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SPEECH

by the Hon. Mr Justice Godfrey Lam
President of the Hong Kong Competition Tribunal

on

COMPETITION DISPUTE RESOLUTION IN HONG KONG

1. It is my pleasure and privilege to address you today.

2. Since the Competition Ordinance of Hong Kong which was enacted in June 2012 will be fully coming into effect on 14 December this year, I shall take the opportunity to speak about competition dispute resolution in Hong Kong.

3. There are of course also competition laws in most other jurisdictions in the region: the Anti-Monopoly Law of Mainland China came into effect in 2008; the Singapore Competition Act in 2004; the Vietnam competition law in 2004; the Thai Competition Act in 1999; the Indian Competition Act 2002; the Indonesian Law Regarding Prohibition of Monopolistic Practices and Unfair Business Competition in 1999; the Malaysian Competition Act in 2010; the Taiwan Fair Trade Act in 1992.

4. The near universality of competition law in this part of the world, achieved in the last 15 or 20 years or so, is a phenomenon in itself. What that means is that competition law disputes will

perhaps become increasingly common in Asia and the resolution of such disputes a worthy subject of consideration. I cannot of course speak about other jurisdictions but I wish to mention a few features of the dispute resolution centre for competition law matters in Hong Kong – i.e. the Competition Tribunal.

5. By way of introduction, apart from the provisions on merger control which apply only to the telecommunication industry, the Hong Kong Competition Ordinance contains two substantive conduct rules. They are first, the rule prohibiting anti-competitive agreements, including horizontal agreements between competing businesses operating at the same level in the market, and vertical agreements between firms at different levels of the supply chain, and, secondly, the rule prohibiting abuse of substantial market power – called abuse of dominance or dominant position in some other jurisdictions, such as predatory behaviour towards competitors, and refusal to supply.

6. As for its territorial reach, the Hong Kong law specifically provides that the two conduct rules will apply if there is an object or effect of harming competition in Hong Kong, even if the undertaking is located outside Hong Kong, or the agreement was made outside Hong Kong, or the unilateral conduct was engaged in outside Hong Kong.[1]

7. Hong Kong has chosen a prosecutorial or judicial enforcement model for competition law. The law has established a statutory body called the Competition Commission as the executive body to enforce competition law. It is the body that receives complaints, investigates cases and ultimately brings enforcement

[1] Ss. 8, 23

actions for fines or other orders in the Competition Tribunal. It has powers to interrogate individuals to obtain documents and information[2], and may apply to the courts for search warrants to carry out dawn raids.[3]

8. The task of adjudicating upon applications for enforcement of the competition rules and imposing penalties or other orders is vested in a judicial body created by the Ordinance – the Competition Tribunal.

9. The disputes that the Tribunal are entrusted to resolve broadly speaking fall into three types:

- Enforcement proceedings brought by the Commission for financial penalties or other orders against respondent undertakings[4]

- Applications for review of certain decisions of the Commission[5]

- Private "follow-on" actions brought by victims of infringing conduct against the undertakings concerned[6]

10. The practice and procedure of the Tribunal is governed by a set of rules called the Competition Tribunal Rules.[7] The Rules are subsidiary legislation which has already passed negative vetting by

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2 Ss. 41 & 42
3 S. 48
4 S. 92, 94
5 S. 84
6 S. 110
7 Cap. 619D

our legislature. There will also be two sets of Practice Directions issued by myself as the President of the Competition Tribunal, which have largely been finalised but not yet published. These rules and practice directions have been made after consultation with the Competition Commission, the Communications Authority, the Bar Association and the Law Society. There will be two briefing sessions for the legal professions about the practice and procedure of the Tribunal, one for the Bar and one for solicitors, nearer December when the Ordinance comes into full operation. We are also continuously building up expertise on competition law within the Judiciary through own training programme as well as overseas workshops.

11. There are several features of the practice of the Tribunal that I wish to mention.

12. First, <u>independence and impartiality</u>. Independence of the adjudicator is something we cherish deeply in Hong Kong. The Tribunal is part of the Judiciary of Hong Kong. It consists of all the judges of the Court of First Instance of the High Court,[8] excluding recorders and deputy judges. One of the judges is appointed the President[9] and another the Deputy President.[10] In this way, I believe, one can be assured that the Tribunal is wholly independent from the Commission, the Government and from business interests.

13. Secondly, <u>flexibility</u>. Since the Tribunal has to deal with different types of proceedings including enforcement proceedings

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[8] S. 135(1)
[9] S. 136
[10] S. 137

brought by the Commission as well as private actions, some flexibility in the procedure is important. In this regard you will find that the Tribunal Rules are divided into several parts, with certain provisions applicable generally and then specific provisions for specific types of proceedings.

