a range of authorities to reach determinations without going to the Tribunal regarding applications for exclusion and exemption, issuing infringement notice, making commitment and so on. But all these are reviewable determination by the Tribunal which rules on legality.

The second factor flows partly from the first. The Ordinance requires us to produce guidelines before commencement of the Ordinance, that is, before there are any real cases of enforcement or court cases. Some of the details of our guidelines may only come or have to be adjusted after we have been thrown in at the deep end. We will find out if we float or require a life saver. Some of our guidelines must be reviewed and adjusted to reflect what the Tribunal has ruled. The Ordinance has actually foreseen this and provided for procedural requirement when we have to amend the guidelines.

The reason why I highlight these two factors is because I hear people say that they expect our forthcoming guidelines to provide greater legal certainty for them to assess if this or that conduct contravenes the competition rules. In simple terms, some expect us to write an operating manual and provide the comfort that as long as businesses follow the manual they would be regarded as compliant. We will not

be able to aim for that level of certainty or authoritativeness. Unfortunately for all of us, very few things in this world are either black or white, most things are grey and fall in between. What the guidelines would provide may be greater predictability and consistency of our enforcement approach and clarity of our procedures. The guidelines themselves guide but do not rule, and they have to evolve and mature over time.

Engagement and consultation of stakeholders on Guidelines

In terms of process, we plan to talk to major stakeholders in around mid May on some underlying themes of our legal framework and some general aspects of and approaches to the guideline drafting work. We hope to benefit from them before we actually produce the draft guidelines. The text of the draft guidelines itself will come around September. We are planning the basis of a wider consultation exercise that will allow all interested parties to give us views on the draft guidelines and the process will take us to the end of the year. In conjunction with that, we will also go to the Legislative Council and consult them, which is a necessary step before the government would consider submitting a commencement notice to the legislature to put the Competition Ordinance to full effect.

When we consult the Legislative Council, we will consult them also on the Memorandum of Understanding between the Commission and the Communications Authority regarding the division of labour between the two under our concurrent jurisdiction. This consultation is also required by the Ordinance and if your work has something to do with the telecommunications sector you may wish to pay special attention to this.

To complete the picture, the government will make regulations for the determination of the turnover of an undertaking (this is under section 163 of the Ordinance) and the Competition Tribunal will make rules for the Tribunal procedures (this is under section 158 of the Ordinance). They are subsidiary legislations and they should be in place when the Competition Ordinance comes to full effect. There is a lot of interest in the determination of 'turnover', so don't lose sight of it. If all these processes go forward smoothly, we will be able to meet the target of commencing the Ordinance in 2015.

New staff members of the Competition Commission on board

These are the things you will expect to see in the coming months. In addition, you will expect some new faces from the Commission as well. Some of you may be aware that our Executive Director for Operation and Executive Director for Public Affairs and Commission Service have arrived, and the Senior Executive Director will be arriving in end April. The remaining Executive Director who is our General

Counsel will come on board in June. I hope I can let you know soon who will be our Chief Executive Officer and when he or she will come. But we are in the final stage of our recruitment process so the suspense will continue for a while longer.

Get started on your preparation for competition audits and compliance

Now I turn to what you may wish to prepare for the implementation of the Ordinance. There are a lot that you can do. But what you should not do is to wait and see. We certainly welcome people's input when we consult them on the draft guidelines and other documents demanded by the Ordinance. But our businesses do not have to wait for the conclusion of this exercise. The Ordinance is already there for quite some time. The anti-competitive conducts sanctioned by the Ordinance are those commonly found in the competition laws in most jurisdictions. Therefore, if you are helping your companies on competition audit and compliance, there are plenty of experiences you can draw from. I trust this is what is indeed happening. In these two years, I have seen increase of competition practices in local law firms and compliance services they provide to the businesses. I have also seen, for example, the Hong Kong Institute of Chartered Secretaries, taking proactive steps to produce a Guidance Note on Competition Law for their members.

I came across a paper produced by the EU on what companies can do better to comply with the framework of competition law and I found it rather succinct and useful. That paper suggests a number of questions for companies to reflect on –

- Do you think ahead to minimize competition violation risk of your company instead of just being reactive?
- Do you have a strategy to assess and minimize that risk?
- Do you know if your sector has been a subject of competition infringement in other jurisdictions and whether you may have the same risk?
- Do you know if your company or part of our company has frequent interaction with competitors and whether that entails any competition violation risk? Do you provide your staff with guidance?
- If you have a compliance strategy, have you disseminated it throughout the company explicitly?
- Do you provide a mechanism for staff to inquire or report on competition concerns?
- Do you have monitoring or auditing measures for competition compliance?

I think all companies, big and small, should think through these questions and always stay alert of the competition violation risk. I would like to add one item of my own and, that is, have you reviewed your contracts to identify any area that needs to be changed?

On the part of the Commission, after we have concluded our recruitment and have a reasonable size of staff on board, we would start developing strategies and tools which may help business to do their self-assessment on competition risks, and to provide education materials to aid compliance. But ultimately the initiative and responsibility for compliance must be with the businesses. If they do not have that awareness, they will be putting themselves to risk. I therefore urge you to help us spread the message, raise awareness of the companies that you serve, and act fast to get your fellow staff and clients familiarized with the Ordinance. If it helps, please explain to your audience that a disqualification order against a director personally could be imposed under section 101 of the Ordinance and that our doors will be opened to requests for leniency.

Conclusion

I know there are other interesting competition subjects that we will cover at the panel session. I just want to thank you for the attention, and look forward to the ensuing discussion. And I think our dialogue will continue throughout the year in various forms and settings.

Thank you.