HKGCC

Hong Kong General Chamber of Commerce
香港總商會1861

香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

*Helping Business since 1861*

24 April 2015

Dr Stanley Wong
Chief Executive Officer
Competition Commission
Room 3601, 3607-10, 36/F, Wu Chung House
197-213 Queen's Road East
Wanchai
Hong Kong

Dear Dr Wong,

**Competition Commission consultation on proposed recommendation to Government for fees payable under the Competition Ordinance in respect of applications**

Thank you for your letter of 2 April 2015, inviting the Hong Kong General Chamber of Commerce ("HKGCC") to express its views on the Competition Commission's proposed recommendation in respect of fees for applications to the Commission under the Competition Ordinance ("CO").

Section 164(1) provides the Commission with a discretion whether or not to charge a fee for the making of an application under the CO: the Commission is not required to charge a fee. HKGCC would urge the Commission to use its discretion not to charge fees, at least in the first five years of the Conduct Rules and Merger Rule (together "the Competition Rules") entering into force, and not to charge at all for block exemptions which are granted by category of agreement (such as vertical agreements) on a non-sector specific basis. The reasons are as follows:

1. In spite of the Commission's efforts to clarify, through its draft guidelines, how the Competition Rules are likely to apply in practice (efforts which we welcome), there will still be a significant number of grey areas which are open to subjective interpretation, and which published decisions on applications under the Competition Rules will help to clarify in actual "real life" cases. Examples of such grey areas include the concept of "object" versus "effect"; what effect on competition is considered "more than minimal"; what is a "substantial degree of market power"; the definition of "abuse"; and how to assess under Schedule 1 paragraph 1 and the Second Conduct Rule whether there is "net consumer harm". Decisions on these issues will be a useful educative tool which will help business self-assess whether their proposed arrangements or conduct are likely to contravene the Competition Rules. They should therefore be regarded as being of general benefit to the public in Hong Kong, in the same way

that the guidelines are, and individual businesses should not be charged for providing this additional clarity. In this respect, we submit that the Commission's reference to the "user pays" principle is mis-placed. While this principle may have been applied to certain sector-specific activities which require a licence and ongoing regulatory supervision, it is not appropriate in the case of a competition law which apples to businesses in general. Even in relation to sector-specific block exemptions, the participants in the sector may change over time, so one cannot necessarily fairly apply a user pays principle to such exemption applications and there is a broader public benefit that also comes from the necessary clarity that such exemptions bring to these industries.

2. We therefore believe that it is in the Hong Kong public interest to encourage applications in the early years under the Competition Rules not to discourage them by charging fees (especially fees which are considerably higher than those in comparable jurisdictions, as noted below). Charging fees for applications will send the wrong message to Hong Kong businesses and, through deterring applications, deny them the additional certainty which published decisions would provide and to which they are entitled. This increases the chances of the law causing type I error and having the perverse consequence of reducing the competitiveness of Hong Kong in fundamental contradiction to its stated objective.

3. Charging fees is only a part of the cost of making an application. In order to maximise the prospect of a favourable decision from the Commission, businesses will no doubt feel the need to engage specialist external counsel to assist in drafting the application, and preparing the arguments and supporting facts and evidence, thereby multiplying the cost. This will have a particularly severe impact on SMEs which do not have in-house legal teams and have to depend to a greater extent on external counsel. We note the Commission's suggestion that a waiver or reduction might be considered for SMEs, or in cases where there is a greater public interest, but we believe that all businesses should be entitled to the benefit of legal certainty, irrespective of size, and that all published decisions, particularly in the early years of implementation, will collectively and incrementally benefit the public interest by providing greater legal certainty. So the approach of imposing charges in principle, with the possibility of waiver or reduction in certain cases would not, we respectfully suggest, be an appropriate way forward. The fairest solution for all concerned is not to impose any charges for at least the first five years.

4. There is a general principle under Hong Kong's Bill of Rights that laws should be sufficiently clear that individuals and businesses can predict what conduct is permitted and not permitted, and plan their conduct accordingly. To the extent that the requisite certainty cannot be gleaned from the Ordinance or the guidelines, we do not therefore believe it is fair that, as a matter of principle, businesses should have to pay for obtaining this clarity. Once the Competition Rules have been in force for several years, and a body of decisions has been published providing further clarity in actual cases, it may then be appropriate to consider whether businesses should be able to make their own assessment of their proposed arrangements under the existing Guidelines and precedents, and whether it is fair for them to pay a fee for having the additional security of a decision. But this should not be the case at the outset, when a substantial amount of legal uncertainty remains.

5. A block exemption should be granted for vertical agreements, as HKGCC has submitted on several previous occasions, because to do so is economically efficient and in the public interest. Business should not have to apply for such a block exemption and even if they did, they should not have to pay for it. The Commission should initiate the process of issuing such a block exemption as soon as possible after the Competition Rules take effect. This exemption is fundamental to giving effect to the government's stated policy on the application of the law to verticals and to bring necessary certainty to businesses as to the scope of this new law and the arrangements that are regarded as likely to restrict competition.

We appreciate that other jurisdictions charge for making applications, at least in some categories, but these regimes have been in force for several years already and have implemented competition laws in circumstances that are quite different to the situation in Hong Kong. We submit that the Commission should base its decision on what is right for Hong Kong's individual circumstances, including the highly developed and competitive state of its economy, the competitive pressure exerted by other jurisdictions (both in China Mainland and the region), and the strong appeals for legal certainty that necessarily come from the business community in such circumstances and which have been voiced throughout the legislative process leading up to the adoption of the CO, which have not yet been fully satisfied, as noted above.

If, in spite of the reasons set out above, the Commission wishes to proceed with its proposed recommendation, we believe that a further public consultation needs to be conducted on the Commission's proposed recommendation, since there are a number of important issues on which the public has not yet been consulted. These include the following:

1. Is it appropriate in principle to charge fees for applications for each of the categories of decision referred to in its letter of 2 April, given the reasons set out above as to why this is not the case?

2. How has the Commission arrived at the level of fees in each of the categories referred to in its letter of 2 April?

3. Whether dealing with applications for decisions was budgeted for in the Commission's annual budget (given that this is a key part of its functions) or whether it had been assumed in preparing the budget that charges would be made of a certain level, even before the outcome of the current consultation was known?

4. In Singapore, under the equivalent of the Schedule 1 paragraph 1 exclusion, we understand that the fee is HK$ (equivalent) 28,600 for straightforward applications, as opposed to a flat fee of HK$100,000. Why does the Commission believe that a flat fee rather than a tiered fee structure is appropriate?

5. For mergers, we understand that in the UK and Singapore, the level of fee depends on the target's turnover, and in Singapore the first level starts at HK$28,546. In Germany the fee level depends on the complexity of the transaction, and the first level is HK$41,725. In the U.S. the level of fee also varies, depending on the size of the transaction. In these

circumstances, why does the Commission believe that a flat fee is appropriate, and that the level of the flat fee should be set at HK$500,000? This question is particularly pertinent, given that the maximum fee chargeable under the current telecommunications merger provisions is HK$200,000 – less than half the amount that the Commission is now proposing. Why is there such a big difference?

We would happy to discuss our views as set out above with the Commission, if this would be useful.

Yours sincerely,

Shirley Yuen
CEO

cc: The Hon. Jeffrey Lam, Chairman, Legislative Council Panel on Economic Development