Hong Kong Institute of
Certified Public Accountants
香港會計師公會

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By Hand

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Mrs. Rose Webb
Senior Executive Director,
Competition Commission,
Room 3601, 36/F Wu Chung House,
213, Queen's Road East,
Wanchai,
Hong Kong.

Dear Mrs. Webb,

Re: Getting Prepared for the Full Implementation of the Competition Ordinance

Thank you for the opportunity to meet representatives of the Competition Commission (CC) on 10 July and to discuss the CC's proposals for implementing the Competition Ordinance (CO). As you know, the Hong Kong Institute of CPAs has since hosted a forum, on 22 July, at which Messrs. Philip Monaghan and Tim Lear gave a presentation to our members, which was also helpful as means of increasing general awareness and clarifying some of the concepts and future operations of the CC.

In the context of the present outreach and consultation exercise, I think that it may be useful if we reiterate some of the points made by representatives of the Institute at the meeting, to which I have added a few additional personal observations, in the light also of the presentation on 22 July.

Explaining the framework

Competition law is new to Hong Kong, although discussion on the subject has been taking place for several years, including during the drafting and passage of the bill, and there was a Competition Policy Advisory Group in place for a number of years before that.

Hong Kong, geographically at least, is a small market, where, in a number of sectors, there are only a few providers in the market and, in some cases, de facto monopolies or duopolies. The government has dealt with issues of ensuing fair

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pricing, etc. through a variety of means, such as licensing and regulation, schemes of control, consultation mechanisms and participation on boards. It is not clear how, in future, the CO will apply, if at all, to these areas of the market.

While the concepts of competition law will be familiar to multi-national companies and foreign companies from jurisdictions that already have an established competition framework, this would not include the bulk of companies operating in Hong Kong. Although many of these will be small and medium sized enterprises (SMEs), which may not ordinarily meet the turnover thresholds under the first and second conduct rules, as was pointed out at our meeting and during the presentation, these businesses will still fall within the scope of the law if they are deemed to have engaged in serious anti-competitive conduct. So, as with larger businesses, they will need to be aware of the provisions of the law and the CC's interpretations.

We note that Hong Kong has adopted a prosecutorial approach and that only the Competition Tribunal (CT) can adjudicate breaches of the CO and award penalties. This being the case, the role and responsibilities of the CC in dealing with alleged breaches of the CO, particularly those that do not get referred to the CT, may not be immediately understood, even by those stakeholders that have some awareness of competition law overseas, which may operate on a different basis.

I suspect also that some stakeholders are not yet aware that parts of the CO are in operation already, including parts relating to the setting up of the CC.

First and foremost, therefore, continuing education will be important to ensure that the remit and work of the CC, and the operation of the framework overall, are understood. Discussion around the preparation of draft guidelines and the guidelines themselves will naturally be part of this process.

Interpreting terminology

The terminology used in CO, and how that will be interpreted in practice, needs to be made as clear as possible. We understand, for example, that the interpretation of "turnover" in relation the de minimis thresholds will be specified in regulations to be made by the secretary for commerce and economic development under the CO. The determination of "turnover" will be important for the large number of SMEs in Hong Kong. As you may know, subsidiary legislation in Hong Kong does not go through

the same legislative process and may not come to attention of stakeholders as readily as primary legislation, particularly if it is subject only to a negative vetting process in the legislature, which is the normal procedure. This should be borne in mind and every effort made to ensure that the business sector, and the community generally, are made aware of the introduction into the legislature of the relevant regulations.

A key question would be at what point an undertaking or undertakings that fall below the de minimis thresholds would become subject to the full scope of the CO, once they exceed the threshold? Undertakings whose turnover is close to the limit could, in principle, move either side of the line from year to year, so it is important that they should be aware at any given time where they stand, albeit the prudent approach for undertakings whose turnover is close to the threshold might be to assume that they are subject to the CO.

The interpretation of "Hong Kong turnover", in relation to the maximum penalty that can be imposed on an undertaking found to be in breach of the CO, should also be made clear. As you indicated, this will be different from the calculation of the de minimis turnover thresholds, which relate to the total global turnover of the relevant undertakings. Given that Hong Kong has a source-based tax regime, so that only assessable profit arising in or derived from Hong Kong, from a trade, profession or business carried on in Hong Kong, is taxable (section 14 of the Inland Revenue Ordinance (Cap. 112), questions may arise as to whether the concept of "turnover of an undertaking obtained in Hong Kong" will follow a similar approach. There will be implications either way.