14. Further, while the Tribunal Rules to some extent incorporate the Rules of the High Court – our general rules of civil procedure, the Rules provide that the Tribunal may dispense with the application of the High Court Rules in order to proceed more expeditiously and informally, to save costs or where it is in the interests of justice to do so.[11] The Tribunal also eschew formality insofar as it is consistent with attaining justice.[12] With some exceptions, notably in proceedings for pecuniary penalties, rules of evidence do not apply.[13] In appropriate cases, with sensible parties, proceedings may be conducted like an arbitration. This approach will hopefully enable the Tribunal and the parties to zoom in and focus on the real substantive issues in each case, rather than get bogged down in procedural squabbles.

15. Thirdly, <u>early hands-on case management</u>. Proceedings before the Tribunal have an adversarial character – they are not public inquiries as such. But the adversarial procedure does not mean the Tribunal is purely passive. On the contrary, one can expect the Tribunal to be active in case management from the beginning, and the parties should expect to have to respond to the Tribunal's questions and interventions at any stage of the proceedings.

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11 CTR, r. 4.
12 S. 144(3)
13 S. 147

16. The Tribunal Rules and, in particular the Practice Directions of the Tribunal which will be published in due course, seek to ensure that the conduct of business in the Tribunal is marked by active case management.

- This includes docketing a case with a specified judge as early as possible, who may be the President, Deputy President or another High Court judge. The intention is that as far as possible the same judge will see the case through and deal with all significant interlocutory matters. This means the judge in charge has a better opportunity to get familiar with the case early on, which will in turn enhance consistency in the handling of the case, and facilitate early robust case management. It should also save judicial resources, and the parties' time and costs, in terms of getting the Tribunal "up to speed" every time a dispute arises in a case that requires determination.

- There will be case management conferences to identify necessary procedural directions and generally to manage the conduct of the case. The judge may well raise with parties his observations or concerns about substantive issues so that irrelevant and unrealistic matters can be weeded out early on and so that everyone can focus on the real questions. It is important, therefore, that the representatives who attend case management conferences are properly prepared and authorised, and conversant with the case.

- The Tribunal will aim at fixing dates at an early stage for case management conferences as well as the substantive final hearing of the proceedings. These will be regarded as milestone dates which, as in ordinary civil litigation in the courts, are generally immutable save in exceptional circumstances.

- Once these milestone dates are fixed, other steps will have to be conducted at a pace in keeping with the tempo required. Timetables may have to be set by working backwards from the milestone dates. This will focus the parties' minds on the ultimate event and reinforce the need to justify any deviation from the timetable on substantial grounds.

17. Fourthly, confidentiality. By that I do not mean hearings in private as in arbitration. The Tribunal is by law a superior court of record; proceedings in the Tribunal will generally be held in public.[14] We are however aware that competition law disputes sometimes involve evidence of a confidential nature such as pricing strategies, cost structures, sales figures, or other business data in the nature of trade secret, and that genuine commercial interests may be prejudiced if such secret information is divulged. There are three stages to consider.

- When a case is under preparation and the parties are filing documents into the Tribunal and serving them on other parties, there may be a need to protect the confidentiality of certain information. Generally it is impermissible to provide certain information to the Tribunal but not to the other side.

[14] CTR r. 28

In special circumstances, one solution may be to limit disclosure to a small specified group of persons within the opponents' camp – known as a "confidentiality ring" – such as their legal representatives and expert witnesses, and prohibit any wider dissemination of the information beyond that ring within the opponent.

◦ When the case is being tried in the Tribunal and reference needs to be made to confidential information. The question that arises then is whether part of the case should be heard in camera, or in private, excluding the press and the public.

◦ Finally, when judgment is given, there may be questions about how much information the judgment, which will be a public document, should disclose to the public. Where there is a justifiable demand for confidentiality, one possible response is to have a confidential version of the judgment for the parties, and another version for public consumption from which really confidential information is removed.

To deal with the question of confidentiality specifically, there is a provision in the Tribunal Rules and there will be a special practice direction on confidential information. The guiding principle is open justice, but the Tribunal will be sensitive to real needs of confidentiality in individual cases. One has to understand, however, that consistently with our traditions, values and our constitutional set-up, confidentiality is very much the exception rather than the rule and will only be protected insofar as clearly necessary and justified.

18. Fifthly, alternative dispute resolution. Coming to the Tribunal is not a point of no return. The Tribunal encourages alternative dispute resolution including negotiation and mediation. So long as judgment has not been given, it is open to the parties to settle a matter. Although the parties cannot bind the Tribunal to make the orders they wish, as at present advised I do not see why even enforcement proceedings brought by the Commission cannot in principle be compromised provided it is in a way acceptable to the Tribunal. There is a specific provision in the Tribunal Rules that provides for the making of orders by consent stipulating that an order includes any finding, determination or decision.[15]

19. Although the Competition Tribunal itself faces little competition, because broadly speaking it has exclusive jurisdiction in the matters that fall within its purview, I hope that it will be seen as a just, fair and efficient forum under Hong Kong's new competition law.

20. I wish you all a rewarding conference and a good day.

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[15] CTR r. 39