

Our Ref: SN/4  
5 March, 2014

Ms Anna Wu  
Chairperson  
Competition Commission  
Room 3601, 3607-10, 36/F Wu Chung House  
197-213 Queen's Road East  
Wanchai, Hong Kong

Dear Ms. Wu

### **Competition Ordinance ("the Ordinance"): Guidelines**

We are most grateful to you for attending the meeting of our Economic Policy Committee (also attended by members of our Legal Committee) on 10 January, 2014, and for giving us a very illuminating and useful insight into how the Competition Commission is preparing for the full introduction of the Ordinance.

2. We thought it might be useful to follow up on some of the points that arose during our discussion, and a few other pertinent issues, in case this might assist the Commission in preparing for the full introduction of the Ordinance, and in particular in preparing its Guidelines. As you will appreciate, many of our members have experience in dealing with competition laws in other jurisdictions, and our comments below draw on the benefits of that experience. We would like to focus in this letter on four topics: ensuring the Guidelines serve their purpose; promoting economic efficiency; the applicability of EU precedent; and the approach to vertical agreements.

#### **I. Making the Guidelines serve their purpose**

3. In view of the generalised way in which the Conduct Rules have been drafted, the Guidelines will play a critical role in helping businesses to comply with the new law. The question arises as to how this is achieved under Hong Kong's chosen enforcement structure, in which it is the Tribunal, not the Commission, which interprets the law and decides cases.

4. A large part of the answer to this question lies in the fact that it is the Commission which will initiate all cases before the Tribunal (given that there is no provision in the Ordinance for "standalone" claims). If the Commission can give reliable guidance in the Guidelines on the types of cases it will choose to bring before the Tribunal, rather than purely attempting to interpret the Ordinance (which is ultimately the Tribunal's function), this will greatly assist in bringing much needed clarity to the new law. In other words, the Guidelines would focus on what the Commission's enforcement priorities will be, rather than on what the law means. Framed in this way, the Guidelines would give very helpful guidance to businesses in their compliance efforts.

5. The decision not to introduce standalone claims at this stage was, of course, taken so that Hong Kong could have a measured and orderly approach to enforcement, focusing on cases of most concern while cases and precedent are built up to give further clarity.

6. There is a precedent for this approach in the EU, which confronted a similar problem under its competition law. Rather than issuing guidance on the interpretation of the law on abuse of dominance (a notoriously complex area), the EU Commission focused on giving guidance on its enforcement priorities, i.e. the types of cases it would choose to investigate and prosecute<sup>1</sup>.

## **II. Promoting economic efficiency**

7. Should arrangements between businesses that promote overall economic efficiency be allowed, even if they reduce competition? And should conduct by businesses—even those with substantial market power—which excludes competition only because of superior efficiency be permitted? The answer should be a clear “yes” to both of these questions, and it would be very helpful to make this clear in the Guidelines.

8. In the Ordinance, the First Conduct Rule and Merger Rule permit transactions which enhance “overall economic efficiency”, even if they reduce competition. This is similar to the approach in other relatively small, open economies such as Singapore, New Zealand, Australia and Canada. The Guidelines should usefully emphasise this point, and give guidance on how this balancing exercise will be conducted. As one international expert has stated: “In a small economy, it is vital that the goals of competition policy be clearly, consciously and unambiguously defined, and that economic efficiency be given primacy over other goals.”<sup>2</sup>

9. While the Ordinance is less explicit on the importance of efficiency in the Second Conduct Rule, the Commission should make it clear in the Guidelines that any conduct which excludes competition merely as a result of superior efficiency will not be a target for enforcement. For example, the law should not prevent businesses from undercutting the prices of rivals who cannot compete on price because of their higher costs. It would be perverse if companies were encouraged to compete vigorously, and then punished for having done so successfully. In any competition, there are winners and losers, and competition in markets is no different.

## **III. Applicability of the EU precedent**

10. Despite the fact that some of the language in the Ordinance’s Conduct Rules is similar to the EU competition law, the language is still sufficiently open-textured to allow for Hong Kong’s particular characteristics to be taken into account in enforcing the Ordinance. This is important, since the EU competition law has different objectives. Much of the EU competition case law, for example, is based on the objective of creating a single EU market, an objective which has no relevance to Hong Kong. As noted above, in a small economy like Hong Kong, overall economic efficiency should be the primary objective. The Guidelines should therefore make it clear that the Commission will not exclusively follow the EU approach, and will take into account precedents in other jurisdictions.

---

<sup>1</sup> “Guidance on the Commission’s Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings” OJ C45 24.2.2009 P.7-20

<sup>2</sup> Michal S Gal *Competition Policy for Small Economies*, Harvard University Press 2003 p.47.

#### **IV. Approach to vertical agreements**

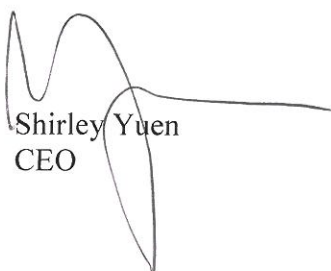
11. It is now generally recognised worldwide that vertical agreements (agreements between businesses at different levels of the production/distribution chain such as manufacturers and wholesalers) are rarely problematic for market competition, and if they are, it is usually because one or both of the parties has substantial market power. For this reason, vertical agreements are commonly excluded from overseas equivalents of the First Conduct Rule, and dealt with only under the Second Conduct Rule. The Singapore Competition Law, for example, contains such a “carve-out”, and the EU has a “block exemption” regulation for vertical agreements. Excluding vertical agreements would be consistent with Hong Kong’s free market tradition and its policy of intervening in markets only where necessary.

12. Since vertical agreements are far more common in commercial practice than horizontal agreements, the inclusion of a Singapore-style exclusion in the Ordinance itself (as advocated by this Chamber) would have significantly eased the compliance burden for Hong Kong businesses, without jeopardizing the Ordinance’s objectives. Since this particular opportunity appears to have been missed, we would strongly advocate that the Commission exercises its power under section 15 of the Ordinance to issue a block exemption order for vertical agreements, to take effect on or before the Conduct Rules are brought into effect. We would recommend that a draft of such an order be issued for public consultation in parallel with the draft Guidelines, so that both can be issued in final form at the same time.

#### **V. Conclusion**

13. We hope that these comments are useful, and would be very happy to discuss our recommendations further with the Commission and/or its advisers. We look forward to maintaining a constructive dialogue with you and your colleagues, as the preparations for the full introduction of the Ordinance take shape.

Yours sincerely

  
Shirley Yuen  
CEO