While the regulations are not the immediate responsibility of the CC, as a major stakeholder, the CC would, no doubt, want to see the maximum degree of clarity and certainty around the above issues and a framework that is pragmatic and effective.

Other terminology will be equally important. For example, the criteria for determining how "the market" will be interpreted in different circumstances, how "substantial market power" will be assessed and what constitutes "abuse", should be clarified to the fullest extent possible. In relation to the last point, for example, while section 21 of the CO gives some indication of conduct that may constitute abuse, the concept of "predatory behaviour", referred to in section 21(2)(a), will not be self-explanatory to all.

Exclusions and exemptions is another area that calls for further elaboration, including the exclusion on the ground of economic efficiency. How will economic efficiency be determined, by whom and at what stage in the process? Is it envisaged that an undertaking or undertakings would seek to have an agreement excluded on the basis of economic efficiency at the outset, or that the exclusion might be claimed at the time of an investigation, or would both scenarios be possible? There are questions of definition and process.

Explaining the procedures

The community should be afforded adequate opportunity for a full understanding of how the framework will operate from the procedural point of view. This would include procedures relating to:

- how complaints can be made and how the CC will deal with complaints and conduct monitoring and investigations;
- what information may be sought from undertakings that are the subject of complaints, monitoring or investigations;
- How issues of confidentially of information will be addressed;
- leniency and cooperation arrangements and policies;
- when and how cases will be referred to the CT;
- application processes for exemptions and exclusions;
- policies on publication of case information and sanctions;
- the operating procedures and sanctioning policies of the CT itself. (While these are beyond the scope of the CC, they will form a significant part of the overall framework and should be made easily accessible, alongside the procedures of the CC.)

Guidelines

We would suggest that as much as possible of the above information be clarified in the guidelines and/ or other educational and explanatory materials. As mentioned during our meeting with you, examples and case studies should be included in the guidelines. While initially any real case studies would, almost certainly, be overseas cases, we would recommend that, over time, (anonymised) information about Hong Kong cases and how these have been dealt with, should be included. Examples of specific types of conduct, which, depending on the facts, may be anti-competitive in

some circumstances but not in others, such as bundling and information sharing, would also be helpful.

We would support the proposed content of guidelines indicated on page 7 of the outreach document. It will be very important to make clear the distinction between what is regarded as serious, and what as less serious, anti-competitive conduct, given that, as noted above, this will determine whether undertakings that fall below the de minimis thresholds are brought back into the scope of the CO.

The triggers for the CC to intervene in particular situations should also be made clear.

We understand that the CC will be publishing risk assessment tools. This type of material will be useful if it helps businesses and associations review and carry out risk assessments of their own and their industry practices.

Other matters

Offering advice

The CC should consider whether it will be prepared to give advice to applicants who approach it about whether a particular type of agreement or conduct would be likely to fall foul of the law. If this information is sought in advance of the agreement or conduct taking place, applicants may be prepared to seek advice openly. If, on the other hand, the activity is already taking place, applicants may want to seek advice confidentially, without revealing their identity. In our view the CC should be prepared to offer such advice, at least in the early years of its operation, even though any advice given may not be legally binding on the CC.

Whistle-blowing

While whistle-blowing by parties to anti-competitive conduct, who may be seeking to cooperate with the CC, may be seen as one source of information provided to the CC, it is noted that the CO provides no specific protection for internal whistle-blowers.

Priorities

In our view, in the early phase of its operation, apart from giving priority to education, the CC should focus its enforcement efforts on addressing the more severe cases, involving blatant and persistent breaches of the CO, rather than, for example, pursuing conduct that may fall into grey areas, with a view to establishing precedents in Hong Kong.

I hope that this is of some assistance. Should you have any questions on the above, please feel free to contact me at the Institute.

Yours sincerely,

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PMT/sc

c.c.: Mr. Philip Monaghan
Mr. Timothy Lear